NORTH CAROLINA COURT OF APPEALS REPORTS

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RALEIGH
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CASES REPORTED WITHOUT PUBLISHED OPINION

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ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. JOHN BULLOCK, JR.

No. 7514SC558

(Filed 17 December 1975)

1. **Criminal Law §§ 5, 29— *motion for second psychiatric examination* — denial proper**

Defendant was not denied his constitutional rights by the trial court's denial of his motion for a second psychiatric examination after the first examination revealed that he was competent to stand trial.

2. **Criminal Law §§ 40, 63— prior criminal trial — not guilty by reason of insanity — evidence properly excluded in subsequent trial**

In a prosecution for assault with a deadly weapon with intent to kill where defendant's sanity was at issue, the trial court did not err in excluding evidence that defendant, in an earlier prosecution for another different criminal assault with a deadly weapon charge, had been acquitted by reason of insanity.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 3 April 1975 in Superior Court, DURHAM County. Heard in the Court of Appeals 16 October 1975.

Defendant was charged on 6 January 1975 with felonious assault with a deadly weapon with the intent to kill, inflicting serious injury. Pursuant to defendant's own motion, the trial court on 13 February 1975 committed defendant to a State psychiatric hospital for a professional determination of his competency to stand trial. On 13 March 1975, Dr. Bob Rollins,

Psychiatrist and Director of Forensic Services at Dorothea Dix Hospital, reported to the trial court that the defendant was competent to stand trial notwithstanding a tentative finding of "[l]atent schizophrenic reaction." Dr. Rollins further noted that defendant was paranoid, misinterpreted reality and tended ". . . to defend himself with excessive . . . force whenever he feels threatened."

Defendant's attorney, unsatisfied with Dr. Rollins's conclusions, moved in April 1975 for a second psychiatric examination and reminded the trial court that his client " . . . has been in and out of mental hospitals at least four times. Last summer, less than a year ago, he was acquitted by a jury in this very court of an identical charge to that which he is facing today by reason of insanity." Dr. Rollins, further explaining his report, testified on voir dire that defendant ". . . presents himself as hostile and uncooperative, but . . . he chooses to be that way. . . . [H]e could cooperate with his lawyer if he wanted to and . . . his failure to do so was not the result of mental illness to the point that he did not know what was going on or appreciate the issues involved." As far as Dr. Rollins could perceive, the defendant, though difficult and obstinate, ". . . was in touch with what was going on." In view of this information, the trial court denied defendant's motion for a second psychiatric examination and declared defendant competent to stand trial.

At trial, the State's evidence tended to show that on 24 December 1974 defendant entered Jimmy Koutsis's City Sandwich Shop to beg for money. Owner Koutsis testified that he had ". . . warned him before about begging. I got up in a nice way and told him that I had warned him in the past about begging. I told him I didn't want him coming back any more. He said O.K., and walked to the door and just stood there with his back to the outside and his hand in his pocket. I went to the door and told him again that I wanted him to stay out of the business. He said O.K. again and looked like he was going out the door. I then heard Sheriff Davis [, who was in the restaurant at the time,] say, 'Jimmy, watch,' and when I turned around and looked I saw a [switchblade] knife coming at me. I jumped over and he hit me on the hand with the knife. . . . When I jumped, I hit the steam table at the same time the knife hit me. I grabbed a chair and hit him and tried to push him out the door. He was gesturing at everybody with the knife. Two

policemen then came and took him to the courthouse. My wrist had been cut and required twelve stitches." On cross-examination, Koutsis amplified on the extent of his injuries and stated that "[i]t took three or four weeks to get the stitches out. I was in the hospital all of Christmas Eve, but just to get the stitches. I was not admitted, I was in the emergency room only. I saw the doctor two times, when the stitches went in and when they came out. I still feel pain any time the weather is cold."

Durham Sheriff Marvin L. Davis essentially corroborated Koutsis's testimony; though Davis actually never saw the specific blow which wounded Koutsis.

Defendant testified that he struck Koutsis in self-defense and ". . . nick[ed] him in the arm so he would put the chair down." Dr. Rollins, called as a defense witness, testified that defendant ". . . was sufficiently in control of himself to be held accountable and responsible for his actions." On cross-examination, Dr. Rollins further stated that:

> "In my opinion Mr. Bullock was legally responsible for his actions at the time of the alleged crime. In my view, he had a clear understanding of what was going on. I believe he was aware that there were consequences for attacking and hurting other people. He pictured the situation as one in which he was defending himself. In my opinion he was generally aware that people could be punished for doing actions such as that. I would describe that also as knowing the difference between right and wrong. I also believe that John Bullock would have the ability to form the intent to kill at the time of the alleged event."

From a plea of not guilty, the jury returned a verdict of guilty of assault with a deadly weapon inflicting serious injury. From judgment sentencing him to a term of imprisonment, defendant appeals.

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

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

MORRIS, Judge.

[1] Defendant first contends that the trial court erred in denying his motion for a second psychiatric examination. Defendant

maintains that such a denial deprived him of his fifth, sixth and fourteenth constitutional amendment rights. We find no merit in this contention. A criminal defendant is entitled to a fair trial with the assistance of counsel. *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963). Without question, this principle implies that the defendant ". . . is capable of understanding the nature and object of the proceedings against him and to conduct his defense in a rational manner. . . . " *State v. Jones,* 278 N.C. 259, 266, 179 S.E. 2d 433 (1971). Unless the defendant is competent mentally at the time of trial the State cannot force the accused to enter a plea and to defend himself from prosecution. This ". . . rule is for the protection of the accused, rather than that of the public, though it applies even to a defendant who demands trial. The rule has been explained on the ground that the accused is disabled by act of God from making whatever defense he may have." 21 Am. Jur. 2d, Criminal Law, § 62, pp. 143-144.

Once the question of competency has been raised, whether by the defendant, State, or court, "[t]he manner and form of an inquiry to determine whether a person accused of [a] crime has the mental capacity to plead to the indictment and prepare a rational defense is for the determination of the trial court in the exercise of its discretion. . . ." 2 Strong, N. C. Index 2d, Criminal Law, § 29, p. 526. Furthermore, ". . . such action is . . . not reviewable unless [such] discretion is abused by being exercised arbitrarily." 21 Am. Jur. 2d, Criminal Law, § 66, p. 149. Moreover, a defendant, though entitled to a fair trial while mentally competent, is not entitled to a *second* psychiatric examination to determine his competency as a matter of right. *State v. Cavallaro,* 1 N.C. App. 412, 414, 161 S.E. 2d 776 (1968) ; affirmed 274 N.C. 480, 164 S.E. 2d 168 (1968).

[2] Defendant also contends that the trial court erred in excluding evidence that defendant, in an earlier prosecution for another different criminal assault with a deadly weapon charge, had been acquitted by reason of insanity. Defendant thus argues that under *State v. Duncan,* 244 N.C. 374, 93 S.E. 2d 421 (1956), a prior adjudication of his insanity was admissible in this particular subsequent prosecution. In *Duncan,* the defendant was charged with murder and raised the defense of his insanity. During the same term in which the bill of indictment was returned and only a short time after the alleged commission of the crime, the trial judge impanelled a jury to determine

defendant's competency. This jury determined that defendant was ". . . insane and without sufficient mental capacity to undertake his defense or to receive judgment in this case . . .", and the defendant was committed to a State psychiatric hospital. *Id.* at 377. When subsequently tried under the murder charge, the defendant unsuccessfully tried to introduce into evidence that ". . . adjudication of insanity. . . ." In view of the exclusion of that evidence, the State Supreme Court ordered a new trial, holding that "[t]he record of his adjudication of insanity at the January Term 1947 of the Superior Court of Chatham County offered by the defendant for the purpose of tending to show that he was insane at the time of the inquisition is admissible in evidence for the consideration of the jury on the issue as to whether or not he was insane when the alleged offense was committed in December 1946." *Id.* at 379. The Court further opined that such evidence is admissible ". . . provided the inquiry bears such relation to the person's condition of mind at the time of the alleged crime as to be worthy of consideration in respect thereto." *Id.* at 377.

Here, unlike the situation in *Duncan,* where the adjudication of "insanity" and incompetence arose only a month after the alleged offense had occurred, this defendant seeks to introduce evidence with respect to his competency in a completely different cause of action pursued under a different circumstance many months prior to this present adjudication, to substantiate some current claim of insanity. This particular question of insanity turns on this jury's determination of the defendant's mental state at the time of this particular crime charged. What his mental state happened to be when he allegedly committed an earlier different offense is simply not relevant and too remote to this prosecution and hence fails to bear "such relation to the person's condition of mind at the time of the alleged crime as to be worthy of consideration in respect thereto." *Id.* at 377. " 'Courts are today universally agreed that both prior and subsequent mental condition, within some *limits,* are receivable for consideration. . . .' " (Emphasis supplied.) (Citation omitted.) *Id.* at 378. Here, however, the particular attempt to reach back to a previous jury's finding of insanity is simply beyond those reasonable limits which govern judicial determination of reasonableness and relevancy. Unlike the situation presented in *Duncan,* there is a significant question ". . . as to remoteness of the [prior] adjudication . . .", and such remote-

ness distinguishes this case from the fact situation presented in *Duncan*. *Id.* at 378.

Essentially, the problem is one of relevancy versus prejudice. Often evidence, notwithstanding some relevant link to the issues involved in the particular case, should be excluded because the prejudicial effect outweighs the probative value. Thus, "[e]ven relevant evidence may . . . be subject to exclusion where its probative force is comparatively weak and the likelihood of its playing upon the passions and prejudices of the jury is great. This is not a general rule of exclusion, but it . . . is a factor to be considered, along with those of unfair surprise and confusion of issues, in determining whether a particular item of evidence should be rejected on the ground of remoteness." 1 Stansbury, N. C. Evidence, § 80, pp. 243-244 (Brandis Rev. 1973). The obvious danger in admitting this particular evidence is that the jury may ignore the court's instructions as to the law of insanity and reach back to the prior verdict of not guilty by reason of insanity to resolve the difficult issue of insanity in this current prosecution. Moreover, even a ". . . limiting instruction may be insufficient to overcome the highly prejudicial likelihood that the jury will give the evidence controlling or at least significant weight in resolving the issue as to which it is incompetent; and in such cases the evidence should be excluded." 1 Stansbury, N. C. Evidence, § 79, p. 241 (Brandis Rev. 1973). Therefore, we hold this case is distinguishable from *Duncan* and overrule defendant's contention.

Defendant's other assignments of error go to various aspects of the court's charge to the jury. A contextual reading of the instructions, however, indicates no error prejudicial to the defendant.

No error.

Judges PARKER and MARTIN concur.

STATE OF NORTH CAROLINA, EX REL. COMMISSIONER OF INSURANCE, APPELLEE v. INTEGON LIFE INSURANCE COMPANY, FIRST PROTECTION LIFE INSURANCE COMPANY, STURDIVANT LIFE INSURANCE COMPANY, AMERICAN DEFENDER LIFE INSURANCE COMPANY, THE CITADEL LIFE INSURANCE COMPANY, DURHAM LIFE INSURANCE COMPANY, CHARTER NATIONAL LIFE INSURANCE COMPANY, FOREMOST LIFE INSURANCE COMPANY, UNION SECURITY LIFE INSURANCE COMPANY, PROVIDENT ALLIANCE INSURANCE COMPANY, LTD., DIAMOND STATE LIFE INSURANCE COMPANY, FIRST UNION NATIONAL BANK, NORTH CAROLINA NATIONAL BANK, THE NORTHWESTERN BANK, PEOPLES BANK & TRUST COMPANY, THE PLANTERS NATIONAL BANK AND TRUST COMPANY, AND WACHOVIA BANK & TRUST COMPANY, N.A., APPELLANTS

No. 7510INS660

(Filed 17 December 1975)

1. **Insurance § 27.5— credit life insurance rates — authority of Commissioner of Insurance**

The Commissioner of Insurance was not authorized to set rates for credit life insurance by the power given him under G.S. 58-9(1) to make "rules and regulations," by G.S. 58-54.3, the statute prohibiting unfair methods of competition or unfair or deceptive acts or practices in the insurance industry, by the rate making authority granted under G.S. 58-260.2 for credit accident and health insurance, or by the acquiescense of companies writing credit life insurance in rates set by prior Commissioners of Insurance.

2. **Administrative Law § 5; Insurance § 27.5— rules for credit insurance — jurisdiction of appeal**

An appeal from an order of the Commissioner of Insurance promulgating rules and regulations for credit life and credit accident and health insurance lies in the Superior Court of Wake County under G.S. 58-9.3, not in the Court of Appeals.

APPEAL by respondents from two orders issued by the North Carolina Commissioner of Insurance on 7 April 1975. Heard in the Court of Appeals 18 November 1975.

The Commissioner of Insurance, John Ingram, held hearings, beginning 23 September 1974 and continuing on twelve different days ending 20 January 1975, in order "to fully examine the entire credit insurance system" in North Carolina. Prior to the commencement of the hearings, written notice was mailed to each life insurance company licensed to write credit life and credit accident and health insurance in North Carolina and notice was published for the public. After the conclusion

of the hearings, the Commissioner considered the testimony and evidence offered and on 7 April 1975 entered two orders, one setting the maximum rates to be charged in North Carolina for credit life insurance and the other promulgating rules and regulations governing credit life and credit accident and health insurance in North Carolina. Both orders were to become effective on 2 June 1975. Respondents appealed to the North Carolina Court of Appeals.

Davis & Hassell by Charles R. Hassell, Jr., for Commissioner appellee.

Young, Moore & Henderson by Charles H. Young; Allen, Steed and Pullen by Arch T. Allen and Thomas W. Steed, Jr.; Jordan, Morris & Hoke by John R. Jordan, Jr., for appellants.

HEDRICK, Judge.

Credit life insurance is defined by statute to be "insurance upon the life of a debtor who may be indebted to any person, firm, or corporation extending credit to said debtor," and "may include the granting of additional benefits in the event of total and permanent disability of the debtor." G.S. 58-195.2. Credit accident and health insurance is defined by statute to be "insurance against death or personal injury by accident or by any specified kind or kinds of accident and insurance against sickness, ailment, or bodily injury of a debtor who may be indebted to any person, firm, or corporation extending credit to such debtor." G.S. 58-254.8. As used in the orders appealed from and in this opinion, these terms apply to policies "where the original beneficiary is a creditor, to the extent of the creditor's interest."

Because of the different disposition required as to each of the two orders, we shall consider them separately.

Order of the Commissioner Setting Maximum Credit Life Insurance Rates

The Commissioner, in his order, concluded that there existed in North Carolina what is termed as "reverse competition" which tends to force the price of insurance premiums up rather than down. Because of competition among insurance companies to have lending institutions offer credit insurance policies to debtors from one insurance company to the exclusion of all other insurance companies and because there is no market for

debtors to obtain credit insurance other than from the lending institution, there results competition among each insurance company to offer higher commissions to the lending institution in order to have the institution issue only its insurance to the exclusion of other companies. Higher premiums are charged debtors in order to cover the cost of the commissions.

The Commissioner also concluded that the premium rates charged in North Carolina were the highest in the United States and that such rates were excessive.

The Commissioner, in his order, found that reverse competition was (1) "a practice injurious to the public of this State and . . . an appropriate subject of regulation by the Commissioner pursuant to [the power granted in] G.S. 58-9(1)," and (2) "an unfair method of competition and . . . an unfair and deceptive act or practice in the business of insurance" as defined in G.S. 58-54.4 and prohibited by G.S. 58-54.3. The Commissioner found that excessive rates were a "direct adverse consequence" of reverse competition and were likewise an appropriate subject of regulation pursuant to 58-9(1) and 58-54.3. In addition, regulation of rates for credit life insurance was "consistent" with the authority to set maximum credit accident and health insurance rates as provided by G.S. 58-260.2, and as defined in G.S. 58-254.8 to include "accidental death." Finally, the Commissioner found that "[t]here is no law in North Carolina which specifically prohibits the Commissioner of Insurance from regulating credit life insurance rates, and by custom and practices former Commissioners of Insurance have heretofore set maximum rates for credit life insurance, and such maximum rates have been adhered to by insurance companies writing credit life insurance in this State."

Based on the above findings, the Commissioner concluded that he had "the responsibility and authority to regulate credit life insurance rates," and in his order set maximum premium rates for credit life insurance at approximately one-half the prevailing premium rates then being charged.

The authority of the Commissioner to set rates must be conferred by statute. *In re Filing by Automobile Rate Office,* 278 N.C. 302, 180 S.E. 2d 155 (1971); *In re Filing by Fire Ins. Rating Bureau,* 275 N.C. 15, 165 S.E. 2d 207 (1969); *Insurance Co. v. Gold, Commissioner of Insurance,* 254 N.C. 168, 118 S.E. 2d 792 (1961); 1 Strong, N. C. Index 2d, Administrative

Law, § 3. While the legislature may delegate rate making authority to an administrative officer where sufficiently clear standards exist to control his discretion, "[o]bviously, the Commissioner of Insurance has no authority to prescribe or regulate premium rates, except insofar as that authority has been conferred upon him . . . [by statute]. In exercising the authority, he must comply with the statutory procedures and standards." *Filing by Fire Ins. Rating Bureau, supra* at 33, 165 S.E. 2d at 220.

[1] Appellants contend that nothing in the statutes cited by the Commissioner grant to him the express or implied authority to set rates for credit life insurance. We agree.

> "Express powers delegated by statute and implied powers reasonably necessary for its proper functioning are the only powers which an administrative agency possesses. . . . Thus, it is clear that administrative agencies must find within the statutes justification for any authority which they purport to exercise." *Insurance Co. v. Lanier, Comr. of Insurance,* 16 N.C. App. 381, 384, 192 S.E. 2d 57, 58-59 (1972).

The Commissioner purports to act under G.S. 58-9(1) and 58-54.3. G.S. 58-9(1) provides:

> *"Powers and duties of Commissioner.*—The Commissioner shall:
>
> (1) See that all laws of this State governing insurance companies, associations, orders or bureaus relating to the business of insurance are faithfully executed, and to that end he shall have power and authority to make rules and regulations, not inconsistent with law, to enforce, carry out and make effective the provisions of this Chapter, and to make such further *rules and regulations* not contrary to any provision of this Chapter *which will prevent practices injurious to the public by insurance companies,* fraternal orders and societies, agents, adjusters and motor vehicle damage appraisers. The Commissioner may likewise, from time to time, withdraw, modify or amend any such regulation." (Emphasis added.)

The Commissioner's power to make "rules and regulations" can in no way grant him the authority to carry out the "legislative power" (Filing by Automobile Rate Office, *supra* at 319)

of setting rates. Rate making authority, as distinguished from purely administrative functions, must be derived from a clear statutory enactment granting the Commissioner such power. *See generally Comr. of Insurance v. Automobile Rate Office*, 287 N.C. 192, 214 S.E. 2d 98 (1975). *Insurance Co. v. Lanier, Comr. of Insurance, supra.* An administrative agency has no power to promulgate rules and regulations which alter or add to the law it was set up to administer or which have the effect of substantive law. 1 Strong, N. C. Index 2d, Administrative Law § 3; 1 Am. Jur. 2d, Administrative Law, § 126. Clearly, G.S. 58-9(1) contains no express grant of authority to set rates and it is not such an implied power as is "reasonably necessary for [the Commissioner's] proper functioning." *Insurance Co. v. Lanier, Comr. of Insurance, supra.*

G.S. 58-54.3 provides:

> *"Unfair methods of competition or unfair and deceptive acts or practices prohibited.*—No person shall engage in this State in any trade practice which is defined in this Article as or determined pursuant to this Article to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance."

Chapter 58, Article 3A, which includes this statute was enacted to regulate trade practices in the insurance business in accordance with directives from federal anti-trust law. G.S. 58-54.1. Filing by Automobile Rate Office, *supra.* Nothing in the quoted statute grants authority to the Commissioner to take any action whatsoever. It merely prohibits unfair methods of competition or unfair or deceptive acts or practices in the insurance industry, which are exhaustively defined in G.S. 58-54.4. Nothing in 58-54.4 declares the charging of excessive rates to be an act or practice within the prohibition of 58-54.3. Moreover, 58-54.5, 54.6, and 54.7 which provide for the Commissioner's power to act in regard to "any unfair method of competition or in any unfair or deceptive act or practice prohibited by G.S. 58-54.3 . . . ", grant no remedial power to the Commissioner to remedy unfair trade practices other than the power to investigate, bring charges, and issue cease and desist orders. Clearly Article 3A generally and 58-54.3 specifically contain no authority to issue orders setting premium rates.

The Commissioner also found that rate making authority for credit life insurance is "consistent" with rate making au-

thority granted under G.S. 58-260.2, for credit accident and health insurance (repealed by Session Laws 1975 c. 660 s. 4, ratified 18 June 1975). The fact that the two types of insurance are defined differently indicates that two distinct types of policies are contemplated. The conspicuous absence of express rate making authority with regard to credit life insurance when such authority exists with regard to credit accident and health insurance manifests the fact that no such authority has been conferred. Since G.S. 54-260.2 applies only to credit accident and health insurance defined in G.S. 58-254.8, it has no application to credit life insurance and cannot be seen as granting implied authority to set credit life rates.

Finally, the Commissioner's contention that acquiescense by companies writing credit life insurance in rates set by prior Commissioners of Insurance gives the present Commissioner the authority to fix credit life rates is untenable.

We hold the Commissioner had neither express nor implied authority to enter the order setting credit life insurance rates. The order appealed from is vacated.

ORDER OF COMMISSIONER PROMULGATING "RULES & REGULATIONS GOVERNING CREDIT LIFE AND CREDIT ACCIDENT & HEALTH INSURANCE"

While appellants have argued extensively the merits of the Commissioner's action in promulgating rules and regulations with regard to credit insurance, we do not deem it necessary or appropriate to consider these arguments.

G.S. 58-9.3 in pertinent part provides:

> "*Court review of orders and decisions.*—(a) Any order or decision made, issued or executed by the Commissioner, except an order to make good an impairment of capital or surplus or a deficiency in the amount of admitted assets and except an order or decision that the premium rates charged or filed on all or any class of risks are excessive, inadequate, unreasonable, unfairly discriminatory or are otherwise not in the public interest or that a classification assignment is unwarranted, unreasonable, improper, unfairly discriminatory, or not in the public interest, shall be subject to review in the Superior Court of Wake County on petition by any person aggrieved. . . ."

G.S. 58-9.4 in pertinent part provides:

> "*Court review of rates and classification.*—Any order or decision of the Commissioner that the premium rates charged or filed on all or any class of risks are excessive, inadequate, unreasonable, unfairly discriminatory or are otherwise not in the public interest or that a classification or classification assignment is unwarranted, unreasonable, improper, unfairly discriminatory or not in the public interest may be appealed to the North Carolina Court of Appeals by any party aggrieved thereby."

[2] Clearly an appeal from an order promulgating rules and regulations lies in the Superior Court in accordance with G.S. 58-9.3. The order appealed from is not "an order to make good an impairment of capital or surplus or a deficiency in the amount of admitted assets" or an order regarding rates, or one concerned with a "classification assignment." Accordingly, the appeal from the order promulgating rules and regulations is dismissed.

The result is: The order purporting to fix credit life insurance rates is vacated; the appeal from the order promulgating rules and regulations with respect to credit life and credit accident and health insurance is dismissed.

Judges PARKER and ARNOLD concur.

RALPH W. DAVIS v. COLONIAL MOBILE HOMES

No. 7523DC495

(Filed 17 December 1975)

1. **Uniform Commercial Code § 19— reasonable time for inspection — payment before delivery**

When a seller ships purchased goods to the delivery point, the buyer is entitled to a reasonable time after the goods arrive at their destination in which to inspect them and to reject them if they do not comply with the contract; the fact that the buyer paid the seller before delivery does not constitute an acceptance of the goods or impair the buyer's right to inspect or any of his remedies. G.S. 25-2-512(2).

2. **Uniform Commercial Code § 20— revocation of acceptance of mobile home**

Plaintiff within a reasonable time revoked his acceptance of a mobile home where it was delivered on 7 June, numerous parts of the

home were out of line and the home leaked, defendant seller sent out persons to make repairs on four occasions, plaintiff on 3 July notified defendant that he demanded immediate replacement of the home or a refund of all money paid, defendant again sent workers to make repairs on 29 July but plaintiff refused to allow them to do so, and plaintiff moved out of the home after three months.

3. **Uniform Commercial Code § 20— rejection of revocation of acceptance — recovery of price — damages**

If a buyer made an effective rejection of a mobile home or justifiably revoked his acceptance of it, he has a right to recover so much of the price as has been paid plus any incidental and consequential damages. G.S. 25-2-711(1); G.S. 25-2-715.

4. **Uniform Commercial Code § 20— revocation of acceptance — no duty to allow repairs**

Where a mobile home was purchased on 18 May and delivered on 7 June and defendant seller was thereafter unable to tell plaintiff buyer when the unit would be properly repaired, defendant did not make a conforming delivery within a "reasonable time" or within the "contract time," and after plaintiff revoked his acceptance of the home, he was under no obligation to permit defendant to repair the defects and make a binding re-tender thereof to plaintiff.

APPEAL by both plaintiff and defendant from *Osborne, Judge.* Judgment entered 27 January 1975 in District Court, ALLEGHANY County. Heard in the Court of Appeals 25 September 1975.

This is the second appeal arising out of this litigation. In *Davis v. Enterprises* and *Davis v. Mobile Homes,* 23 N.C. App. 581, 209 S.E. 2d 824 (1974), we ordered a new trial for a determination of whether there had been a rejection or revocation of acceptance.

The lawsuit involves a dispute between the purchaser (plaintiff) of a mobile home and the seller (defendant). Plaintiff complains that, due to defendant's negligent mishandling in shipment and installation, the unit is irreparably damaged and uninhabitable. Plaintiff testified at the first trial that he had paid $5,359.90 in cash for the mobile home and had incurred $1,000 incidental expenses. At the second trial plaintiff testified further with respect to his incidental and consequential damages.

Plaintiff further stated that the unit had been delivered and installed on the lot by defendant on 7 June 1973, and when delivered to the site one tire was flat. Plaintiff testified that defendant's employee told him that ". . . the driver who de-

livered the mobile home to my property from Yadkinville pulled the mobile home on the flat tire 'all the way.' . . ." Once the unit had been installed plaintiff had to wait three weeks in order to inspect the interior because ". . . no keys were delivered with the mobile home." When plaintiff finally obtained the keys he found the cabinets out of line and claims they "would not make a tight seal, and the outer edge of the door of the refrigerator was about a quarter-inch higher than the top of the refrigerator. The windows would not shut a tight seal, and the front door would not stay shut. When you would shut the front door, the walls would vibrate just like the studding had been torn completely loose from the rafters. Along the upper edge and the right rear corner of the outside of the mobile home, you could stick your fist up between the paneling and the frame of the trailer. On the bottom at the right rear corner, the corrugated metal exterior was bent out of shape and pulled away from the frame. There was an indentation less than ¼ inch deep in the left front corner of the frame and the 'I' beam running under the chassis was completely warped. The 'I' beam on the left-hand side was twisted and bent and bowed out. The windows wouldn't shut, the floors were buckled, and the rafters on the top were warped and bent out of shape; they were warped into a kindly 'S' shape."

"When it rained the floors were flooded. Water ran out from under the paneling into the inside. My daughter packed towels and stuff under the paneling to keep water out of the shoes. After about an hour, the circuit breakers in the electrical panels started flickering off, so I pulled the main switch. There was water all over the floors, in the hall and kitchen, bathroom and both bedrooms. After each rain, water would drain from the walls for from one to three hours—from between the outer aluminum skin and the inner walls. . . ."

". . . Defendant sent an employee named Paul Stanley to install a hot water heater. He also smeared a substance similar to tar on the roof, but it only stopped about 50% of the leaking. Water was still running down between the inner and outer walls into the bathroom, the center bedroom and the hall. Water continued to cause the circuit breakers to kick off, and water continued to drip out from between the walls after each rain. One night I locked the door and went to bed. During the night a breeze rocked the trailer and the door came open. I noticed a crack across the kitchen floor. None of the damages I have

described were visible when I inspected the mobile home at Yadkinville prior to purchasing it."

Plaintiff remained in the trailer for approximately three months and finally moved out in September of 1973. Prior to moving out, plaintiff, through a letter from his attorney, on or about 3 July 1973, demanded replacement or, in the alternative, a refund.

Defendant's evidence indicated that he had made efforts to repair; though they were finally refused access to the unit for repair purposes by plaintiff after the lawsuit had been initiated.

In the first action, the District Court awarded plaintiff $900 for defendant's breach of the contract.

Subsequent to the first appeal, plaintiff on 3 December 1974, amended his complaint and averred that he had ". . . seasonably and within a reasonable time notified defendant of his rejection [of the unit] thereof." Alternatively, plaintiff alleged that ". . . if the Court should find that plaintiff initially accepted said mobile home (which is denied), then plaintiff seasonably and within a reasonable time revoked any such acceptance."

Plaintiff seeks the entire purchase price paid by him to defendant and incidental and consequential damages.

Based on the transcript of the first trial and the additional evidence presented in the second trial, the court found facts and concluded that plaintiff made an effective rejection of said mobile home within a reasonable time after delivery, and after seasonable notice to the seller and is entitled to recover the purchase price of said mobile home from the defendant. The Court did not award any incidental and consequential damages and did not find any facts with respect to this portion of plaintiff's case.

From said judgment, both plaintiff and defendant appealed.

Edmund I. Adams for plaintiff.

Arnold L. Young for defendant.

MORRIS, Judge.

Both plaintiff and defendant take exception to various aspects of the District Court's judgment and bring forward

for our consideration several assignments of error. Grouping the parties' contentions by subject matter, we have before us these questions:

(1) Did the trial court prejudicially err in finding a rejection by the plaintiff buyer?

(2) Where the plaintiff buyer rejects or revokes acceptance does he have the right to incidental and consequential damages?

(3) Where the buyer rejects or revokes his acceptance of goods, does this defendant seller have the ancillary right to cure and repair the alleged defects and then make a binding "retender" or a "continuing tender"?

[1] Our Supreme Court, interpreting the applicable provisions under the Uniform Commercial Code, has held that when a seller, as in this case, ships the purchased goods to the delivery point, ". . . the buyer is entitled to a reasonable time after the goods arrive at their destination in which to inspect them and to reject them if they do not comply with the contract." *Motors, Inc. v. Allen,* 280 N.C. 385, 394-395, 186 S.E. 2d 161 (1972); also see *Davis v. Enterprises* and *Davis v. Mobile Homes, supra,* at 587. The mere fact that plaintiff Davis paid defendant before delivery ". . . does not constitute an acceptance of goods or impair the buyer's right to inspect or any of his remedies." G.S. 25-2-512(2); also see *Motors, Inc. v. Allen, supra,* at 395.

The court found as a fact that plaintiff had ". . . notified the defendant by letter dated July 3, 1973 that he demanded immediate replacement of said mobile home, or in the alternative a refund of all money paid. That thereafter on the 29th day of July 1973 defendant sent a crew of workers to said mobile home to make repairs and adjustments, but the defendant refused to permit said workers to attempt to make repairs and adjustments. That prior to this time the defendant had sent an employee to mobile home of the plaintiff to make repairs on four different occasions. That after ninety days the plaintiff moved out of said mobile home, and has lived in said mobile home only during the summer months." It is not clear from the record whether the on-site repair visits transpired prior to or subsequent to the 3 July 1973 letter to defendant. The evidence, however, is plenary that plaintiff was justifiably dissatisfied with the delivered product and that defendant was

well aware of the dissatisfaction. Defendant's district manager, Joey Odell, testified that "[s]*hortly after delivery,* I made a call on Mr. Davis. He had made some complaints. . . . [H]e had complained . . . that the water heater would not work. . . . Mr. Davis also made other complaints. . . . I [also] received a complaint from the Consumer Protection Division of the Attorney General's Office. . . ." (Emphasis supplied.) When Odell first tried to check out the complaints plaintiff was not there, but he noted that on his second trip to the site he found plaintiff there. "He had numerous complaints. He complained about the closet doors in the bedrooms not being adjusted properly and catching on the bottom—the doors would not close or open. I did some work on the doors. . . . I did all the work I could that day and told Mr. Davis that we would send a service crew up to finish the work. I did not tell him when to expect the crew. At the time I was kind of short on service personnel. I told him I would get to it as soon as I possibly could. . . ."

Defendants returned to the mobile home on 29 July 1973, almost two weeks after plaintiff initiated this action. On this visit they wanted ". . . to see what else we needed to do." Davis, after calling his attorney, would not let defendants work on the unit. Odell further testified that plaintiff ". . . did not want any work performed on the home to get it to his satisfaction."

[2] We think the evidence in this case supports a conclusion that plaintiff revoked his acceptance. The fact that plaintiff stayed in the unit after allegedly revoking or rejecting the unit does not alone necessarily vitiate any of the buyer's rights. In an analogous case, the State Supreme Court held that the ". . . evidence is insufficient to support a finding that she *rejected* the mobile home. . . ." where, notwithstanding the fact that she told the seller that " '. . . this is not right and I do not want it,' " she moved into the home and made three payments on the unit. *Motors, Inc. v. Allen, supra,* at 396-397. Though finding no rejection the Court nonetheless held that "[t]his evidence, considered in the light most favorable to defendant, would permit a jury to find that she initially accepted the mobile home on the reasonable assumption that plaintiff [seller] would correct the nonconforming defects and subsequently revoked her acceptance by reason of plaintiff's failure to do so." *Id.* at 397.

[3] However, any error committed by the District Court in finding a rejection instead of a revocation of acceptance must be deemed harmless in view of our determination that the evidence warrants a finding of revocation. In either case the plaintiff's relief is the same. "A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them." G.S. 25-2-608(3). Thus, if the buyer " . . . made an effective rejection of the mobile home, or . . . justifiably revoked . . . [his] acceptance of it, . . . [he] has a right to recover 'so much of the price as had been paid' plus any incidental and consequential damages . . . [he] is able to prove, G.S. 25-2-711(1); G.S. 25-2-715." *Motors, Inc. v. Allen, supra,* at 396; also see *Davis v. Enterprises* and *Davis v. Mobile Homes, supra,* at 588.

[4] Defendant contends that he has the right to repair and cure the defects under a continuing tender or re-tender theory notwithstanding plaintiff's notification of rejection or revocation of acceptance.

G.S. 25-2-508 provides that:

"(1) Where any tender or delivery by the seller is rejected because nonconforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.

(2) Where the buyer rejects a nonconforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender."

In this case, plaintiff paid defendant on 18 May 1973 and the defendant delivered the unit on 7 June 1973. When the defendant's employee Odell went to see plaintiff after delivery he could not tell plaintiff when he would be able to repair the unit. He explained that ". . . it is quite hard to tell the individual or customer when you can possibly get to doing work." In fact, Mr. Richard Hensley, defendant's regional service manager, testified that he did not ". . . know how long it would take to make all the repairs necessary to get the mobile home back in good condition. . . . " By their own testimony, defendants were not able to and did not make a conforming delivery within a "reasonable time" or within the "contract time." Under these

circumstances, the plaintiff buyer has no further obligations to purchase or accept any mobile home from defendant, whether the original unit repaired or a replacement. See G.S. 25-2-602 (b), (c); G.S. 25-2-608(3).

On defendant's appeal: Affirmed.

On plaintiff's appeal: Remanded for hearing and determination on plaintiff's prayer for incidental and consequential damages.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. MASON FREEMAN PARKS

No. 7526SC491

(Filed 17 December 1975)

Constitutional Law § 31— identity of confidential informants — necessity for disclosure

Where two confidential informants introduced an SBI agent to defendant and made a buy of marijuana for the agent from defendant on 30 August, and the agent bought marijuana from defendant on 6 September without the assistance of the informants, disclosure of the identity of the confidential informants in a trial of defendant for the 6 September sale of marijuana was not required since the informants did not participate in that sale.

APPEAL by defendant from *Baley, Judge.* Judgment entered 16 January 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 25 September 1975.

Defendant was indicted for the alleged 6 September 1974 felonious distribution of marijuana to State Bureau of Investigation Agent V. R. Eastman.

According to State's evidence, Agent Eastman went to defendant's Connection Lounge " . . . with the purpose of meetng Mr. Parks and making a purchase of marijuana." At trial, Eastman further recalled that he " . . . went with a confidential source, I do not know the name, to the lounge. They were a male and female. It was through this source that I met Mr. Parks. On August the 30th after a brief conversation of introduction to Mr. Parks, we discussed the price of a pound of

marijuana. . . . [H]e agreed to sell a pound of marijuana but not to myself. He agreed to sell it to a confidential source. . . . After I transferred the money to the confidential source, a substance was given to me by the confidential source. It was a vegetable type substance which was in a dry form and ground up. . . . I [then] had a further conversation with him in regard to the buy of further marijuana. I asked Mr. Parks what the price would be per pound for five pounds of marijuana. I asked him this as I was standing by Mr. Parks and the confidential informer. Mr. Parks said he would sell me five pounds for $175.00 per pound. I advised him that the price was a little steep to be buying five pounds, meaning the price was too high."

"Mr. Parks stated that the quality of the marijuana was of good quality, and he could not reduce the price. . . . [A]s the two confidential informers and myself were leaving the front of the Connection [Lounge], . . . I then asked Mr. Parks or advised Mr. Parks that I would return the next Friday to purchase five pounds, and he agreed and said, O.K."

On Friday, 6 September 1974, Eastman returned by himself to the defendant's lounge and testified that:

> " . . . Mason Parks was at the lounge when I arrived. I arrived at the lounge and after my arrival, I went inside at the bar and ordered a beer. I then took the beer and went to a booth which was located inside the lounge. I sat down one booth over from Mr. Parks and an unknown white male that he was talking to. After sitting there for a few minutes, the other male left Mr. Parks' presence. I then advised Mr. Parks to have a seat, asked him if he would have a seat in my booth, and he did.
>
> After he sat there for a few minutes, I introduced myself again, and he advised me he remembered me from the last week. I introduced myself as Ray Eason. I asked Mr. Parks if he had the five pounds that I requested on August 30. Mr. Parks advised me that he did not know me, and that he didn't want to deal with anybody that he did not know. After a few seconds, I advised Mr. Parks that I had come to the Connection Lounge with the intent of buying five pounds of marijuana. I stated that I had people who were expecting parts of the five pounds on the same evening. Mr. Parks then stated that, or I then stated to Mr. Parks, that I had the entire amount of money to purchase

five pounds of marijuana. Mr. Parks then advised me that he would deal with me, but if I was an informer or working for the police, that he would have me done away with. At that point I advised Mr. Parks that I felt the same way about informers or people working for the police. Mr. Parks then agreed to sell me five pounds of marijuana, and we began a discussion about the price. After arguing over the price of $175 per pound, Mr. Parks agreed to sell me five pounds of marijuana for $850, being approximately $170 per pound, I think. I then handed Mr. Parks $850 in United States currency. He left my presence and went into his office and returned in a few minutes and stated that he would have to go about a block away to pick up the five pounds.

To the best of my knowledge, the $850 was broken down into two $100 bills and the rest was in $20 bills, and perhaps one $10. He was in his office approximately five to ten minutes. When he came out, he advised me to accompany him outside. On the way out, he asked me if I had a vehicle, and I informed him that I did, and he advised that we would take my vehicle to pick up the marijuana. I was operating a '74 Continental Pontiac. It was green with a light green top. We then drove north on Tryon Street approximately a block and a half. No one was in the car besides Mr. Parks and myself, and I was driving. We went up to the Bowens A & G Store. It was at the intersection of Tryon Street and Eastway. We arrived and parked beside the store and sat there for approximately fifteen minutes in a parking lot. It was approximately 8:25 when we arrived at the Bowens Store. While we were there, the party that we were supposed to have met did not arrive at that time. Mr. Parks and myself engaged in a conversation and during that conversation, Mr. Parks advised me about the marijuana. He advised me about the use of marijuana and stated that he believed there wasn't anything wrong with marijuana and he said that he used marijuana. He said he used marijuana as a sexual stimulant during intercourse, and he further stated he did not see anything wrong with the use of marijuana or with the sale of marijuana.

A. I then asked Mr. Parks if he sold any other type drugs. Mr. Parks stated that he did. . . . I asked him about the price of cocaine and he stated that he sold cocaine for fourteen

hundred dollars per ounce . . . . and seven hundred and fifty dollars per half ounce. At that time I agreed with Mr. Parks as to the price and agreed to contact him later on, after I had gotten money together to buy the ounce of cocaine, or half ounce of cocaine. . . .

I would say we sat in the parking lot of the A & G Store with Mr. Parks for approximately twelve to fifteen minutes. After the party that we were supposed to have met didn't show up, Mr. Parks advised me to return to the Connection Lounge which I did. I hadn't gotten out of the car at any time while I was at the parking lot. And he didn't get out of the car until we got back to the Connection Lounge. Neither of us got out of the car from the time I left the lounge at around 8:25 until I returned to the lounge which would have been around twenty minutes of nine. At that time, Mr. Parks went inside the lounge and during the time he was inside the lounge, two ABC officers came up in State type vehicle. They went inside and came outside. One of them was looking around the outside of the premises. I was still in my car behind the driver's portion. Mr. Parks returned to the vehicle in approximately ten to twelve minutes, and I asked him who the gentlemen were in the vehicle that was parked in front of the lounge. He said they were ABC officers and they had a job to do and they were checking his place for ABC violations. He did not indicate to me in those words who operated the Connection Lounge. When he returned to the car he advised me that we would return to the same parking lot, which we did. We stayed there for approximately five to seven minutes, and in a few minutes, a white over red '73 Eldorado Cadillac arrived occupied by one white female and a shaggy dog. Mr. Parks advised me to open my trunk, which I did. At that time, he was in the process of getting out of the right side of my vehicle. I didn't see anybody else in the parking lot when the white over red Cadillac drove up. It was a white convertible top over a red body. The driver was a white female with long brownish type hair. After Parks told me to open the trunk, I did so, and Mr. Parks went to the red and white Cadillac, opened the door and reached behind the driver's seat and he grasped five white plastic bags in his hand and brought them over to my vehicle and put them in my trunk. The Cadillac was approximately twelve to fifteen feet from my car. He brought all the bags at one

time. I didn't open the bags. The bags were placed in the trunk of my vehicle.

Also in my trunk at that time were a couple of boxes and my police SBI radio was in the back seat. It was covered at the time in the back in the trunk of my car. The bags were placed together in the trunk of my car. As I said before, Mr. Parks placed them himself in the trunk of the car. Mr. Parks then wished me a farewell and said, 'I'll see you again later,' and I said, 'O.K., goodnight,' and left the area."

Eastman immediately took the suspected contraband to Special Agent Ross waiting at a nearby motel and the purchased material was properly channeled and tagged throughout police custody. According to the State Crime Laboratory Chemist, the substance allegedly purchased from the defendant on 6 September 1974 contained tetrahydrocannabinal, the active ingredient normally found in marijuana.

Defendant maintained that neither on 30 August nor 6 September 1974 did he ever arrange with Eastman for the sale of marijuana. Defendant testified that he stayed home on 6 September 1974 with his son, helping the child prepare his football gear for an upcoming game. The son and business partner both corroborated defendant's alibi.

From a plea of not guilty, the jury returned a verdict of guilty. Sentenced to a term of imprisonment, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Charles J. Murray, for the State.

James, Williams, McElroy & Diehl, P.A., by William K. Diehl, Jr., for defendant appellant.

MORRIS, Judge.

Defendant, citing as error the failure of the trial court to require disclosure of the identity of the confidential informers involved in the purported 30 August 1974 meeting and drug transaction, maintains that disclosure was necessary for the effective presentation of his alibi defense and his related contention of misidentification.

The United States Supreme Court, though recognizing the government's privilege of informant nondisclosure, noted the counterbalancing principle that disclosure is warranted where informant identity is " . . . relevant and helpful to the defense of an accused, or is essential for a fair determination of a cause. . . . " *Roviaro v. United States,* 353 U.S. 53, 60-61, 1 L.Ed. 2d 639, 77 S.Ct. 623 (1957) ; also see *McLawhorn v. State of North Carolina,* 484 F. 2d 1, 5 (4th Cir. 1973) ; *State v. Cameron,* 283 N.C. 191, 193, 195 S.E. 2d 481 (1973). The Supreme Court, rather than amplify on the details of this basic problem, broadly opined " . . . that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Roviaro, supra,* at 62; *McLawhorn, supra,* at 4.

Our Supreme Court, interpreting the *Roviaro* decision, has concluded that *"Roviaro* makes two things clear: (1) There is a distinct need for an informer's privilege but the general rule of nondisclosure is not absolute, and (2) disclosure is required where the informer directly participates in the alleged crime so as to make him a material witness on the issue of guilt or innocence." *State v. Ketchie,* 286 N.C. 387, 390, 211 S.E. 2d 207 (1975). This Court, consistent with our Supreme Court's analysis, will compel disclosure " . . . if it appears that he [*i.e.* the informant] is a participant as opposed to a 'mere tipster.' " *State v. Lisk,* 21 N.C. App. 474, 476, 204 S.E. 2d 868 (1974), cert. denied 285 N.C. 666 (1974). Also see *McLawhorn, supra* at pp. 5-6. Whether the informant is a participant or a "mere tipster" turns, at least partially, on the " . . . qualification of the informant to testify directly concerning *the very transaction constituting the crime."* (Emphasis supplied.) *McLawhorn, supra,* at p. 5. If the informant can testify as to the details surrounding the *actual* crime, then the defendant should be given the opportunity to test his credibility as a witness.

In this case, the informants purportedly accompanied Agent Eastman to the defendant's Connection Lounge on 30 August 1974 and allegedly made the "buy" for Eastman. However, defendant was not charged with the felonious distribution of drugs

on 30 August, but rather, stood on trial for the illegal and felonious sale of five pounds of marijuana on 6 September 1974 to Agent Eastman. Defendant dealt only with Eastman with respect to the 6 September "deal" and the informants never participated in the negotiation or actual culmination of the purported unlawful transaction. Without question, the informants provided Eastman with the necessary entree to defendant's purported drug business, but once the course of dealing was established on 30 August 1974 and defendant felt confident that he was dealing with a safe buyer, the relationship became one uniquely personal between defendant and Eastman.

We are familiar with the California Supreme Court's decisions in *People v. Durazo,* 52 Cal. 2d 354, 340 P. 2d 594 (1959), and *People v. Williams,* 51 Cal. 2d 355, 333 P. 2d 19 (1958), but we consider their reasoning faulty and illogical and expressly reject their position. In *Durazo* and *Williams* the California Supreme Court held that when a subsequent transaction, even though accomplished without the assistance of the informant, " . . . was consummated in reliance upon the prior one . . . " then disclosure was necessary. *Williams, supra,* at 360. In *Durazo,* Justice Shenk, forcefully dissenting, argued that disclosure was unwarranted because "there was no informant participation." *Durazo, supra,* at 357. We believe Justice Shenk's opinion more accurately reflects the proper application of the law. In North Carolina, participation is the essential factor and when the " . . . unknown person was not present at the time of the actual sale . . . " there is no necessity for revealing the confidential source's name. *State v. Cameron, supra,* at 194.

Here, the officer was sure and certain of his identification. It was not based on an observation lasting just a few minutes; he was in the presence of defendant for almost an hour. Most of that time the two were alone and engaged in face to face conversation. Felony narcotics violations appear to be increasing at a rather alarming rate. Because of the nature of the crime, the use of informers has to play a major role in the apprehension and conviction of narcotics violators. Further extension of the rule with respect to disclosure of the name of the informer could well result in the elimination of the use of informers and, correspondingly, ineffective law enforcement in the area of narcotics violations. To adopt the majority rule in *Durazo* and *Williams* would result in requiring disclosure of the informer's name in almost every case where the defendant claims he is

"not the man." This we are unwilling to do, especially, where, as here, there was positive, direct, face to face testimony of the arresting officer that defendant was "the man," and the informer had nothing to do with the transaction for which defendant was arrested.

No error.

Judges HEDRICK and ARNOLD concur.

TOWN OF MEBANE v. IOWA MUTUAL INSURANCE COMPANY

No. 7515SC534

(Filed 17 December 1975)

1. **Attorney and Client § 4— testimony by trial attorney**

While an attorney is competent to testify for his client, he or any member of his firm may not continue representation in the trial unless he can come under the exceptions listed in Disciplinary Rule 5-101(b)(1)-(4) of the Code of Professional Conduct.

2. **Attorney and Client § 4— testimony by trial attorney**

In an action to recover under a bonding contract for an embezzlement loss, the trial court did not err in refusing to permit plaintiff's attorney to testify as to defendant's waiver of the two-year limitation provision of the contract unless the attorney withdrew as trial counsel.

APPEAL by plaintiff from *Braswell, Judge.* Order entered 3 February 1975 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 16 October 1975.

Plaintiff's action was to recover on a bonding contract which provided that defendant insurance company would reimburse the plaintiff town for losses sustained, up to $10,000, as a result of dishonesty of any of the town's employees. Under the terms of the contract the defendant was not liable unless action was brought within two years after loss was discovered.

The complaint alleged that plaintiff had suffered an embezzlement loss. Defendant denied the allegations and alleged that action had not been brought within two years after discovery of the loss as required by the contract. Plaintiff amended its complaint and alleged that defendant had waived the two-year limitation provision.

At the pretrial conference the presiding judge was advised by defendant that plaintiff was grounding its case on an alleged waiver by defendant of the contract provision requiring action to be brought within two years after discovery of loss; that plaintiff would present evidence of the alleged waiver through the testimony of plaintiff's attorney. Defendant objected to the attorney testifying as long as he or his firm were attorneys for the plaintiff.

It was ruled by the judge at pretrial conference that the attorney would not be permitted to testify as a witness and at the same time represent the plaintiff. Moreover, the court suggested that if the attorney had to be a witness for plaintiff that the attorney should withdraw and secure other counsel to try the case, and that in such event a continuance would be allowed to give new counsel opportunity to prepare.

Plaintiff's counsel advised the court that they wished to go forward with the trial as scheduled. Counsel further advised that they would not withdraw but would tender the attorney as a witness and take exception to the judge's ruling.

The trial judge sitting without a jury held for defendant and found that there had been no waiver of the provision requiring that action be brought within two years after discovery of loss. From judgment denying recovery plaintiff appeals to this Court.

Allen, Allen & Bateman, by J. Kent Washburn, for plaintiff appellant.

Henson, Donahue & Elrod, by Perry C. Henson and Kenneth R. Keller, for defendant appellee.

ARNOLD, Judge.

This case presents the troublesome question of when an attorney may testify on behalf of a client and not withdraw as trial counsel. The weight of authority in this country is that while it is a breach of professional ethics for an attorney for a party to testify as to matters other than formal matters without withdrawing from the litigation, he is not incompetent so to testify. The testimony is admissible if otherwise competent. 118 A.L.R. 954 (1939).

The Supreme Court of North Carolina has historically discouraged the practice of attorneys testifying on behalf of clients,

and although it has been allowed, in most instances the lawyer acting as witness for his client has surrendered his right to participate in the litigation. *In re Will of Kemp,* 236 N.C. 680, 73 S.E. 2d 906 (1953); *see State v. Woodside,* 31 N.C. 496 (1849).

Recognizing the unique problem of attorneys appearing as witnesses on behalf of parties they represent, the Council of the N. C. State Bar, an agency created by the General Assembly of North Carolina and empowered to formulate and adopt rules of ethics and conduct for attorneys licensed to practice in this State, adopted rules applicable to this situation in the Code of Professional Responsibility. (4A Gen. Stat. Append. VII 169 (Sup. 1974)). The pertinent rules of the Code are as follows:

"DR5-101—Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

. . . .

(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his own firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

(1) If the testimony will relate solely to an uncontested matter.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case."

"DR5-102—Withdrawal as Counsel When the Lawyer Becomes a Witness.

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious

that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR5-101 (B) (1) through (4)."

Article 2, Section 1 of the N. C. Constitution provides that "The legislative powers of the State shall be vested in the General Assembly. . . . " It is clear that the General Assembly is not to abdicate or delegate its authority to make law, but where it 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. Med. Care Com.*, 283 N.C. 110, 195 S.E. 2d 517 (1973); *Coastal Hwy. v. Auth.*, 237 N.C. 52, 74 S.E. 2d 310 (1953).

G.S. Chapter 84, Article 4 creates the N. C. State Bar as the agency, subject to the superior authority of the General Assembly, to formulate and adopt rules of professional ethics and conduct for licensed attorneys. Adequate standards are set forth to guide the State Bar in effectuating the policy or legislative goals declared by the General Assembly.

While the Disciplinary Rules set forth in the Code of Professional Conduct do not control the admissibility of evidence or the competency of witnesses, they do govern the ethics and conduct of attorneys licensed to practice law in the State, and it should be the policy of the courts to give effect to these rules which specifically address the question of when an attorney may be a witness for a party he represents.

[1] We see no inconsistency in the Code of Professional Conduct and the uniform practice that has existed in North Carolina with respect to attorneys testifying on behalf of clients. If it becomes obvious that an attorney ought to testify on behalf of his client it is clear that he may do so, but he or any member of his firm shall not continue representation in the trial unless he can come under the exceptions listed in Disciplinary Rule 5-101(B) (1) through (4). The exceptions allow an attorney or a member of his firm to testify and continue representation of

the client if the testimony relates solely to an uncontested matter; relates solely to a matter of formality and there is no reason to believe substantial evidence will be offered in opposition; relates solely to the nature and value of legal services rendered; and "as to any matter if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case."

The learned trial judge was mistaken during the trial when he remarked that "[a]s a matter of law one cannot be a counsel of record and a witness for his client in one and the same lawsuit. There are no facts or circumstances presented or shown to this court to modify or change it, or make any exception even if the law would permit an exception. I know of no law that permits any exception." Both the Code of Professional Conduct, as already cited, and the common practice recognized by the North Carolina Supreme Court provide for exceptions whereby attorneys may testify on behalf of clients. See *In re Will of Kemp, supra;* and *State v. Woodside, supra.*

[2] We feel, however, that there was no error in refusing to allow the attorney's testimony in this case. The ruling by the trial judge actually occurred during a pretrial conference in which the court instructed the attorney that he would be allowed to testify only if he withdrew and secured other counsel to try the case.

Plaintiff's contention that to require it to secure new counsel would be an economic hardship, and hence a substantial hardship as contemplated in Disciplinary Rule 5-101(B)(4), was expressly rejected by the judge in the pretrial conference. Indicating that he had considered Disciplinary Rule 5-101, and due to the nature of the testimony offered, the judge declared that the plaintiff's attorney would not be permitted to testify.

In making his determination not to allow the attorney to be a witness unless he withdrew the trial judge properly considered Disciplinary Rule 5-101. It was the judge's view that due to the nature of the testimony offered the attorney did not come under the exception in 5-101(B)(4) as a matter of law. We agree.

No sudden emergency developed during the course of the trial which presented plaintiff's attorney with the dilemma of whether he ought to take the stand as a witness for his client. He was given ample notice of the court's ruling before trial

commenced, and the court offered to postpone the trial of the case in order for new counsel to prepare. This is not a case where the testimony offered by the attorney came within any of the exceptions set forth under Disciplinary Rule 5-101(B) (1) through (4).

Plaintiff also assigns as error the court's holding as a matter of law that there was no evidence of waiver by defendant of the requirement to commence action within two years following discovery of the loss.

Both parties cite *Hicks v. Insurance Co.*, 226 N.C. 614, 617, 39 S.E. 2d 914 (1946), which states the relevant law with respect to waiver as follows: "Waiver of the . . . provision in a policy of insurance is predicated on knowledge on the part of the insurer of the pertinent facts and conduct thereafter inconsistent with an intention to enforce the condition."

Plaintiff argues that the fact that defendant requested and received from plaintiff a copy of a transcript of certain criminal proceedings is evidence of waiver. We disagree, and find no evidence in the record to show any conduct by defendant which was inconsistent with an intention to enforce the two-year condition, or which would have caused plaintiff to honestly believe there was any waiver.

We find no error in the court's conclusion that there was no evidence of waiver of the contract provision.

Affirmed.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. DAVID DOWD

No. 755SC668

(Filed 17 December 1975)

1. Criminal Law § 99— examination of prospective jurors — statement by court

When defense counsel asked prospective jurors a question containing an inadequate statement of law, the trial court did not commit prejudicial error in stating that counsel's question was inaccurate and in proceeding to correct the error.

2. Robbery § 1— attempted armed robbery

An attempt to rob another of personal property with the use of a dangerous weapon whereby the life of the person is endangered or threatened is, itself, a completed crime and is punishable to the same extent as if the property had been taken as intended. G.S. 14-87.

3. Criminal Law § 3— attempt defined

In order to constitute an attempt, it is essential that the defendant, with the intent of committing the particular crime, should have done some overt act adapted to, approximating, and which in the ordinary and likely course of things would result in, the commission thereof.

4. Robbery § 4— armed robbery — guilt as principal — sufficiency of evidence

The State's evidence was sufficient for the jury to find that defendant was a principal in the offenses of armed robbery and felonious assault where it tended to show that defendant and his three companions discussed robbing a convenience store, defendant entered the store to check on the clerk, when defendant left the store one of his companions entered the store and shot the clerk, and the other two companions then entered the store for the purpose of taking the money but became scared and ran from the store without doing so.

APPEAL by defendant from *Fountain, Judge.* Judgment entered 11 April 1975 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 18 November 1975.

Defendant was charged with armed robbery and assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death. Upon arraignment he entered a plea of not guilty to both charges. He was found guilty as charged in both charges and was sentenced to prison for a term of years on each charge, sentences to run concurrently.

The evidence for the State tended to show the following:

James Kally Quillan was an employee at the Zip Mart on 25 January 1975. He was alone at the time someone entered and shot him four times. He fell to the floor, triggered the burglar alarm and picked up a firearm. Just prior to the shooting Quillan had used the phone to call his residence and request that coffee be brought to him so that he could stay awake. The first bullet struck under Quillan's ear, went through his lower jaw, and lodged behind his left ear. This bullet has not been removed surgically due to the danger of loss of hearing in the left ear. The second bullet entered above the right eye, and lodged in the left eye, necessitating the removal of the entire left eye, and the use of a glass eye. The third bullet hit the

right arm and made a scar and the fourth shot caused a superficial wound on the left side.

Linell Josey, age 15, testified for the State and stated that he and defendant David Dowd, Nathaniel Scott, and Donald Frazier discussed robbing the Zip Mart. They had a .25 caliber automatic pistol which had been shown to defendant prior to their going to the Mart. When they arrived at the store they saw Quillan making a phone call and defendant Dowd was instructed to go inside and learn what he could about the call. Dowd went inside the store and walked around like he was going to buy something, and he came back out and reported that the man called his wife to bring him some coffee. The plan called for Josey to shoot Quillan and for Scott and Frazier to run in and get the money. He further testified:

> "I don't think the man knew any of us. Seems like I recall that there was a conversation about him being able to identify us. I believe someone said, 'Well, the man in the Zip Mart, if you go in there and you just hold him up, he will go down there and identify you, to testify you give him some trouble;' and somebody said the best thing to do is go in there and shoot the man, because if you shoot him, he can't testify against you.
>
> When I went into the Zip Market, I think David Dowd was by the Zip Mart or, you know, close near the Zip Mart. I can't really recall where he was at.
>
> . . .
>
> I went into the Zip Mart and shot the man. I don't know where I shot him. I shot him about three times. When I shot him, I guess he was putting up cigarettes with his back to me. He never saw me that I can recall."

Nathaniel Scott testified for the State. His testimony tended to corroborate Josey's testimony and added that Scott and Frazier ran into the store after the shooting, saw Quillan on the floor, got scared and ran out of the store without taking any money. He confirmed that Dowd assisted in the planning and the preparation for the robbery.

The court conducted a voir dire to determine the admissibility of defendant's statement and thereafter made findings of fact. Detective Simpson testified that Dowd signed a waiver of his rights, stated that he and the other three boys discussed

robbing the Zip Mart, and admitted going into the store. Simpson further testified that Dowd told him that Josey entered the store as he was walking out of it, and that he heard shots being fired as he reached the parking lot. Officer Brown corroborated the evidence which indicated that Dowd's function in the robbery was to see who was in the store before Josey went in to shoot the clerk.

The defendant, age 15, testified that he did not speak with the three boys about robbing the Zip Mart. He stated that he went to the store on his own and bought a coke, that he saw Frazier and Scott across the street from the market, and that Josey passed him without speaking. He further testified that he returned to the pool hall and saw Linell Josey and a lot of his friends there. He denied knowledge of a shooting.

Attorney General Edmisten, by Associate Attorney Cynthia Jean Zeliff, for the State.

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

MARTIN, Judge.

[1] The defendant contends by his first assignment of error that he was prejudiced because of the trial judge's remarks made during defense counsel's questioning of prospective jurors. The court stated that one of the defense counsel's questions was not accurate, and then proceeded to correct the error.

The defendant cited *State v. Holden,* 280 N.C. 426, 185 S.E. 2d 889 (1972), which states that remarks by the judge which tend to belittle counsel or which suggest that counsel is not acting in good faith, may cause the jury to disbelieve all evidence adduced in defendant's behalf. The judge in that instance had told the defense counsel to ask proper questions. The Supreme Court stated that this remark was indiscreet and improper, but that the totality of circumsances showed that it was harmless error.

The defendant contends that the judge's comment affected the jury, citing the incident of juror Delag's request to be excused from jury duty. Ms. Delag stated that she thought some of the defense counsel's questions were unnecessary. The record indicates that the juror's request was not prompted by the judge's remarks.

The trial judge is empowered and authorized to regulate and referee the selection of the jury to the end that both defendant and the State receive the benefit of a trial by a fair and impartial jury. *State v. Vinson,* 287 N.C. 326, 215 S.E. 2d 60 (1975). Counsel for defendant posed a question to the jury containing an inadequate statement of law and it was the court's duty to make a correction. Counsel's questions should be limited to material and relevant matters relating to the qualification or disqualification of the jurors. They should not anticipate the instructions of the court and demand reaction thereto.

In *State v. Vinson, supra,* Justice Huskins, speaking for the Court, stated:

> "On the voir dire examination of prospective jurors, hypothetical questions so phrased as to be ambiguous and confusing or containing incorrect or inadequate statements of the law are improper and should not be allowed. Counsel may not pose hypothetical questions designed to elicit in advance what the juror's decision will be under a certain state of the evidence or upon a given state of facts. In the first place, such questions are confusing to the average juror who at that stage of the trial has heard no evidence and has not been instructed on the applicable law. More importantly, such questions tend to 'stake out' the juror and cause him to pledge himself to a future course of action. This the law neither contemplates nor permits. The court should not permit counsel to question prospective jurors as to the kind of verdict they would render, or how they would be inclined to vote, under a given state of facts."

This assignment of error is overruled.

Defendant next assigns error to the admission into evidence of statements which defendant made to Officer Simpson. After conducting a voir dire hearing, the trial court concluded that "At the time the defendant made such statements, if any, as were made to Officer Simpson, he did so freely, voluntarily, knowingly and understandingly." The record reveals that competent evidence supported these findings, and they in turn supported the court's conclusions. This assignment of error is overruled.

Defendant assigns as error the failure of the court to allow him timely made motions for nonsuit.

In considering a trial court's denial of a motion for judgment of nonsuit, the evidence for the State, considered in the light most favorable to it, is deemed to be true and inconsistencies or contradictions therein are disregarded. Evidence of the defendant which is favorable to the State is considered, but his evidence in conflict with that of the State is not considered upon such motion. *State v. Price,* 280 N.C. 154, 184 S.E. 2d 866 (1971). The question for the court is whether, when the evidence is so considered, there is reasonable basis upon which the jury might find that an offense charged in the indictment has been committed and the defendant was a principal in the commission of the crime.

[2, 3] By the terms of G.S. 14-87 an attempt to rob another of personal property, made with the use of a dangerous weapon, whereby the life of a person is endangered or threatened, is, itself, a completed crime and is punishable to the same extent as if the property had been taken as intended. *State v. Price, supra; State v. Spratt,* 265 N.C. 524, 144 S.E. 2d 569 (1965). Such attempt occurs when the defendant, with the requisite intent to rob, does some overt act calculated and designed to bring about the robbery, thereby endangering or threatening the life of a person. *State v. Price, supra; State v. Spratt, supra.* In order to constitute an attempt, it is essential that the defendant, with the intent of committing the particular crime, should have done some overt act adapted to, approximating, and which in the ordinary and likely course of things would result in the commission thereof. Therefore, the act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. It must not be merely preparatory. In other words, while it need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made. *State v. Price, supra.*

Considered in accordance with the above stated principles, the evidence in the record is amply sufficient to justify a jury in finding that Linell Josey entered the market with the intent to rob Quillan, shot him three times in the head with a pistol, intending to kill him and inflicting serious injury, for the purpose of accomplishing the intended robbery and thereby endangered his life. Thus, the evidence of the State was suffi-

cient to show that the offenses charged in the bills of indictment were committed.

[4] The remaining question is whether the evidence is sufficient to show that the defendant was a principal in the commission of each offense. All who are present at the place of a crime and are either aiding, abetting, assisting, or advising in its commission, or are present for such purpose to the knowledge of the actual perpetrator, are principals and equally guilty. *State v. Dawson,* 281 N.C. 645, 190 S.E. 2d 196 (1972). 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, 67 S.E. 2d 272 (1951). By its express terms G.S. 14-87 extends to one who aids and abets in an attempt to commit armed robbery.

The State's evidence, considered as above stated, is ample to support a finding by a jury that the defendant aided and abetted Linell Josey in feloniously assaulting and attempting to rob James Kally Quillan so as to become a principal in the second degree and equally liable with the actual perpetrator. The motion for judgment of nonsuit was, therefore, properly denied.

We have carefully examined defendant's remaining assignments of error and find them to be without merit. Defendant had a fair trial, free from prejudicial errors.

No error.

Judges VAUGHN and CLARK concur.

IN RE THE WILL OF JAMES WILLIAM ROSE, DECEASED

No. 7523SC432

(Filed 17 December 1975)

1. Wills § 22— caveat — mental capacity on date will executed

In this caveat proceeding, the trial court erred in permitting witnesses who had not seen decedent within a month of the date the

will was executed to express opinions as to decedent's mental capacity to execute the will on that particular date since the witnesses' opinions should have been limited to the time when they had the opportunity to observe decedent.

2. **Wills § 23— caveat — mental capacity — instructions**

The trial court in a caveat proceeding erred in giving the jury an instruction which placed on the caveators the burden of showing that testator was lacking in *all* of the elements of mental capacity essential to the making of a will.

APPEAL by caveator from *Wood, Judge.* Judgment entered 27 March 1975 in Superior Court, YADKIN County. Heard in the Court of Appeals 17 September 1975.

Decedent died on 8 September 1974. A purported will executed by decedent on 19 March 1974, leaving all of his property to the First Baptist Church of Arlington, was probated in common form. Caveator, mother of decedent and the sole beneficiary of a purported will executed by him on 22 November 1972, filed a caveat.

Testimony from the caveator's witnesses tended to show the following.

For several years prior to his death, caveator's son, the decedent, had been an alcoholic. He was treated by several doctors and hospitalized a number of times for alcoholism. He was admitted to the hospital on 8 December 1972 and released on 6 January 1973. At the time of that admission his abdomen was full of fluid, he was deeply jaundiced and in a semi-coma for some time. He had been hallucinating, hearing voices and seeing things.

When he was discharged from the hospital in January, 1973 he was released in the care of his mother who took him to her home. He was placed on medication that caused him to become ill if he used alcohol. His mother had the prescriptions for the medicine filled. His mother took him to the doctor every two weeks until about 11 September 1973. In early 1974 decedent started drinking again. During these drinking episodes he would become profane and abusive to his mother. Decedent was not married at the time and his mother cooked and cared for him. Finally, about the first of February, 1974, because of excessive drinking and the consequent senseless conduct, it was necessary to admit him to the Veteran's Hospital in Salisbury. After several weeks there he was, on 8 March 1974, again released in

the care of his mother. He stayed with his parents most of the time and would, on occasion, go to a house trailer where he formerly lived. He was violent to his father and other members of his family. On 15 March 1974 he got a gun and threatened to shoot his father. He was arrested but later released when his mother signed his bond. He stayed drunk about all the time from the 15th until the last of March, 1974, when he was again admitted to the Veteran's Hospital. Both of decedent's parents were old. His sister usually went to their home every day. She saw decedent threaten and run their parents out of the home on several occasions. He tried to beat his sister. On 19 March 1974 the sister saw decedent at his mother's home. The mother was trying to get decedent sober because, among other reasons, he was supposed to be in court on the 20th as a result of the assault on his father. Decedent promised his mother that he would leave, quit drinking and go to court. Instead, decedent went to a law office and stayed several hours. Decedent did not go to court on the 20th but did show up at his parents' home on the following day and again began to be profane and abusive to his mother. His sister was there at the time and when he threatened to beat her she escaped by crawling out of a window. Several days later he went to his sister's house and although he was still drinking, he was not abusive. While there he ate some food and went to sleep. On 28 March 1974 he was again admitted to the Veteran's Hospital where he remained for about a month. He didn't stop drinking after he returned from the hospital until he died several months later. At the time of his death he was 45 years old.

Decedent tended to "go from one person to another." On the occasions when he "turned on" his mother he would get along with his father. When he was sober he was very good and kind to the members of his family. He helped his mother with her garden and was affectionate to other members of his family. Both the mother and decedent's sister testified that on 19 March 1974, the date that the will was purportedly executed, in their opinion, deceased did not have sufficient mental capacity to know and understand the nature and extent of his property, to know the natural objects of his bounty and to realize the full force and effect of disposition of his property by will.

A doctor testified that when decedent was unable to control his consumption of alcohol his judgment was impaired in every way and that it would take several weeks without alcohol for him to make a proper judgment.

Propounder offered three employees of the law firm that prepared the will. All of them had known decedent prior to the date of the execution of the will and saw decedent on 19 March 1974. All of them responded in the affirmative when asked if it was their opinion that on 19 March 1974 decedent possessed "sufficient mental capacity to know what property he had; who his relatives were; and what claims they had upon him; whether he was capable of disposing of his property by will; and understanding all of the consequences and effects of so doing."

Propounder also offered a number of witnesses from the community, including several trustees and members of the First Baptist Church of Arlington. When they were asked the foregoing question they responded with answers such as "he was capable of carrying on his business," "he was capable," and "could handle his business," and "knew what he was doing." Most of these witnesses had not seen decedent on the day he is said to have executed a will and most of them could not say that they had seen decedent during the month of March. Although most of them said they knew decedent had a drinking problem, few of them said they had ever seen him when he was drinking.

The jury found that the will of 19 March 1974 was properly executed by decedent and that he had sufficient mental capacity to make a will. Judgment was entered admitting the will to probate in solemn form.

Randleman, Randleman & Randleman, by J. Michael Randleman, for propounder appellee.

Franklin Smith, for caveator appellants.

VAUGHN, Judge.

[1] A number of caveator's assignments of error arise out of of the following. Other than those who saw decedent in the law office on the day the purported will was executed, most of propounder's witnesses could not say that they had seen or talked with decedent within a month of the time the will was executed. In substance, the following question was asked of each of them:

> " . . . based on your conversations with him, and observations I ask you if you have an opinion, satisfactory to yourself, as to whether James Rose possessed *on March 19, 1974,*

sufficient mental capacity to know what property he had; who his relatives were; and what claims they had upon him and whether he was capable of disposing of his property by will; and of understanding the consequences and effect of so doing?" (Emphasis added.)

Caveator promptly objected to these questions, the objections were overruled and the witnesses were allowed to answer.

Caveator readily concedes that the witnesses could state their opinions of decedent's condition as of the time they had the opportunity to observe him. It is also clear that the opportunities of the witnesses to observe decedent were close enough to the date of the alleged execution of the will so as to make their opinion of his condition, at the time they saw him, relevant on the question of his condition at the time of the execution of the purported will. The objection, as we see it, is that the questions called for the witnesses' opinion of decedent's condition on the specific day of 19 March 1974, a day when they did not have the opportunity to observe decedent. The jury, of course, could infer that decedent was competent on the day in question from testimony that he was competent a month before or after. We believe, however, that this is an inference for the jury and not for the lay witnesses. The prejudice is compounded when, as here, the judge then recapitulates the testimony of each witness to the effect that, on the date the purported will was executed, the decedent was competent. The witnesses' opinion of decedent's condition should have been limited to the time when they had the opportunity to observe decedent. This is particularly true since decedent's mental disability, if any, was a consequence of his excessive use of alcohol over a long period of time and the degree of that disability apparently varied with the time and amount of alcohol ingested.

[2] At least one of caveator's assignments of error to the charge must be considered as well taken. In his mandate on mental capacity the judge instructed the jury:

"I instruct you as to this second issue that if the Caveators, that is Mrs. Etta Rose, if she has proved to you by the greater weight of the evidence that on March 19, 1974, that the deceased, James W. Rose, lacked sufficient mental capacity to know the kind and nature and extent of his property or to know the natural objects of his bounty or to understand the legal consequences of the Propounders'

> Exhibit 1, the purported last will and testament of James W. Rose, I say to you, ladies and gentlemen, if the Caveators *so proved those things* to you by the greater weight of the evidence, then you ought to answer that second issue in their favor." (Emphasis added.)

The emphasized portion thus placed on the caveators "the excessive burden of showing that testator was lacking in *all* of the elements of mental capacity essential" to the making of a will. *In re Will of Shute,* 251 N.C. 697, 111 S.E. 2d 851. All the elements of testimentary capacity are essential to make a will and the lack of any one of them renders one incapable of making a will. It may well be that the omission of the critical words "either of" preceding "those things" is due to an error in the transcription. We must nevertheless take the record as we find it. It is certainly true that just before the emphasized portion of the quoted part of the charge the judge had properly instructed the jury as to the essential elements of testamentary capacity. This does not nullify the erroneous instruction. "Where instructions in regard to a material matter are conflicting, one erroneous and the other correct, a new trial must be granted, for the jury is not supposed to know which one is correct and this court cannot say that they did not follow the erroneous instruction." *In re Will of Shute, supra.* Moreover, not all of propounder's witnesses testified that decedent possessed all the evidence of mental capacity to make a will.

In light of the foregoing, we cannot say that the trial below was free from errors prejudicial to the caveator. Since we hold that there must be a new trial we do not discuss any of the numerous other assignments of error brought forward on this appeal.

New trial.

Chief Judge BROCK and Judge MARTIN concur.

GLADYS A. DAVIS v. COLONIAL LIFE & ACCIDENT INSURANCE COMPANY

No. 7529SC391

(Filed 17 December 1975)

Witnesses § 1— 12-year-old witness — understanding of "divine punishment" — testimony properly considered

The trial court erred in determining that a 12-year-old child could not testify because of his lack of understanding of "divine punishment"; however, such error was not prejudicial since the judge tried the case without a jury, the court nevertheless allowed the child to testify for "purpose of appeal," and the judge considered all the evidence, including the testimony of the child, in making his findings.

APPEAL by defendant from *Friday, Judge.* Judgment entered 7 March 1975 in Superior Court, MCDOWELL County. Heard in the Court of Appeals 4 September 1975.

This is an action to recover under an accidental death insurance policy issued by defendant. The insured died as a result of a gunshot wound. Plaintiff is the beneficiary. The benefits were payable if the loss resulted "directly, independently and exclusively of all other causes from bodily injury effected solely through external and accidental means." The only question before the court was whether death occurred under conditions covered by the policy. The judge heard the case without a jury and entered judgment for plaintiff.

The testimony of plaintiff tends to show she and her husband, the insured, were at home with their children on the night he was killed. The two had been arguing. The children went to bed about 9:15 p.m. Plaintiff and her husband retired to their bedroom about 9:30 p.m. and began arguing and fighting. Insured choked her, hit her with a flashlight and banged her head against the wall. She was thrown from the bed against the wall. About that time the lights in the bedroom came on and she saw her 11-year-old son standing in the doorway. The next thing she remembered was seeing her husband lying on the floor bleeding from the head. She called for an ambulance. She was with her husband in an ambulance when he died while being transferred from Marion to a hospital in Asheville.

Plaintiff next called her son, then twelve years old as her second witness. The court then examined the child as follows:

"Q. What is your age Wayne?

A. 12 years old.

Q. What grade are you in?

A. Sixth grade.

Q. Wayne what does it mean when you put your hand on the Bible and swear to tell the truth?

A. To tell the truth.

Q. What will happen to you if you don't tell the truth?

A. You get in trouble.

Q. With whom?

A. My mamma.

Q. What else does it mean?

Q. Who will punish you if you don't tell the truth?

A. My mamma.

Q. Anyone else?

Q. Wayne what did you do when you were given your oath a few minutes ago? Did you put your hand on the Book?

A. Yes sir.

Q. What book was it then?

A. Bible.

Q. Do you know what the Bible is? Do you know what it is supposed to be?

A. Yes.

Q. What is it supposed to be?

A. God's word.

Q. Where did you learn that?

A. In church.

Q. Do you go to church?

A. Used to.

Q. What church did you go to? Did you go with your family?

A. Yes.

Q. Did some of your brothers and sisters go?

A. Yes.

Q. How long has it been since you went? Can you tell me that?

A. No.

Q. When you put your hand on the Bible and swore to tell the truth, the whole truth, and nothing but the truth, by that then you can honestly tell the truth?

A. Yes.

Q. Is it your intention to tell the truth?

A. Yes.

Q. If you don't, do you expect to be punished?

A. Yes.

Q. Do you think that you might be punished by your mother? Did I understand you to say that?

A. Yes.

Q. Has she told you to tell the truth on this occasion?

A. Yes.

Q. Do you expect as a result of going to church to be punished by God if you don't tell the truth?

A. Yes.

Q. Do you expect to be punished by this court?

A. Yes.

Q. And it is your intention to tell the truth about it?

A. Yes.

Q. Do you know the difference between the truth and a lie?

A. Yes.

The court then declared:

"The court is not satisfied at this stage, from its own examination, and examination from the counsel, that the witness understands divine punishment. It is the ruling that the witness does not qualify to testify because of his lack of belief in the oath he has taken or the lack of understanding, particularly that section dealing with punishment by God if he does not tell the truth on the stand."

The court, nevertheless, then immediately allowed the child to be sworn and testify for "purpose of appeal." His testimony is as follows:

"I became 12 years old on August 4, 1974. I do not recall my father dying. I do recall the night my mother has testified about. I do remember going to bed that night and I will describe to the court what happened that night after I went to bed.

I went to bed about 11 and Mom and Daddy were arguing and then Daddy started beating on Mamma. Then I got up and cut the light on in the kitchen. I got the gun off the top of the freezer, I knew that was where the gun was because it was kept there. It was a .38 pistol. I had never shot that pistol before. My father had had that pistol for some time, but I have never handled it in any way. I had seen him use it. I had watched him shoot it and did know how it worked. After I got the pistol off the freezer, I took it out of the holster. I threw the holster down and went down and cut the hall light on. I then cut the bedroom light on. I could not see anything until that time. When I turned the light on in the bedroom, I saw Daddy on top of Mamma beating her. He throwed her out in the floor and he kicked her, he got up off the bed and started toward me. I told him to stop or I would shoot and he started running towards me. I shot him. I knew it had hit him in the head. I did not shoot him more than one time. I went back in the kitchen and just stood there. I laid the gun on the table. I did not go back to the room where Daddy was."

Plaintiff then rested and defendant's motion for involuntary dismissal was denied. Defendant then attempted to offer

the child's testimony, as previously given, as evidence for the defense. The court declared that it had already ruled that the child was incompetent to testify and duly noted defendant's exception. Defendant then rested and its renewed motion for involuntary dismissal was denied.

The court thereafter entered a judgment wherein, after reciting plaintiff's testimony, it made the following findings of fact:

"1. That John R. Davis, the insured, met his death on February 16, 1973, as a result of a gunshot wound;

2. That the widow did not hear a shot nor did she see the shooting;

3. That on the record, the shooting is unexplained;

4. That prior to the shooting, the insured had been engaged in an assault on his wife, a misdemeanor, and that this assault had apparently terminated when the bedroom light came on;

5. That Wayne Davis, 12 year old son of the insured and wife, turned the bedroom light on;

6. That deceased had no weapon of any type on his person at the time of his death."

The court then concluded that the insured's death was accidental within the meaning of the policy and entered judgment in favor of plaintiff for the amount due thereunder.

Carnes & Rollins, by Everette C. Carnes, for plaintiff appellee.

Dameron & Burgin, by Charles E. Burgin, for defendant appellant.

VAUGHN, Judge.

We note at the outset that there are no exceptions to the court's findings of fact. The facts so found are sufficient to support the conclusion that the insured's death was accidental within the meaning of the policy, i.e. it resulted from an unexplained gunshot wound.

Defendant's assignment of error directed to the court's failure to grant its motions for dismissal, "judgment notwith-

standing the verdict," a new trial and its exceptions to the entry of the judgment do not present the question of the sufficiency of the evidence to support the findings of fact made by the court.

Defendant brings forward an assignment of error based on the judge's ruling on the competency of the child as a witness. The trial judge was wrong when he said that the child could not testify because of his lack of understanding of "divine punishment." It clearly appears that the child expressed an understanding of his duty to tell the truth. He told the judge that if he did not tell the truth he expected to be punished by his mother, the court and by God. If he lacks understanding of the precise nature of the punishment to be expected from the latter, it is, perhaps, a dilemma shared by many who are much older than he is. Moreover, it is highly questionable whether a disqualification as a witness because of either lack of understanding of, or disbelief in divine punishment could, in proper case, withstand an attack on constitutional grounds.

The question now is whether the error prejudicially affected the outcome of the trial. The judge tried the case without a jury. He heard the child's testimony and it is in the record. He referred to the testimony in the judgment and makes, what might be called, alternative findings which are, in part, as follows:

> "The infant's testimony seems to establish that the insured had quit the assault on his wife, the infant's mother, when the bedroom light came on and was WALKING toward the infant. The evidence does not disclose for what reason the father did so. It would appear to be fair inference that the father intended to remove the dangerous weapon from the possession of the youth who was untrained in the use of firearms for the protection of the youth, his mother, or himself. It would not appear under any circumstances that the father expected the child to shoot him."

The quoted alternative finding explains the "unexplained gunshot wound" and discloses that it was the result of the intentional act of another. That the death wound on deceased was inflicted by the intentional act of another, standing alone, does not bar recovery under the terms of the policy before us. The policy does not have a clause excluding injury by the intentional act of another. *Bone v. Insurance Co.*, 10 N.C. App. 393, 179 S.E. 2d 171.

The judgment before us includes the following:

> " 'In policies . . . calling for construction of insurance coverage case of death by 'external . . . and accidental means' . . . the true test of liability . . . is whether the insured, being in the wrong, was the aggressor, under such circumstances that would render a homicide likely as a result of his own misconduct.' CLAY v. INSURANCE CO., 174 N.C. 642. And in FALLINS v. INSURANCE CO., 247 N.C. 72, p. 75, the Court said, 'an injury is effected by accidental means if in the line of proximate cause the act, event or condition from the standpoint of the insured person is unintended, unexpected, unusual, or unknown, the unintended acts of the insured are deemed accidental. Injuries caused to the insured by the acts of another person without the consent of the insured are held due to accidental means unless the injurious acts are provoked and should have been expected by the insured.' "

Clay v. Insurance Co., supra, quoted in part by the trial judge, is cited as supporting the following:

> "Despite some variety in the language used, the general rule is to the effect that the mere fact that a person insured against accidental injury or death voluntarily and wrongfully assaulted another will not be sufficient to characterize as nonaccidental all possible injuries which he receives in the course of or as a consequence of his attack, but such injuries may be regarded as accidental unless they were a natural or probable result of the insured's actions, reasonably foreseeable by him or by a reasonably prudent man in his position." 44 Am. Jur. 2d Insurance, § 1248, p. 93, n. 10.

As here, *Aetna Life Ins. Co. v. Beasley,* 272 Ala. 153, 130 So. 2d 178, involved a bedroom assault by a husband on his wife. The father was shot and killed by his 14-year-old son. The Alabama court affirmed recovery under a policy that provided benefits for loss of life sustained solely by accidental means. For other cases where death or injuries resulted from family fights, *see* Annot., 26 A.L.R. 2d 423 (1952).

The evidence in this case would permit the judge to find that the deceased was the aggressor in a bedroom fight with his wife. It would also permit the judge to find that deceased could not reasonably foresee that death by gunshot from

the hands of his 11-year-old son (who had already gone to bed) would be a natural or probable result of the altercation with his wife. The judge could properly find that the father advanced on the child only to remove a dangerous weapon from the hands of the child without any expectation that the child would intentionally shoot him. When the substance of the record before us is considered without undue regard to its form, it is perfectly obvious that these are the findings made by the trial judge and that he considered all of the evidence, including the testimony of the child.

The judgment is affirmed.

Affirmed.

Chief Judge BROCK and Judge MARTIN concur.

CHARLIE H. FOSTER, ADMINISTRATOR FOR THE ESTATE OF DAISY BELL FOSTER v. KAYE ROWE SHEARIN AND ROWE CHEVROLET-BUICK, INC.

No. 759SC410

(Filed 17 December 1975)

Automobiles §§ 62, 83— striking pedestrian crossing street — absence of negligence — contributory negligence

In an action to recover for the death of a pedestrian who was struck by defendant's car while crossing the street, the evidence was insufficient to show negligence on the part of defendant by speeding or failing to keep a proper lookout where there was no direct evidence concerning the speed of defendant's vehicle and the only physical evidence concerning speed was 48 feet of skid marks and a dent in the hood of defendant's car, and where the evidence showed that, although there was no visual obstruction for some 1000 feet looking toward the scene of the accident from the direction in which defendant's car approached, it was dark, no street lights or other artificial lights were in the area, and the accident occurred at a point where pedestrians would not normally be expected, and there was no evidence as to how long deceased was positioned within the range of the headlights of defendant's car; furthermore, the evidence disclosed that deceased was contributorily negligent as a matter of law in failing to yield the right of way while crossing the street in the dark at a point that was neither a marked nor an unmarked crosswalk and where she had an unobstructed view of defendant's oncoming car for over 600 feet.

Foster v. Shearin

APPEAL by plaintiff from *Bailey, Judge.* Judgment entered 4 March 1975 in Superior Court, FRANKLIN County. Heard in the Court of Appeals 4 September 1975.

This is an action to recover damages for wrongful death. The parties stipulated to the following facts:

> "That on the 5th day of December 1972, at approximately 5:50 o'clock p.m., there was an accident on N.C. Highway 401 in Louisburg, North Carolina involving an automobile operated by Kaye Rowe Shearin, and the plaintiff's intestate, Daisy Bell Foster; that the car and Mrs. Foster came into contact with each other; that at the time of the accident Daisy Bell Foster was attempting to cross that highway on foot from the east to the west; Daisy Bell Foster died as a result of the injuries sustained in the accident; that at the time of the accident, Kaye Rowe Shearin was operating an automobile which was owned by Rowe Chevrolet-Buick, Inc. and was doing that with the permission and consent of Rowe Chevrolet-Buick, Inc. That the car was going in a southerly direction over and along Highway 401; that the maximum speed limit where the accident occurred is 45 miles an hour. Where the accident occurred, there are no street lights. Daisy Bell Foster attempted to cross N.C. Highway 401 at a point which was not within a crosswalk, either marked or unmarked. It was dark at the time of the accident. Some distance to the north of the location where the accident occurred, there are several business establishments."

The only witnesses who testified concerning the accident were the investigating officer and the daughter of the deceased. The officer testified that when he arrived at the scene on 5 December 1972, he found defendants' new 1973 Chevrolet automobile headed south in the south-bound lane on the right-hand (west) side of the road at a point approximately 600 feet south of the Family Dollar Store which is located on the east side of the highway. In the immediate vicinity of the automobile there was a 45 mile per hour speed limit sign on the west side of the highway. Defendants' car was located within a few feet south of that sign. The officer did not recall if the headlights on the automobile were burning as he arrived. He did not recall what, if any, skid marks he observed at that time, but he later measured 48 feet of skid marks in the right-hand lane of travel, "clearly in the lane travelled by Mrs. Shearin." He did not see

any skid marks off of the travelled portion of the highway. There was a dent in the middle of the hood of the Chevrolet, which "hit part of the crease in the hood and took in part of the left-hand side." The highway was straight and level, constructed of smooth asphalt, and there were no defects in the road. The weather was clear and the pavement was dry. He observed no artificial lighting in the area. There are shoulders on both sides of the road. On the left-hand (east) side is a deep embankment of several hundred feet and on the right-hand (west) side of the road there was about a 50 foot deep embankment. Standing at the point where he observed the Chevrolet automobile and looking in a northerly direction, the officer could see a little over 1000 feet without visual obstruction. Standing at the same place and looking in a southerly direction, he could see approximately a quarter of a mile without visual obstruction.

The deceased's 52 year old daughter testified that on 5 December 1972 she lived with her mother and father. Late in the evening on that date she and her mother had been to the store located on the east side of the highway. While they were returning home, she and her mother started to cross the road. She was in front and "her mother was supposed to be behind her." She had crossed over and gotten to the 45 mile per hour sign. When she looked back, her mother had already been hit and was lying out in the road.

The officer also testified that the defendant, Mrs. Shearin, told him that "she had pulled out of the Family Dollar Store and headed south, and she saw a lady on the side of the road waving her hands. About that time she saw the lady (Daisy Bell Foster) in her lane, at which time she slammed on brakes and couldn't stop." He testified that "Mrs. Shearin stated to him that she saw the person that was struck by her automobile for the first time after she observed the lady on the side of the road waving her hands at which time she glanced back to the highway and saw for the first time the lady (Daisy Bell Foster) in her lane of travel."

At the close of plaintiff's evidence, defendant moved for a directed verdict under Rule 50 of the Rules of Civil Procedure. The court granted the motion, and from judgment dismissing the action, plaintiff appealed.

Pearson, Malone, Johnson, DeJarmon, & Spaulding by C. C. Malone, Jr., for plaintiff appellant.

Newsom, Graham, Strayhorn, Hedrick, Murray & Bryson by E. C. Bryson, Jr. for defendants appellees.

PARKER, Judge.

Plaintiff's sole assignment of error is directed to the granting of defendants' motion for a directed verdict. Viewing the evidence in the light most favorable to the plaintiff, we find it insufficient to take the case to the jury on the issue of defendant's actionable negligence and therefore affirm the judgment.

Negligence is not presumed from the mere fact that plaintiff's intestate was killed in the accident. *Robbins v. Crawford,* 246 N.C. 622, 99 S.E. 2d 852 (1957). To carry his case to the jury against the defendants on the ground of actionable negligence, the plaintiff "must offer evidence sufficient to take the case out of the realm of conjecture and into the field of legitimate inference from established facts." *Williamson v. Randall,* 248 N.C. 20, 25, 102 S.E. 2d 381, 386 (1958). In his amended complaint plaintiff alleged that defendant driver was negligent in that she operated her vehicle at an excessive speed and failed to keep a proper lookout. Plaintiff's evidence, however, was insufficient to show the driver was negligent in these or in any other respect. There was no direct evidence concerning the speed at which defendants' vehicle was being operated, and the only physical evidence, that concerning the 48 feet of skid marks and the dent in the hood, was clearly insufficient to support a finding of excessive speed. The only evidence bearing on the question whether defendant driver maintained a proper lookout was the evidence as to the physical circumstances at the scene of the accident and as to defendant driver's statements to the officer. The physical evidence showed that the highway was straight and level and that there was no visual obstruction for some 1000 feet looking toward the scene of the accident from the direction in which defendants' vehicle was approaching. However, the stipulations and the evidence also establish that it was dark at the time, there were no street lights or other artificial lights in the area, and the accident occurred at a point where pedestrians would not normally be expected to be. More importantly, the stipulations and evidence also establish that plaintiff's intestate was attempting to walk across the highway from east to west directly into the path of

defendants' oncoming car, and there was no evidence to show how long the deceased was so positioned as to be within the range of the vehicle's headlights. It is left completely to conjecture whether the deceased had been, either momentarily or for any appreciable period of time, at some point on the highway where her presence would be revealed by the headlights of the approaching car. Thus, the physical circumstances leave it a matter of speculation as to whether the most careful driver, maintaining a proper lookout, could have seen the deceased in time to avoid the collision. Nor do we think that defendant driver's statement to the officer that she saw "the lady on the side of the road waiving her hands (evidently referring to the daughter of the deceased, since there was no evidence that any other person was in the area) at which time she glanced back to the highway and saw for the first time the lady (referring to plaintiff's intestate) in her lane of travel," was sufficient to warrant a jury finding that the driver was failing to maintain a proper lookout. On the contrary, that a person is waving his arms on the side of the road furnishes adequate cause for a driver to remove his eyes momentarily from the road. "A driver who only looks ahead, oblivious to conditions behind and beside him which should affect his driving, is not keeping a proper lookout." *Russell v. Hammond,* 200 Va. 600, 605, 106 S.E. 2d 626, 631 (1959).

We also find that the evidence in this case, viewed in the light most favorable to the plaintiff, so clearly establishes negligence on the part of plaintiff's intestate as one of the proximate causes of her injuries as to require directed verdict for the defendants on that ground. The intestate was walking across a highway at a point other than within a marked crosswalk or within an unmarked crosswalk at an intersection. It was her duty to yield the right of way to all vehicles upon the roadway. G.S. 20-174(a). Although the failure of a pedestrian crossing a roadway at a point other than a crosswalk to yield the right of way to a motor vehicle is not contributory negligence *per se* but is only evidence of negligence, "the court will nonsuit a plaintiff-pedestrian on the ground of contributory negligence when all the evidence so clearly establishes his failure to yield the right of way as one of the proximate causes of his injuries that no other reasonable conclusion is possible." *Blake v. Mallard,* 262 N.C. 62, 65, 136 S.E. 2d 214, 216 (1964). Here, the stipulations and evidence establish that plaintiff's intestate walked in the dark across the highway directly into the path

of the approaching vehicle at a point where it was her duty to yield the right of way and where she had an unobstructed view of the vehicle as it approached over a distance of at least 600 feet. "A pedestrian who crosses the street at a point where he does not have the right of way must constantly watch for oncoming traffic before he steps into the street and while he is crossing. (Citations omitted.) If he sees a vehicle approaching him, he must move out of its path. (Citations omitted.) 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, 678, 207 S.E. 2d 282, 284 (1974).

The trial court properly granted defendants' motion for directed verdict, and its judgment is

Affirmed.

Judges BRITT and CLARK concur.

CLIFTON GATTIS LEE v. RICHARD MARK KELLENBERGER

No. 7511SC466

(Filed 17 December 1975)

1. **Automobiles § 90— summary of testimony by trial court — no error**

The trial court in his jury instruction was not required to state all of an officer's testimony with respect to the parties' intoxication, but was required only to present in summary every substantial and essential feature of the case; moreover, if plaintiff's counsel felt that the court's condensed statement of the officer's testimony resulted in an incorrect or distorted reflection of that testimony, it was the duty of counsel to call attention thereto and request a correction.

2. **Automobiles § 90— instruction on contributory negligence — repetition of definition unnecessary**

Where the trial court had previously defined the term "under the influence of intoxicating liquor," it was not necessary for the court to repeat the definition in explaining that plaintiff would be negligent if he voluntarily rode with the defendant knowing that defendant was under the influence of intoxicating liquor.

3. **Automobiles § 90; Rules of Civil Procedure § 51— requested instruction — failure of court to give — no error**

The trial court did not err in refusing to give an instruction requested by plaintiff concerning plaintiff's knowledge as to the mental or physical impairment of defendant.

ON *writ of certiorari* to review proceedings before *Hall, Judge.* Judgment entered 7 March 1975 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 22 September 1975.

Plaintiff-passenger brought this action to recover damages for personal injuries sustained when defendant-driver's automobile struck and split a utility pole in a single car accident which occurred at 2:45 a.m. on 6 July 1973. Plaintiff and defendant were the only occupants of the car, and they were both injured in the wreck. They had been together since the preceding evening, when they visited the Last Chance Tavern and later went to a party with friends. They were on their way to defendant's house when the accident occurred.

Plaintiff alleged that defendant was negligent in failing to keep a proper lookout, in failing to keep his vehicle under proper control, and in other respects. Defendant denied negligence and pleaded plaintiff's contributory negligence in entering and remaining in defendant's car knowing that the driver was under the influence of intoxicating beverages and was sleepy and that his ability to operate an automobile was substantially impaired. Plaintiff testified that he was himself asleep when the accident occurred.

The jury answered issues of negligence and contributory negligence in the affirmative. From judgment that plaintiff recover nothing in this action, plaintiff appealed but failed to docket the record on appeal in apt time. This court subsequently granted plaintiff's petition for writ of certiorari.

Levinson & Berkau by Thomas S. Berkau for plaintiff appellant.

Mast, Tew & Nall, P.A., by George B. Mast and Joseph T. Nall for defendant appellee.

PARKER, Judge.

[1] Plaintiff's assignments of error are all directed to the court's charge to the jury. His first assignment of error is based on his exception to the following portion of the charge in which the court was summarizing the testimony of the investigating police officer:

> "He (the police officer) testified that in his opinion the plaintiff and defendant were under the influence of intoxi-

> cating liquor but he didn't know to what extent. He testified that in his opinion their mental and physical faculties were affected by intoxicating liquor but he didn't know to what extent."

Plaintiff does not contend that this was in itself an inaccurate statement of the officer's testimony. He contends that it was an incomplete statement in that the court failed to summarize for the jury the officer's explanation of why he did not know to what extent the faculties of plaintiff and defendant were affected by intoxicating liquor. In this connection the officer testified he first saw plaintiff and defendant some thirty minutes after the accident when he interviewed them in the hospital emergency room. He testified that each had the odor of alcohol on his breath, that each had bloodshot eyes, and that in his opinion each was under the influence of an intoxicating beverage, but he did not "know the extent or how much they had had." In explanation, the officer testified that "[d]ue to the fact that those people had been injured, it was harder to tell whether their actions were coming from alcohol or from injuries." Plaintiff contends that by failing to include this explanation in its summary of the officer's testimony, the court "expressed an opinion on the evidence favorable to the defendant." We do not agree.

In its charge to the jury the court is not required to review all of the evidence. It must of necessity condense and summarize. "All that is required is a summation sufficiently comprehensive to present every substantial and essential feature of the case." *Steelman v. Benfield,* 228 N.C. 651, 654, 46 S.E. 2d 829, 832 (1948). Here, the court's summation was sufficient for that purpose. Moreover, if plaintiff's counsel felt that the court's condensed statement of the officer's testimony, by omitting reference to the officer's explanation, resulted in an incorrect or distorted reflection of that testimony, it was the duty of counsel to call attention thereto and request a correction. *Steelman v. Benfield, supra.* This was not done, though counsel was given the opportunity when the court inquired if either side desired further instructions. Plaintiff's first assignment of error is overruled.

[2] In charging the jury on the issue of contributory negligence, the court instructed the jurors that if the defendant had satisfied them by the greater weight of the evidence that the plaintiff failed to exercise due care for his own safety, "or that

he voluntarily rode with the defendant knowing that the defendant was under the influence of intoxicating liquor, that such conduct would constitute negligence." Plaintiff's exception to the quoted portion of the charge is the basis of his second assignment of error. We find no error prejudicial to plaintiff in the portion of the charge excepted to. Earlier in the charge the court, following the formulation approved in *State v. Carroll*, 226 N.C. 237, 37 S.E. 2d 688 (1946), fully and correctly defined for the jury what is meant by being "under the influence of intoxicating liquor" as that phrase is used in G.S. 20-138. It is negligence *per se* for one to operate an automobile while under the influence of intoxicating liquor within the meaning of that statute, and "[i]f one enters an automobile with knowledge that the driver is under the influence of an intoxicant and voluntarily rides with him, he is guilty of contributory negligence *per se.*" *Davis v. Rigsby*, 261 N.C. 684, 686, 136 S.E. 2d 33, 35 (1964). Having previously defined the term "under the influence of intoxicating liquor," it was not necessary for the court to repeat the definition in the portion of the charge excepted to. Plaintiff's second assignment of error is overruled.

[3] In apt time as provided by G.S. 1A-1, Rule 51(b), plaintiff requested the court to give the following special instruction to the jury:

> "That according to plaintiff's testimony, he had no knowledge of any appreciable impairment of defendant's mental or physical faculties from either intoxication or lack of sleep and if the jury believes this testimony, it should not find plaintiff contributorily negligent in not staying awake to help the defendant drive the car."

The court refused to give the requested instruction, to which plaintiff assigns error. We find no error in the court's refusal. In the first place, plaintiff's contributory negligence did not consist merely in his "not staying awake to help the defendant drive the car." If plaintiff knew that defendant's faculties were in fact appreciably impaired from intoxication or lack of sleep, it would have been contributory negligence for plaintiff to continue to ride in the car with defendant driving, quite apart from whether plaintiff did or did not stay awake. More importantly, it was a question for the jury whether plaintiff knew *or in the exercise of due care should have known* that defendant's faculties were appreciably impaired. The jury's acceptance as true of plaintiff's self-serving testimony that he did not

know of any impairment of defendant's faculties would not alone be sufficient to exonerate plaintiff of contributory negligence. There was ample evidence from which the jury could find that in the exercise of due care plaintiff should have known they were. On cross-examination, plaintiff testified:

> "I do know that he (referring to the defendant) was drinking while we were there (referring to the Last Chance Tavern). I just don't know how much.
>
> I do know when we left that I asked him if he had been drinking very much and he said he hadn't been but we didn't go out there with the intention of drinking a lot of beer. . . . . I just asked him if he had been drinking, how many he had to drink. I didn't know he was tired. I was aware that he could have been sleeping during the day while I was working, but I didn't know. But I was concerned about his ability to drive after we left the trailer park."

The evidence shows that the accident occurred after they left the trailer park. The jury could legitimately find from plaintiff's own testimony, that although he did not actually know that defendant's faculties were so impaired that it was no longer safe to continue riding in the car with defendant as the driver, in the exercise of due care for his own safety plaintiff should have known that such was the case. There was no error in the court's refusal to give the requested instruction, and plaintiff's assignment of error directed to such refusal is overruled.

Finally, citing *Walser v. Coley,* 21 N.C. App. 654, 205 S.E. 2d 366 (1974), plaintiff contends that "the charge as a whole fails to adequately instruct the jury as to the conditions which must be established before a passenger who voluntarily rides with a person who has had something to drink or is tired can be guilty of contributory negligence." We do not agree. On a careful reading of the entire charge, particularly as it relates to the issue of contributory negligence, we find that if any error was committed therein, it was favorable to the plaintiff and not such as to which he may now justly complain.

No error.

Judges BRITT and CLARK concur.

LUDIE TAYLOR, EMPLOYEE, PLAINTIFF v. ALBAIN SHIRT COMPANY, INC., EMPLOYER; AMERICAN MUTUAL LIABILITY INSURANCE CO., CARRIER, DEFENDANTS

No. 758IC377

(Filed 17 December 1975)

Master and Servant § 62— workmen's compensation — injury while crossing street — accident not in course of employment

Plaintiff's accident did not arise "in the course of" her employment where plaintiff had clocked out at the end of her shift and was struck by an automobile as she attempted to cross a public street in front of her employer's factory while on her way to a private parking lot which was neither owned, controlled, nor in any manner provided by her employer, notwithstanding employees of defendant constituted a great majority of persons using the street at the time of the accident and the driver of the car which struck plaintiff had just picked up one of defendant's employees.

APPEAL by plaintiff from order of North Carolina Industrial Commission entered 20 February 1975. Heard in the Court of Appeals 2 September 1975.

This is a proceeding under the Workmen's Compensation Act, G.S. Ch. 97. Plaintiff employee was injured on 5 January 1973 when she was struck by an automobile as she was crossing the street in front of defendant employer's factory. Plaintiff had just clocked out at the end of her shift and was on her way to her car, which was parked in a private parking lot across the street from the factory.

Defendant's factory is located on the east side of North East Street in Kinston, the front wall of the factory being built on the property line separating the defendant's property from the right-of-way owned by the city. In front of the factory there is a dirt sidewalk running along the east side of the asphalt paved street between the front wall of the factory and the concrete curb on the east side of the street. The distance between the front door of the factory and the concrete curb is approximately 20 feet. The employer owns no interest in the dirt sidewalk or in the street.

Defendant employer employs between 425 and 465 employees. It maintains a parking lot for its employees on the east side of the street immediately north of the factory building. Employees using this factory-owned parking lot can walk between the lot and the factory along the dirt sidewalk on the

east side of the street without having to cross a street. There exists a privately-owned parking lot directly across the street from the factory. As of 5 January 1973 approximately 20 employees, including plaintiff, parked on this lot and paid one dollar per week for that privilege. The remainder of the employees who drove to work parked in the factory-owned lot or on a street near the factory.

On Friday, 5 January 1973, the work shift for all employees ended at 4:00 p.m. At that time plaintiff, with other employees, proceeded to the time clock, punched out, and exited through the front door. She walked across the 20-foot wide dirt sidewalk and stepped off the curb onto the paved street between two parked cars. Both of these cars were parked heading north on the east side of the street parallel and adjacent to the curb. The drivers of these cars were waiting to pick up other employees who were leaving the factory at the same time as the plaintiff. Immediately before plaintiff reached the street, the employee who was being picked up by the northern-most parked car, located to plaintiff's right, had gotten into that car. The driver of that car, intending to drive away, mistakenly placed that car in reverse. Just as plaintiff walked between the two parked cars, the car on her right moved suddenly backward, crushing plaintiff between the rear of that car and the front of the car on her left, severely injuring plaintiff. At the time plaintiff was injured, other employees were still leaving the factory, and the street was crowded with cars driven by employees or by persons who had come to pick up employees.

The Deputy Commissioner hearing plaintiff's claim made findings of fact and concluded that "[t]he injury by accident, given the facts and circumstances of this case, arose out of and in the course of the employment notwithstanding the fact that claimant was beyond the official time and space limitations of the employment because the risk of street injury was increased by discharging 425 to 465 employees at approximately the same time and because said risk followed claimant into the street thereby temporarily, for a short period of time and distance, extending the time and space limitations of the employment." Based on his conclusion that plaintiff's injuries arose out of and in the course of her employment, the Deputy Commissioner held plaintiff's claim to be compensable.

On appeal, the Full Commission vacated the hearing Deputy's findings to the effect that "the practice of releasing 425

to 465 employees at the same time at the end of a working day, given the facts and circumstances of this case, extended the zone of danger and environment of the employment onto the public street in front of the factory during an undisclosed period of time prior to and after termination of the formal working day." In place of the vacated findings, the Full Commission made the following findings of fact:

> "15. At the time of plaintiff's injury she had finished her work for the day, had left the premises of her employer, had 'clocked out' and was free to go wherever she chose. She had reached a point where her employer had no control over her movements or the property on which she was located.
>
> 16. Plaintiff was on her way from her place of work to a privately-owned parking lot, not controlled, maintained or furnished by her employer, at the time of her accident.
>
> 17. Plaintiff's injury did not arise out of or occur in the course of her employment. The risk of her injury was a risk shared equally by all members of the traveling public in her community, she being on a public street, and it is, therefore, not traceable to her employment."

From the order of the Full Commission denying her claim, plaintiff appealed.

Brock & Foy by Donald P. Brock for plaintiff appellant.

Hedrick, McKnight, Parham, Helms, Kellam & Feerick by Philip R. Hedrick and Edward L. Eatman, Jr. for defendant appellees.

PARKER, Judge.

For an injury to be compensable under the Workmen's Compensation Act, it must be "by accident *arising out of* and *in the course of* the employment." (Emphasis added.) G.S. 97-2(6). "The two italicized phrases are not synonymous; they 'involve two ideas and impose a double condition, both of which must be satisfied in order to bring a case within the Act.' " *Robbins v. Nicholson*, 281 N.C. 234, 238, 188 S.E. 2d 350, 353 (1972). "The words 'in the course of' as used in the statute, refer to the time, place and circumstances under which the accident occurred, while 'out of' relates to its origin or cause."

Bell v. Dewey Brothers, Inc., 236 N.C. 280, 282, 72 S.E. 2d 680, 682 (1952).

Here, the accident occurred at a time after plaintiff had completed her regular work shift, had "clocked out" on the time clock provided by her employer for that purpose, and had left her employer's premises for the day. It occurred at a place which was not on her employer's premises and over which it had no control. Thus, the accident did not arise "in the course of" her employment. Cases such as *Maurer v. Salem Co.*, 266 N.C. 381, 146 S.E. 2d 432 (1966) and *Davis v. Manufacturing Co.*, 249 N.C. 543, 107 S.E. 2d 102 (1959), holding to be compensable injuries received by accident occurring on an employer-provided parking lot, are not here controlling. Here, the accident occurred on a public street which plaintiff was attempting to cross while on her way to a private parking lot which was neither owned, controlled, nor in any manner provided by her employer.

We find the decision in *Bryan v. T. A. Loving Co.*, 222 N.C. 724, 24 S.E. 2d 751 (1943) dispositive of the present case. There, the employee was killed when he was struck by a car while attempting to walk across a public highway to report for work at his duty station located immediately across the highway on his employer's premises. In holding the death to be non-compensable under the Workmen's Compensation Act, the opinion of the Court written by Barnhill, J. (later C. J.) pointed out that the facts that employees of defendant constituted the great majority of those who used the highway and that the operator of the car which struck the deceased was also an employee of defendant did not justify the conclusion that the public highway was a part of the defendant employer's premises. The opinion goes on to state (p. 729):

> "The hazard created by traffic on the highway under the circumstances of this case cannot fairly be traced to the employment. It cannot be said that it was, at the time and place and under the circumstances disclosed, a natural incident of the work. It was not created by the employer. It did not arise out of the exposure occasioned by the nature of the employment. It was neither an ordinary nor an extraordinary risk directly or indirectly connected with the services of the employee. On the contrary, any other person undertaking to cross a public highway under the

same or similar circumstances would be subjected to the identical hazard encountered by him.

It is conceded that if deceased had been injured 100 yards down the road the injury would not be compensable. That he was instead within 30 or 40 feet of his destination does not alter the purpose of his going or warrant a different conclusion."

We conclude that in the present case plaintiff has failed to show a compensable claim under the Workmen's Compensation Act, and the order of the Industrial Commission denying the claim is

Affirmed.

Chief Judge BROCK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. JEROME ROBINSON

No. 7526SC666

(Filed 17 December 1975)

Constitutional Law § 32— right to effective assistance of counsel — failure of attorney to question witness — right not denied

Defendant was not denied effective assistance of counsel where an attorney was appointed for him, there was a conflict between the attorney and defendant, both requested that the attorney be relieved as counsel, the request was denied, the attorney's motion to withdraw was made on the basis that defendant wished to testify in his own behalf and to call one Bertha as a witness, but both planned to give perjured testimony, and the court allowed the attorney not to ask the witness Bertha any questions.

APPEAL by defendant from *Kirby, Judge.* Judgment entered 13 March 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 18 November 1975.

Defendant entered a plea of not guilty to an indictment charging breaking and entering and larceny. Evidence by the State tended to indicate that the Walker Drugstore was broken into through a door located at the back of the building. Officers observed two black males inside the drugstore building around 3:00 or 3:30 a.m., and they observed defendant coming through

the broken rear door in a crouched position, carrying an armload of various bottles and a bag. Defendant was apprehended running from the building.

The record reflects that defendant was tried previously for the same offense. He was represented by Mr. William F. Burns, Jr., court appointed counsel, and Mr. Burns also represented defendant at the trial which is the subject of this appeal. The first trial ended in a mistrial.

From a verdict of guilty and a judgment imposing a prison sentence defendant appealed to this Court.

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

Peter H. Gerns for defendant appellant.

ARNOLD, Judge.

The question raised in this appeal is whether defendant was denied effective assistance of counsel. Both defendant and his attorney moved to allow the attorney to withdraw, and to appoint new counsel. The motion was disallowed.

The right to assistance of counsel is guaranteed by the Sixth Amendment to the Federal Constitution and by Article I, Sections 19 and 23 of the Constitution of North Carolina. *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963); *State v. Sneed,* 284 N.C. 606, 201 S.E. 2d 867 (1974). It is now well established that a state defendant has a right not only to timely appointment of counsel but also to the assistance of counsel whose quality of performance does not fall below a minimum level of effectiveness. *McMann v. Richardson,* 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed. 2d 763 (1970); *Reece v. Georgia,* 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. 77 (1955); *Powell v. Alabama,* 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *State v. Sneed, supra.* However, the indigent defendant does not have the unbridled right to reject assigned counsel and demand another. A defendant's freedom of choice of counsel may not be manipulated to subvert the orderly procedure of the courts or to interfere with the fair administration of justice. *U. S. v. Young,* 482 F. 2d 993 (1973); *U. S. v. Sexton,* 473 F. 2d 512 (1973); *U. S. ex rel. Snyder v. Mack,* 372 F. Supp. 1077 (1974); *U. S. ex rel. Terry v. Rockefeller,* 361 F. Supp. 422 (1973).

Before the entry of a plea defendant's attorney, making the motion at his own request and at the defendant's request, moved to be allowed to withdraw as counsel. After entry of defendant's plea his attorney again made the motion to withdraw, and at various times during the trial, always outside the jury's presence, the defendant himself requested that his attorney be dismissed and the court appoint new counsel. At all times the trial judge refused to dismiss the attorney and appoint new counsel.

The attorney indicated that his basis for moving to withdraw was that defendant wished to testify in his own behalf, and call as a witness Carolyn Bertha, and that both would give perjured testimony. Counsel advised the court that substantial conflict had arisen between him and defendant due to these circumstances, and he felt that he would be prevented from devoting his best efforts to represent defendant.

Inquiry was made by the trial judge of both counsel and defendant at the various times when the question of counsel's withdrawing was raised. The attorney, responding to the judge's inquiry of who advised him that there would be perjured testimony, stated that it was the defendant himself. Further responding to the court's inquiry counsel stated that the basis for his position was his own investigation, and what defendant had told him, and what the witness Carolyn Bertha had told him "of her own knowledge."

Defendant denied that he had indicated to his attorney that he would present perjured testimony.

The trial court advised defendant that he could testify, and that Carolyn Bertha could testify, but that counsel for defendant would not be required to examine either one. It was made clear by the court that defendant or his witness could tell whatever he or she wished. The witness, Carolyn Bertha, testified, but was not examined by defendant's counsel. She was, however, questioned by defendant in his own behalf.

As noted by the N. C. Supreme Court, and other courts, there is not an exact measurement by which to apply the law in this area. A case-by-case approach must be used to determine if the accused has been denied effective assistance of counsel. *State v. Sneed, supra.*

A case we find to be helpful is *U. S. v. Young, supra,* where an indigent defendant was dissatisfied with appointed counsel,

and charged that his counsel disclosed confidential defense matters to the prosecution. Thornburg, J., speaking for the court said:

> "Although an indigent criminal defendant has a right to be represented by counsel, he does not have a right to be represented by a particular lawyer, or to demand a different appointed lawyer except for good cause. *See United States v. Sexton,* 5th Cir. 1973, 473 F. 2d 512, 514. Unless a Sixth Amendment violation is shown, whether to appoint a different lawyer for an indigent criminal defendant who expresses dissatisfaction with his court-appointed counsel is a matter committed to the sound discretion of the district court. The Second Circuit has recently summarized the applicable principles:
>
> > 'In order to warrant a substitution of counsel during trial, the defendant must show good cause, such as a conflict of interest, a complete breakdown in communication or in irreconcilable conflict which leads to an apparently unjust verdict. *Brown v. Craven,* 424 F. 2d 1166 (9th Cir. 1970); *United States v. Grow,* 394 F. 2d 182, 209 (4th Cir.), cert. denied, 393 U.S. 840, 89 S.Ct. 118, 21 L.Ed. 2d 111 (1968); *United States v. Gutterman,* 147 F. 2d 540 (2d Cir. 1945). If a court refuses to inquire into a seemingly substantial complaint about counsel when he has no reason to suspect the bona fides of the defendant, or if on discovering justifiable dissatisfaction a court refuses to replace the attorney, the defendant may then properly claim denial of his Sixth Amendment right. *Brown v. Craven, supra.* In the absence of a conflict which presents such a Sixth Amendment problem, the trial court has discretion to decide whether to grant a continuance during the course of trial for the substitution of counsel, and that decision will be reversed only if the court has abused its discretion.' "

We do not find the principles stated in the *Young* case to be inconsistent with the opinions of our Supreme Court or this Court.

Due inquiry was made by the trial judge into the basis for counsel's motion to withdraw in the case before us. The defendant denied communicating to his attorney that he would

offer untrue testimony, but otherwise gave no further reasons for his dissatisfaction with his attorney.

We reject defendant's argument that the court did not inquire into the foundation for counsel's assertion concerning perjury. More than one inquiry was made by the court of both defendant and counsel. Defendant denied the assertion, but the attorney indicated his basis was what defendant told him, what Carolyn Bertha told him, and his own investigation.

Defendant contends that at the time the crime was being committed he did not know it was taking place, and that he was prevented from having this position effectively presented through the testimony of Carolyn Bertha because Mr. Burns did not examine her. He argues in his brief that he was prevented from showing, through his witness, Bertha, that one Joe Alexander got out of the car first and that Carolyn Bertha sent defendant to find Alexander after he stayed gone for 15 minutes. The record does not support defendant's argument.

According to the record, Carolyn Bertha testified concerning who was in the car, and that defendant was driving. They parked near the drugstore and Joe Alexander got out. Fifteen minutes later she told defendant to go get Joe.

On cross-examination Carolyn Bertha said that it was about 3:00 or 3:30 a.m., and that defendant had gotten out of the car to get Joe Alexander.

Citing *Entsminger v. Iowa*, 386 U.S. 748, 87 S.Ct. 1402, 18 L.Ed. 2d 501 (1967), a case dealing with the right of an indigent defendant to have counsel assist on appeal, defendant contends that his counsel failed to function in an active role of the advocate. We find this contention unconvincing.

The trial court indicated to defendant during the trial that his counsel was doing everything he properly could do, and that he did not know what other questions counsel could ask that had not been asked. There is no showing that counsel was unfamiliar with the facts, or that he failed to thoroughly cross-examine the State's witnesses, or that he failed in any manner to function as an advocate. The one exception is that he was not required to examine the witness, Carolyn Bertha, and we do not find any abuse in the court's discretion in allowing counsel not to ask her any questions.

We conclude that there was no denial of effective assistance of counsel in this case. Moreover, the trial court, after adequately inquiring into the conflict, did not find good cause to warrant appointment of new counsel. There was no abuse of discretion for failure to appoint new counsel.

No error.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. CLIFFORD RAY PUTMAN

No. 7521SC657

(Filed 17 December 1975)

1. **Searches and Seizures § 1— warrantless search of apartment basement — admissibility of evidence obtained thereby**

The trial court did not err in admitting evidence obtained pursuant to a warrantless search of an apartment basement notwithstanding the fact that access to the basement could be had only through the apartment, since the basement was not included in the lease of the apartment to defendant, control of the basement was vested in the landlord who not only consented to but participated in its search, the lease expressly gave the landlord the right to enter the apartment and his lawful entry gave him the right to permit the police to pass through the front door and hallway of the apartment in order to reach the basement.

2. **Burglary and Unlawful Breakings § 5; Larceny § 7— breaking and entering house — sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for breaking or entering and larceny where it tended to show that a house was broken into, items valued in excess of $6000 were taken, defendant was observed near the time of the larceny carrying a white sack and crossing fences in the neighborhood of the house broken into, and items taken from the house were found in the basement of defendant's apartment.

APPEAL by defendant from *Walker (Hal H.), Judge.* Judgment entered 10 April 1975 in Superior Court, FORSYTH County. Heard in the Court of Appeals 17 November 1975.

By indictment proper in form defendant was charged with (1) breaking and entering a building occupied by Beulah Cox Dizor as a dwelling house, (2) larceny of personal property

having a value of $6,923.15, and (3) receiving stolen property. He pleaded not guilty.

Evidence presented by the State is summarized in pertinent part as follows:

On Sunday, 16 February 1975, Mrs. Dizor, a widow, and her mentally retarded sister resided in a house at 312 Cascade Avenue in Winston-Salem, N. C. On that date, they left the house at around 9:30 a.m. to attend Sunday School and church. Before leaving they secured all doors leading from the outside into the house. When they returned home around 12:30 p.m., they found the house had been ransacked, and personal property consisting of silverware, jewelry, bed linens, food and other items, valued in excess of $6,000, was missing. The back door to the home was standing ajar, the lock was loose, and there was a cut out place in the wood where the door had been pried open.

On the day in question, George Killian resided at 228 Cascade Avenue. His house was situated on the corner of the next block east of the Dizor residence on the same side of the street. Hollyrood Street ran immediately west of the Killian residence and there was one residence between that street and the Dizor residence. Between 10:30 and 11:00 a.m., while Mr. Killian was standing in the back of his house looking out toward Hollyrood Street and the rear of his lot, he saw two white males enter the southwest corner of his lot from Hollyrood Street. When he first saw the men they were near the middle of Hollyrood Street at a point approximately 300 feet from the Dizor residence. Both of the men had long hair, appeared to be in their late teens or early twenties, and were dressed in blue denim or similar material. Each was carrying a large white bag over his shoulder, leaning forward so as to indicate that the contents of the bags were quite heavy. Mr. Killian observed the men as they carried the bags across the back of his lot, over a fence onto the Dreyer lot which is located immediately to the rear of the Killian lot facing Banner Avenue; he then saw them cross two other fences onto property located at 213 Banner Avenue which is east of the Dreyer lot. There the men entered an outbuilding near the rear northwest corner. Shortly thereafter, one of the men emerged from the outbuilding and entered the main building at 213 Banner Avenue. Not long after the men crossed over the fences, Mr. Killian saw Mr. Sotomayor and Miss Dreyer near the back of the Dreyer lot. He observed

them pick up some items near the point where the men crossed the first or second fence.

Mr. Sotomayor, a student, was living in the Dreyer residence located immediately back of the Killian residence. Around 10:35 on the morning in question, while looking out of his back window, Sotomayor saw a person, whom he identified in court as defendant, climb the fence between the Killian and Dreyer lots as well as the fences east of the Dreyer property. Defendant would get the bag over the fences first and would then cross himself. As defendant was crossing the fence east of the Dreyer lot, he dropped and then picked up two or three silver looking dishes. Defendant was within seven or eight yards of Mr. Sotomayor who could hear the contents of the bag rattling "like metal things." Mr. Sotomayor and Miss Dreyer went to the spot in their yard where he had seen defendant and, at that point, they picked up a glove and two boxes containing a white necklace, a gold bracelet, and some green items. Miss Dreyer had occasion to be in her backyard the preceding afternoon and the glove and boxes were not there at that time. It had rained most of Saturday night and, while the ground where the boxes and glove were found was very wet, they were dry. Soon thereafter, Mr. Sotomayor and Miss Dreyer walked by the residence at 213 Banner Avenue and, as they were passing the residence, he heard clinking sounds "like metal things." The two of them walked on around the block to Mr. Killian's residence and had a conversation with him regarding what they had seen. Before they passed 213 Banner the first time, they saw a cream colored car with Oklahoma license plates drive up to, and stop at, 213 Banner; when they came back a few minutes later, the car was gone. Immediately after returning to her home, Miss Dreyer called the police who went to her home immediately and were informed of what Miss Dreyer and Mr. Sotomayor had seen, heard, and found. A few minutes later Mr. Sotomayor saw defendant in the backseat of a police car.

Police responded to the call from the Dreyer residence at about 11:40 a.m. After receiving a description of the man Mr. Sotomayor had seen in the Dreyer backyard, Officer J. E. Snyder began driving around the area. After stopping his patrol car on Hollyrood Street, between Banner and Cascade Avenues, he saw a white male running north between some houses in the same block on which the Killian, Dreyer, and 213 Banner Avenue residences were located. Snyder immediately drove to

Cascade Avenue where he saw the same male cross Cascade running north. Snyder proceeded north to Gloria Avenue, which runs parallel to Cascade, and there saw the same man start walking west on Gloria Avenue. Snyder stopped the man, later identified as defendant, and took him in his patrol car to the Dreyer residence. Snyder had seen defendant some five days earlier while working a license checkpoint; on that occasion defendant was driving a 1964 Ford with Oklahoma license plates and stated that he was living at 213 Banner Avenue. After detaining defendant for 30 or 40 minutes, Snyder released him. At this time Mrs. Dizor had not reported the burglary.

The main building at 213 Banner Avenue was an apartment house belonging to James L. Sweet. There was one apartment on the street floor and two apartments on the second floor, these latter apartments having outside entrances. The street floor apartment had a front and a rear entrance. Less than a month prior to 16 February 1975, Mr. Sweet rented the street floor apartment to one Paschal who paid a month's rent. Defendant was with Paschal at the time. The building had an unfinished basement, accessible only by a stairway leading from an unlocked door in the hall of the street floor apartment. The lease to Paschal did not include any part of the basement and gave Sweet permission to go in the apartment for purpose of inspecting the premises.

On the afternoon of 21 February 1975, at the request of police, Mr. Sweet met Detective Beane at 213 Banner Avenue. Defendant was in jail at the time. Police had determined previously that the outbuilding on the premises had not been rented and Det. Beane went there for the purpose of searching the outbuilding. When Det. Beane arrived, Mr. Sweet was already there; the front door of the street floor apartment was unlocked, Mr. Sweet was inside and, with his consent, Det. Beane entered the apartment. The apartment had been vacated and contained no property belonging to defendant or Paschal. Mr. Sweet and Det. Beane went to the basement to "look around." Observing something unusual, Mr. Sweet crawled through a small opening between the ground and the floor timbers and found a pillowcase containing numerous articles.

Mrs. Dizor identified the glove, boxes and contents found in the Dreyer yard, and the pillowcase and contents found in or near the basement at 213 Banner Avenue, as being her or

her sister's property and among those items taken from their home.

Defendant offered no evidence.

A jury found defendant guilty of counts (1) and (2), breaking and entering and larceny. From judgment imposing prison sentences as a "committed youthful offender," defendant appealed.

Attorney General Edmisten, by Associate Attorney David S. Crump, for the State.

Wilson and Morrow, by Alvin A. Thomas, for defendant appellant.

BRITT, Judge.

[1] First, defendant contends the search of the apartment and basement without a search warrant was illegal and that the court erred in admitting the evidence obtained pursuant to the search. We find no merit in this contention.

It is settled that the Fourth Amendment to the Federal Constitution and Art. 1, Sec. 19, of our State Constitution guarantee that, in ordinary circumstances, even the strong arm of the law cannot invade a home except under authority of a search warrant issued in accordance with statutory provisions, and evidence obtained by an illegal search without a search warrant is inadmissible. *State v. Robbins,* 275 N.C. 537, 169 S.E. 2d 858 (1969), and authorities therein cited. The case at bar, however, does not come within the ambit of the stated rules and we will not attempt to set forth all of the reasons why this is true.

Defendant's challenge applies primarily to the search of the basement and not of the apartment. The evidence showed without question that any lease which Paschal and defendant had did not cover the basement. At most, they had permission, along with lessees of the other apartments, to store boxes in the basement, but control of the basement was vested in the landlord who not only consented to, but participated in, its search. The question then narrows to whether Mr. Sweet had authority to provide police entrance to the basement via the hallway of the apartment. We hold that he did. In addition to the fact that the apartment had been vacated, the lease expressly gave Mr. Sweet the right to enter the apartment and

his lawful entry gave him the right to permit the police to pass through the front door and hallway of the apartment in order to reach the basement. *United States v. Matlock,* 415 U.S. 164, 39 L.Ed. 2d 242, 94 S.Ct. 988 (1974). *See, e.g., United States v. Mojica,* 442 F. 2d 920 (2d Cir. 1971).

[2] Next, defendant contends the court erred in denying his motion for nonsuit. This contention has no merit. When the evidence is considered in the light most favorable to the State, and the State is given the benefit of reasonable inferences therefrom, as we are required to do, we think it is sufficient to survive the motion for nonsuit. *See* 2 Strong, N. C. Index 2d, Criminal Law, § 104. While there were discrepancies in the evidence, i.e., the testimony of Mr. Killian that he saw two men and the testimony of Mr. Sotomayor that he saw only one, this presented a question of fact for the jury to resolve; it did not warrant nonsuit. *State v. Mabry,* 269 N.C. 293, 152 S.E. 2d 112 (1967).

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

No error.

Chief Judge BROCK and Judge MORRIS concur.

MRS. VERNON HARDEN v. FIRST UNION NATIONAL BANK OF NORTH CAROLINA, ET ALS.

No. 756DC580

(Filed 17 December 1975)

Husband and Wife § 2— antenuptial agreement — effect on joint bank account

Where an antenuptial contract provided that the wife would receive $10,000 as her full share of the husband's estate, and the husband and wife after their marriage entered a contract establishing a joint bank account with right of survivorship, the joint bank account was not subject to the antenuptial contract and the surviving wife was entitled to the proceeds of the joint bank account as well as to the $10,000 under the husband's will.

APPEAL by defendant from *Blythe, Judge.* Judgment entered 22 April 1975 in District Court, HERTFORD County. Heard in the Court of Appeals 21 October 1975.

Harden v. Bank

Plaintiff, widow of Vernon Harden, brought this action to recover funds which were on deposit in a joint bank account in First Union National Bank. The facts are not in dispute.

On 3 July 1969, Vernon Harden and Bessie Lee O'Berry entered into an antenuptial contract. The contract provided that the parties intended to be married and that it was mutually agreed that neither party "by reason of said contemplated marriage hereinafter to be consummated shall have or take any right, title or interest in and to the property of the other, either during their lives or after the death of either except as hereinafter set out:". The agreement further provided that in consideration of the proposed marriage and "the considerations herein stipulated to be paid from the estate of the intended husband, that so far as is legally possible by their private act and agreement, all property belonging to either of them at the commencement of their marriage or coming to either of them during their marriage shall be and be (sic) enjoyed by him or her and be subject to his or her disposition as his or her separate property in the same manner as if the said proposed marriage had never been celebrated." The parties agreed that the intended wife would be paid $10,000 by the intended husband's executor if the wife survived the husband. The wife released all other property of the intended husband at his death from any claims, demands, or rights she might have under the laws existing at the time of the husband's death.

The couple was married on 4 July 1969. On 19 April 1971, they established a joint bank account in the Bank of Windsor, now First Union National Bank. They entered into an agreement which provided:

> "We agree and declare that all funds now, or hereafter deposited in this account are and shall be our joint property and owned by us as joint tenants with right of survivorship, and not as tenants in common; and upon the death of either of us any balance in said account shall become the absolute property of the survivor. The entire account or any part thereof may be withdrawn by or upon the order of either of us or the survivor.
>
> It is especially agreed that withdrawal of the funds by the survivor shall be binding upon us and upon heirs, next of kin, legatees, assigns, and personal representatives."

On 22 February 1972, Vernon Harden died. At that time the funds on deposit in the joint account amounted to $3801.77. By his will, he directed his executrix to pay his wife $10,000, "which is the amount she and I agreed upon in an agreement duly executed before our marriage and in contemplation of marriage, which shall be in full of her share in my estate."

The executrix paid the wife, plaintiff herein, the $10,000 as directed.

On 16 October 1972, plaintiff attempted to cash a check in the amount of $1900.88 drawn on the joint bank account but found that the bank had paid all the funds on deposit in the account to the executrix, and the account had been closed. Whereupon, plaintiff brought an action to recover one-half the funds on deposit at the date of Vernon Harden's death, represented by the dishonored check. The bank answered admitting that the funds had been paid to the executrix, denying that plaintiff was entitled thereto, and asking that the executrix be made a party. The executrix interpleaded and denied that plaintiff was entitled to the funds, averring that under the antenuptial agreement and will of Vernon Harden, plaintiff was entitled only to the $10,000 which had been paid to her.

Plaintiff, on motion, was allowed to amend her complaint to seek recovery from the executrix of the balance of the funds which would have remained in the account had the check presented been paid.

All parties filed motions for summary judgment. The court apparently did not rule upon any of the motions, but "upon the pleadings, exhibits, stipulations and briefs of all the parties; without benefit of jury and outside the regular October 1973 Term of Hertford County District Court, Civil Session, by agreement, consent and stipulation of all the parties," found facts, made conclusions of law, and entered judgment for plaintiff. Defendants appealed.

Law Firm of Carter W. Jones, by Ralph G. Wiley III, for plaintiff appellee.

Pritchett, Cooke & Burch, by J. A. Pritchett and William W. Pritchett, Jr., for defendant appellant.

MORRIS, Judge.

Defendants contend that the terms of the antenuptial contract and the terms of Vernon Harden's will require a holding

that plaintiff is not entitled to any portion of the funds in the joint bank account. Plaintiff agrees that the antenuptial contract is valid and enforceable, and she has accepted the payment of $10,000 under its terms and the terms of Vernon Harden's will. She insists that she is also entitled to the funds on deposit in the joint bank account.

The antenuptial agreement clearly contemplated that each party desired to continue to own, in the same manner, after their marriage any property owned by him or her individually before the marriage. It was further specifically provided that, with respect to any property coming to either of them after the marriage, each would own such property as though there had been no marriage between them. It was agreed that if plaintiff survived her husband, she would be paid $10,000 by her husband's executrix, and she released all other "property of the intended husband at his death" from any claims, demands, or rights she might have.

Antenuptial contracts are not against public policy and should be enforced as written. *Turner v. Turner,* 242 N.C. 533, 89 S.E. 2d 245 (1955). The contract here as written clearly intended to protect to each his or her separate property and to preclude plaintiff from taking any property owned by Vernon Harden at his death other than the $10,000 for which the agreement specifically provided. The question we must decide is: What effect, if any, does the antenuptial contract have upon the joint bank account?

G.S. 41-2.1 provides for the establishment of joint bank accounts with the right of survivorship if the account is established in accordance with the provisions of the statute. There is no question but that the requirements of the statute have been met. The parties entered into a written agreement which both parties executed. They agreed that all funds deposited in the account should be their joint property, owned by them as joint tenants with right of survivorship and not as tenants in common; that upon the death of either, the funds should become the absolute property of the survivor, that all or any part of the funds could be withdrawn by either or the survivor; that all withdrawals by the survivor should be binding upon them, their heirs, next of kin, legatees, assigns and personal representatives. Although the court found as a fact that deposits were made by both, there is no evidence in the record to show the source of any deposit, including the original deposit. While the

finding is not supported by evidence and is error, it is immaterial to decision and, therefore, harmless.

In *Wilson County v. Wooten,* 251 N.C. 667, 669-670, 111 S.E. 2d 875 (1960), Justice Denny said:

> "The survivorship in joint tenancies by operation of law has been abolished in this jurisdiction. G.S. 41-2. However, such a tenancy may be created by contract. (Citations omitted.)
>
> Under common law principles applicable to joint tenancies the survivor takes the entire property, free and clear of the claims of heirs or creditors of the deceased tenant, and the personal representative of such tenant has no right, title or interest therein." (Citations omitted.)

Here, if either party wished to own the funds represented by the joint account, it would have been a simple matter to establish a bank account in the name of the one owning the funds. This was not done. Instead the two parties entered into a contract under which both owned all or any part of the funds during their lives, and the survivor owned that which was remaining. This was clearly not protected by the antenuptial contract but was the subject of a separate contract between the parties entered into sometime after the antenuptial contract.

> "It is well settled law that the parties to a contract, no rights of third parties having intervened, may rescind it, or substitute another contract for it, by making a new contract inconsistent therewith. *Redding v. Vogt,* 140 N.C. 562, 53 S.E. 337, 6 Anno. Cas. 312. The making of a second contract dealing with the same subject matter does not, however, necessarily abrogate the former contract. *Bank v. Supply Co.,* 226 N.C. 416, 38 S.E. 2d 503.
>
> A new contract between the same parties which contains nothing inconsistent with the older one does not discharge the latter. *Drown v. Forrest,* 63 Vt. 557, 22 A. 612, 14 L.R.A. 80; 12 Am. Jur., Contracts, Sec. 433; 17 C.J.S., Contracts, p. 885." *Turner v. Turner, supra,* at 538.

In our view, the second contract is a separate, distinct, and valid contract not dealing with the separate property of either party. Nor does the will of Vernon Harden vitiate the contract. It directs his executrix "to pay my wife the sum of

Ten Thousand Dollars ($10,000), which is the amount she and I agreed upon in an agreement duly executed before our marriage and in contemplation of marriage, which shall be in full of her share in my estate." The funds in the joint bank account were neither "property of the intended husband at his death" under the antenuptial contract nor funds belonging to his "estate" under the will. They were funds made the subject of a separate contract which made the funds the property of both with right of survivorship and which specifically made withdrawal of funds by the survivor binding upon the heirs, legatees, and personal representatives of the deceased. This contract was an agreement in addition to the antenuptial contract and served to take those funds out of that part of the estate of either of the parties to the contract which could be the subject to a devise or legacy.

The court found that the estate of Vernon Harden was "very solvent and can absorb all debt without resort to the funds of the joint bank account." The parties stipulated that the executrix would pay any liability imposed by the court. The court concluded that plaintiff is entitled to the full amount remaining on deposit at Vernon Harden's death, plus interest thereon at the rate of 6% from February 1972. In this we find no error.

Affirmed.

Judges PARKER and MARTIN concur.

BEACH AND ADAMS BUILDERS, INC. v. THE NORTHWESTERN BANK, A NORTH CAROLINA CORPORATION; AND C. BANKS FINGER, AS TRUSTEE FOR THE NORTHWESTERN BANK

No. 7524SC545

(Filed 17 December 1975)

Laborers' and Materialmen's Liens § 7— claim of lien — date materials and labor last furnished — action to enforce — allegation of different date

Plaintiff was bound by its statement in its claim of lien that materials and labor were last furnished on 16 November 1972 where there was nothing on the face of claim of lien to indicate that such date was erroneous; therefore, an action to enforce the claim of lien filed more than 180 days after such date came too late and the lien

was discharged, notwithstanding plaintiff alleged that labor and materials were last furnished on 12 December 1972, not 16 November 1972, and the action was commenced within 180 days of 12 December 1972.

APPEAL by plaintiff from *Judge Harry Martin.* Summary judgment entered 21 March 1975 in Superior Court, WATAUGA County. Heard in the Court of Appeals 16 October 1975.

This is a companion case to *Beach and Adams Builders, Inc. v. Felton, et al,* No. 73CVS148, which is on appeal as No. 7524SC546.

In March 1972, plaintiff entered into an oral contract with the Feltons for the construction of a residence. Upon completion of the job and the Feltons' subsequent refusal to tender payment, the plaintiff filed and recorded a "Claim of Lien" on 1 February 1973 against the property and stated, *inter alia,* in the claim that "[t]he date upon which labor or materials were last furnished upon said property by the Claimant was November 16, 1972." Later, plaintiff, on 6 June 1973, brought action No. 73CVS148 against the Feltons, the Watauga Savings and Loan Association, and the Trustee for the Savings and Loan Association, alleging priority of its "Claim of Lien" to the various interests of the defendants therein. Subsequently, Northwestern Bank asserted a claim against the property.

In this action (No. 7524SC545), filed by verified complaint on 17 December 1974, the plaintiff sought, *inter alia,* to have its purported "Claim of Lien" declared superior to a deed of trust given by the Feltons to the defendants herein on 7 November 1973 and filed and duly registered on 13 November 1973. In this complaint, the plaintiff alleged that the last date of furnishing of labor and materials was 12 December 1972, almost a month later than the date shown in its "Claim of Lien." A copy of the "Claim of Lien" was attached to this complaint, as "Exhibit 'A'," and states that the last date of furnishing of labor and material was 16 November 1972.

Defendants answered that plaintiff's "Claim of Lien," which by law cannot be amended, referred to the last date of furnishing of labor and material as 16 November 1972 and that, consequently, the complaint in case No. 73CVS148 was not filed within 180 days of the last furnishing of labor and material as required by statute. Defendants contended that in view

of plaintiff's noncompliance, the lien is, and should be, discharged. Defendants then moved for a summary judgment.

Plaintiff, responding to defendants' motion, argued that:

". . . the assertion of November 16, 1972 as the date of last furnishing of materials or labor in the Claim of Lien was incorrect and was a mere clerical error, and further, that the date of last furnishing of materials or labor was in fact December 12, 1972, as verified by the Plaintiff, and hence the Complaint to enforce the said Claim of Lien was in fact, timely filed. The Plaintiff argued that since the Court had before it a sworn statement of the Plaintiff that the date of last furnishing of materials or labor was December 12, 1972, and not November 16, 1972, a genuine issue as to a material fact existed, and hence the action should proceed to a full trial. The Plaintiff further argued that since North Carolina General Statute Sec. 44A-12(c) does not require the date of last furnishing of materials or labor to be set forth in the Claim of Lien, the fact that Plaintiff set forth a date of last furnishing in its Claim of Lien was unnecessary surplusage and hence should be ignored; and further, to ignore the date of last furnishing in Plaintiff's Claim of Lien would not amount to an amendment thereof."

The trial court, however, finding no genuine issue of material fact, granted defendants' motion for summary judgment, stating that the ". . . claim of lien is discharged of record by failure to enforce said lien within . . ." 180 days of the last furnishing of labor and material. The trial court further noted that:

". . . although plaintiff alleges that labor and materials were last furnished at the site on December 12, 1972, it has failed to produce any evidence or affidavits concerning same at this hearing on the motion for Summary Judgment and plaintiff's cause of action must be based upon the claim of lien filed February 1, 1973 as Chapter 44A of the General Statutes prohibits the amendment of such claim of lien, therefore plaintiff is bound by his claim of lien as to the last date (November 16, 1972) of furnishing of labor and materials upon which the claim of lien is based." From entry of summary judgment, plaintiff appeals.

Other facts necessary for decision are cited below.

Charles R. Brown, for plaintiff appellant.

Holshouser and Lamm, by Charles C. Lamm, Jr., and Finger, Parks & Greene, by C. Banks Finger, for defendant appellants.

MORRIS, Judge.

Plaintiff contends that the trial court erred in finding that plaintiff had failed timely to commence its action to enforce its Claim of Lien and that the late commencement discharged the lien of record. Plaintiff argues that the entry of the 16 November 1972 date in the Claim of Lien was a "clerical error" and ". . . it should be allowed to show, in a trial on the merits, that the actual date of last furnishing was a date other than that set forth in the Claim of Lien." G.S. 44A-16(3) provides, *inter alia,* that any lien may be discharged for ". . . failure to enforce the lien within the time prescribed in this Article." G.S. 44A-13 provides that an action to enforce the lien may be instituted in any county in which the lien is filed but "no such action may be commenced later than 180 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the lien." The law in this general area recently has been re-examined by our State Supreme Court in *Canady v. Creech,* 288 N.C. 354, 356, 218 S.E. 2d 383 (1975), wherein the Court held that when the date of first furnishing of labor and material listed in a Claim of Lien contains an "'. . . *obvious* clerical error which could not mislead any interested party . . .'" the actual purported date of first furnishing should be given effect and the purportedly incorrect listed date shown on the face of the claim should be disregarded. (Emphasis supplied.) (Citation omitted.) Justice Exum, writing for the Court in *Canady,* noted, however, that they were ". . . not dealing . . . with priorities of competing liens nor with any party who relied on the claim of lien as filed." *Id.* at 356.

Here, we are concerned with the priority of competing claimants. Moreover, in this situation, nothing appearing on the face of the Claim of Lien would indicate to any reader that there was an obvious error. This case involved a purported error in terms of several critical weeks prior to the time of filing the claim. It is difficult to see how any record examiner would be able to recognize any error, clerical or otherwise. For the examiner, 16 November 1972 is as realistic and logical

a date as 12 December 1972. This is considerably dissimilar to the problem presented in *Canady,* where there were no competing claimants to the property and where the listed date of first furnishing was incongruously stated as being subsequent to the date of filing of the claim. Thus, in *Canady,* the Court could state that " '[n]o one *need* misunderstand it who should become interested in the property.' " (Emphasis supplied.) *Id.* at 357. (Citations omitted.) The Court further approvingly cites and quotes from the case of *Schwartz v. Lewis,* 138 App. Div. 566, 568, 123 N.Y.S. 319, 320 (Sup. Ct. App. Div. 1910), wherein a New York Court held that" '[i]f by any fair construction the statement can be read so as to show the date intended, and that date is substantially correct, effect will be given to the notice.' " *Id.* at 357. Here, no " 'fair construction' " of the claim as written would indicate to the reader that the last furnishing was actually several weeks later than that actually shown on the face of the Claim of Lien.

Thus, we hold that this case is governed by our previous decision in *Strickland v. Contractors, Inc.,* 22 N.C. App. 729, 207 S.E. 2d 399 (1974), and distinguishable from the recent Supreme Court decision in *Canady.* In *Strickland,* we wrote that ". . . a lien is lost if the steps required to perfect it are not taken in the same manner and within the time prescribed." *Strickland,* at p. 731. We further held in *Strickland* that to force the examiner to go outside the record as filed would ". . . impose an undue burden on the title examiner and would damage the principle of reliance upon the public record." *Id.* at 732. We believe these principles remain sound in North Carolina after *Canady,* but for those rare instances in which an examiner should be able to detect errors which on the face of the record seem incongruous, obvious, self-apparent and easily reconcilable.

Plaintiff also contends that where the date of last furnishing is not statutorily required, the inclusion of the date ". . . should be completely disregarded . . ." and considered "unnecessary surplusage." We disagree. Though this information is not required, it cannot be deemed mere "surplusage" when supplied even voluntarily. To do so ". . . would do injury to the purpose of the lien statute . . ." in that title examiners would, barring an obvious error, reasonably rely on the date actually furnished. *Strickland, supra,* at 731-732.

Plaintiff next maintains that the trial court erred in finding that plaintiff had failed to produce any evidence or affidavits at the hearing on the motion for summary judgment which would indicate that the last date of furnishing was other than the date shown in the Claim of Lien. We find no merit in this contention. Even taking the verified complaint as an affidavit, the plaintiff merely presents a bare allegation that the date of last furnishing is different from that stated in the Claim of Lien. Moreover, barring an *obvious* error, easily discernible to the title examiner, the plaintiff is bound by the date stated in his Claim of Lien. G.S. 44A-12(d). Under G.S. 44A-13, the claimant has 180 days from the date of last furnishing of labor and material to commence legal action. In this case, plaintiff has simply failed to meet this statutorily mandated standard.

The trial court correctly found no genuine issue of material fact and we find no error in the summary judgment granted therein.

Affirmed.

Judges MARTIN and CLARK concur.

STATE OF NORTH CAROLINA v. JOHN MINOR

No. 7530SC539

(Filed 17 December 1975)

1. Narcotics § 4— growing marijuana — sufficiency of evidence

In a prosecution for possession of marijuana with intent to distribute and for manufacturing and growing marijuana, evidence was sufficient to be submitted to the jury where it tended to show that defendant was on the property where the marijuana was found growing on several occasions prior to and at or about the time such contraband was discovered, defendant participated in the development of a garden on the property and stayed in the house located there, personal property belonging to defendant was found in the house, fertilizer was found in the marijuana field and in the house, and when defendant was apprehended he was in a car with marijuana on the floor of the passenger compartment and marijuana and fertilizer in the trunk.

2. Criminal Law § 113— instruction on circumstantial evidence — no error

The trial court's instruction on circumstantial evidence, though perhaps unclear, was not incorrect, and defendant is not entitled to a new trial.

3. Criminal Law § 113— jury instructions — "defendants or either of them" — instructions proper

The trial court's use of the words "defendants or either of them" did not mislead the jury and cause them to believe that if they found one defendant guilty they could return a verdict of guilty as charged against both defendants, since the court repeatedly instructed the jury that there were two cases consolidated for trial, separate written issues were given to the jury as to each defendant, and the charge taken as a whole would lead the jury to believe that a verdict of guilty should be returned only against a defendant about whose guilt they did not have a reasonable doubt.

APPEAL by defendant from *Friday, Judge.* Judgment entered 24 July 1974 in Superior Court, CHEROKEE County. Heard in the Court of Appeals 14 October 1975.

Defendant was tried on indictments charging him with possession of a controlled substance marijuana, for the purpose of distribution, and with manufacturing and growing marijuana. The cases were consolidated for trial along with those of a codefendant, Ingram. Both defendants pleaded not guilty and were tried before a jury.

Evidence for the State tended to show that on or about 23 July 1973, an agent of the State Bureau of Investigation operating in Cherokee County, armed with a valid search warrant, went to a certain parcel of land located in that county, and made a search of the area. As a result of this search, the agent discovered a field of growing marijuana plants intermingled with corn. The quantity of marijuana was estimated to be between eight and nine hundred pounds. Upon further examination in and around a dilapidated and unoccupied dwelling house and out-buildings located on the premises, the agent found garden utensils, fertilizer, camping gear and items of personal property, which were either owned or used by the defendants, including property with the word "Minor" on it.

Thereafter, on the same day, the defendants were stopped on or near the entranceway to the marijuana field. A search of the automobile in which they were riding yielded a .22 rifle from under some spools of thread and papers in the back seat, and a .22 pistol, found in the glove compartment. The agent

found wilted or fairly fresh marijuana on the left rear floorboard and in the trunk of the automobile.

It was stipulated that defendant Ingram had rented the property in question to raise a garden crop for $25.00 and that defendant Minor had accompanied Ingram to the owner's residence when the agreement was made but had remained in the car. Other evidence was introduced which placed the defendants in the area of the illegal crop during the month of July, 1973. Neighbors said that defendants had told them that they were gardening on this particular parcel of land. At Ingram's request, one of the neighbors plowed and harrowed the land in the Spring of 1973.

The defendants' evidence tended to show the following:

Two fields were plowed. The neighbor who did the plowing told Ingram that the field where the marijuana was later found was too rough to plow and, in any event, was a bad spot for a garden. Ingram responded that he did not intend to use that spot himself but that the neighbor should do the best he could. The neighbor also testified that there were at least three ways to get to the field, only one of which was visible from the road.

Defendants, who lived in Chattanooga, Tennessee, and several family members had discussed the possibility of raising a garden to off-set the high price of food. They all liked this particular area. Ingram formerly resided there and had relatives living in the area. One of the locations plowed was actually planted and work intermittently, but only for a short while. Both defendants denied having planted anything in the field where the marijuana was discovered, and worked only sparingly on the other plot before the weeds took over and the project was all but abandoned.

Defendant Minor apparently came to the Cherokee County location from Chattanooga five or six times. After interest in the garden was substantially lost, camping and fishing were his only activities in the area.

Minor's mother, sister and nephew gave evidence tending to corroborate Minor's testimony. It was stipulated that defendants had witnesses who would testify that both defendants had good character and reputations. The record discloses that both

defendants were found guilty as charged. Minor's appeal was not docketed in time and we allowed certiorari.

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

Ronald W. Howell, for defendant appellant.

VAUGHN, Judge.

Initially, defendant contends that the trial court erred in failing to quash the indictment or arrest the judgment since the bill of indictment returned against the defendant did not indicate that any witness was sworn by the grand jury foreman or testified. There is a presumption of validity of the indictment arising from its return by the grand jury as a true bill. There is no evidence to rebut the presumption and the assignment of error is overruled. *State v. Smith,* 261 N.C. 613, 135 S.E. 2d 571; *State v. Lancaster,* 210 N.C. 584, 187 S.E. 802.

Defendant's assignments of error based on the alleged illegality of the search of the premises and the automobile are without merit and are overruled.

Defendant contends that the trial court committed error in failing to allow him motion for nonsuit.

On motion to nonsuit, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference that might be drawn therefrom, and nonsuit should be denied where there is sufficient evidence, direct, circumstantial, or both, from which the jury could find that the offense charged has been committed and that defendant committed it. *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469. When a motion for nonsuit questions 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. *State v. Spencer,* 281 N.C. 121, 187 S.E. 2d 779.

[1] The evidence was sufficient to take the case to the jury. There is substantial evidence of defendant's knowledge and power to control the contraband. The evidence is that the defendant was on the property (where some eight to nine hundred pounds of marijuana was found growing) on several occasions both prior to and at or about the time such contraband was

discovered. There is evidence that he participated in the development of a garden on the property and stayed in the house located there. Personal property belonging to him was found in the house. Fertilizer was found in the marijuana field and in the house. When defendant was apprehended he was in a car with marijuana on the floor of the passenger compartment and marijuana and fertilizer in the trunk.

This evidence and the other evidence developed at trial are sufficient to withstand the defendant's motion for nonsuit.

[2] Defendant next contends that error was committed by giving conflicting instructions with respect to the use of circumstantial evidence. At one point, the trial judge charged as follows:

> "Now each and every element of the offense charged, or any lesser included offense thereof, must be proven beyond a reasonable doubt, but it is not necessary that every circumstance relied upon for conviction be established by that high standard of proof. It is enough, if, upon the whole of the evidence, the jury is satisfied beyond a reasonable doubt of the defendants' guilt."

Shortly thereafter, the judge instructed:

> "Furthermore, before any circumstances, upon which the State relies, may be considered by you as tending to prove the defendants' guilt, the State must prove that circumstance beyond a reasonable doubt."

The defendant contends that the first charge is an incorrect charge on circumstantial evidence while the second one is a correct charge, and by authority of *State v. Parrish,* 275 N.C. 69, 165 S.E. 2d 230, a new trial must be had. The State argues that while "unclear," the first instruction is not on how the jury should consider circumstantial evidence and that the jury was properly instructed on how they should consider that evidence by the second instruction.

From our examination of the complete charge, we find that while some might find the first instruction "unclear" it is not "incorrect." We understand the trial court to say that while the essential elements of the offense must be proven beyond a reasonable doubt, it is not necessary for the State to prove every circumstance it attempts to prove but that the State must prove enough circumstances to satisfy the jury be-

yond a reasonable doubt that defendant is guilty of every element of the offense with which he is charged. We find no error prejudicial to defendant in the instruction.

[3] Defendant contends that the most "blatant error in the entire trial was the continued use of the court's terminology 'the defendants or either of them'." In short, defendant's contention is that the jury could have understood the judge to mean that if they found one defendant guilty they could return a verdict of guilty as charged against both defendants. Defendant cites numerous cases from the Supreme Court and from this Court where new trials were found to be necessary because of the confusing and ambiguous use of the words "defendants or either of them." For example, *State v. Parrish,* 275 N.C. 69, 165 S.E. 2d 230; *State v. Williford,* 275 N.C. 575, 169 S.E. 2d 851; *State v. Waddell,* 11 N.C. App. 577, 181 S.E. 2d 737.

The appellate courts have repeatedly directed attention "to the desirability for the trial judge in criminal cases with multiple defendants to instruct the jury separately as to each defendant on each count submitted as to each defendant in the final mandate to the jury." *State v. Waddell, supra,* p. 580.

Nevertheless, the entire record must be considered and the charge considered contextually in considering whether there has been error at trial that could have affected the outcome of the trial.

Here the judge expressly told the jury:

> "Now, Ladies and Gentlemen, bear in mind, at all times, that the cases have been consolidated for trial here. These are two separate cases, and they have been consolidated for trial.
>
> Now the Court instructs you, that you may find the defendants guilty as charged, or you may find them not guilty, or you may find one guilty and the other not guilty on one issue, or guilty or not guilty on the other, as you find the truth to be, you being the jury in this action."

Later in the charge the judge instructed the jury:

> "Your careful attention is invited to the fact that there are two cases consolidated for trial here. You should keep in mind, at all times, that these are separate cases, and that

the State has the burden of proving each defendant guilty beyond a reasonable doubt."

Moreover, separate written issues were given to the jury as to each defendant.

When the entire charge is considered in light of the evidence presented at trial, we believe the jury clearly understood the charge to mean that a verdict of guilty should be returned only against a defendant about whose guilt they did not have a reasonable doubt.

We have considered defendant's remaining assignments of error and find no prejudicial error in defendant's trial.

No error.

Judges BRITT and ARNOLD concur.

ANTHONY PAUL BENTON v. W. H. WEAVER CONSTRUCTION COMPANY

No. 7510SC682

(Filed 17 December 1975)

Negligence §§ 2, 22— pleadings based on breach of contract — claim for relief based on negligence

Although plaintiff's complaint was based on defendant's breach of his contract with the State in this action to recover for injuries received by plaintiff, a subcontractor's employee, when he fell through an unguarded elevator shaft in a building under construction for which defendant was the general contractor, the complaint was sufficient to state a claim for relief on the ground of negligence by defendant in failing to exercise ordinary care for the safety of persons rightfully on the premises in violation of defendant's duty imposed by law to such persons.

APPEAL by plaintiff from *McKinnon, Judge.* Judgment entered 18 June 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 19 November 1975.

This is a civil action wherein the plaintiff, Anthony Paul Benton, is seeking to recover $750,000.00 in damages from the defendant, W. H. Weaver Construction Company, as a result of

injuries allegedly sustained from a fall through an unguarded elevator shaft.

In his complaint filed 7 January 1975, plaintiff alleged in pertinent part that:

> "3. On or about March 1, 1971 the Defendant entered into a construction contract with the North Carolina Department of Administration for the construction of an office and laboratory building located at the intersection of North Wilmington and East Lane Streets in Raleigh, North Carolina, commonly referred to as the 'Bath Building.'
>
> 4. In said contract the Defendant agreed to perform all the construction on the project according to the specifications and the requirements in the Instructions to Bidders standard form pamphlet and the A.G.C. Accident Manual in Construction.
>
> 5. Pursuant to the terms of the above pamphlet and manual the Defendant was to provide all necessary safety measures for the protection of all people working on the project. Additionally, the Defendant was required to fully comply with all state laws or regulations and Building Code requirements to prevent accident or injury to persons on or about the location of the work.
>
> * * *
>
> 11. On or about the 23rd day of February, 1972, the Defendant, pursuant to the aforesaid contract, was engaged as the general contractor for the construction of the 'Bath Building.'
>
> 12. At said time and place, the Defendant had subcontracted certain of the work to be performed in the said building, including certain work to be performed by Tri-State Erectors, Inc.
>
> 13. At said time the Plaintiff was an employee of the sub-contractor, Tri-State Erectors, Inc.
>
> 14. On the 23rd day of February, 1972, at approximately 2:10 p.m., the Plaintiff, while engaged in his employment with the said sub-contractor and while working on one of the upper levels of the said premises tripped over a steel stud or shear connector together with a loose steel cable

and fell some five floors through a large unguarded, unprotected hole or opening in the floor of the said building, causing him multiple serious and permanent personal injuries.

15. The large hole through which the Plaintiff fell was an elevator shaft.

16. In clear breach of the requirements of the contract, the Defendant provided neither temporary coverings, railings, safety nets or barricades in the proximity of the elevator shaft wherein the Plaintiff fell.

17. The Plaintiff, being a workman on the job and an invitee of the Defendant, was a third party beneficiary under the terms of the aforesaid contract and hence legally capable of suing the Defendant for its breach of the contract.

18. The Defendant is liable to the Plaintiff for all damages resulting from the breach of the contract which were the reasonably foreseeable consequences of that breach."

Defendant, in its answer, filed 5 February 1975, alleged that plaintiff's complaint fails to state a claim upon which relief can be granted and therefore should be dismissed. In addition, defendant filed a motion for summary judgment on 14 May 1975. At a hearing on 18 June 1975, Judge McKinnon decided to treat the motion for summary judgment as a motion to dismiss under Rule 12(b)(6) and dismissed plaintiff's complaint with prejudice. Plaintiff appealed.

Blanchard, Tucker, Twiggs & Denson by Charles F. Blanchard and Charles A. Parlato for plaintiff appellant.

Smith, Anderson, Blount & Mitchell by John L. Jernigan for defendant appellee.

HEDRICK, Judge.

Both the plaintiff and the defendant have argued in their briefs the question of whether the plaintiff can recover in this action for damages for personal injury against this defendant on the theory that the defendant breached its contract with the State of North Carolina to provide certain safety measures in the construction of the Bath Building, without regard to negligence. Neither party, however, seems to have given considera-

tion to the question of whether plaintiff's complaint, when liberally construed, states a claim upon which relief can be granted.

A complaint may be dismissed pursuant to Rule 12(b)(6),

> " 'if clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim.' But a complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.* Pleadings are to be liberally construed. Mere vagueness or lack of detail is not ground for a motion to dismiss, but should be attacked by a motion for a more definite statement."

2A Moore, Federal Practice § 12.08 (1975). *Accord, Sutton v. Duke,* 277 N.C. 94, 176 S.E. 2d 161 (1970). In *Sutton v. Duke,* Justice Sharp, now Chief Justice, wrote:

> "Under the 'notice theory of pleading' a statement of claim is adequate if it gives sufficient notice of the claim asserted 'to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of *res judicata,* and to show the type of case brought . . . . ' Moore § 8.13" *Id.* at 102.

Any construction of the complaint in this cause reveals that plaintiff's *claim* is for damages for personal injuries allegedly resulting from his fall through an unguarded elevator shaft on a building under construction wherein the defendant was the general contractor. In determining the sufficiency of a complaint to state a claim upon which relief can be granted when challenged by a 12(b)(6) motion, the federal courts have consistently held that the legal theory upon which a claim may be bottomed does not determine the validity of a claim; and particular legal theories of counsel yield to the court's duty to grant the relief to which the prevailing party is entitled, whether demanded or not. *See Thompson v. Allstate Insurance Company,* 476 F. 2d 746 (5th Cir. 1973); *New Amsterdam Casualty Company v. Waller,* 323 F. 2d 20 (4th Cir. 1963), *cert. denied,* 376 U.S. 963, 84 S.Ct. 1124, 11 L.Ed. 2d 981 (1964); *United States v. Martin,* 267 F. 2d 764 (10th Cir. 1959); *Dotschay v. National Mutual Insurance Company,* 246 F. 2d 221 (5th Cir. 1957);

Gins v. Mauser Plumbing Supply Co., 148 F. 2d 974 (2d Cir. 1945).

Our concern, therefore, is not whether the complaint states a claim upon which relief can be granted on a theory of breach of contract, but rather whether the complaint when liberally construed states a claim for this plaintiff in this case against this defendant upon which relief can be granted on any theory.

It is well settled in North Carolina that where a contract between two parties is intended for the benefit of a third party, the latter may maintain an action in contract for its breach or in tort if he has been injured as a result of its negligent performance. *Toone v. Adams,* 262 N.C. 403, 137 S.E. 2d 132 (1964).

> "The parties to a contract impose upon themselves the obligation to perform it; the law imposes upon each of them the obligation to perform it with ordinary care and they may not substitute a contractual standard for this obligation. A failure to perform a contractual obligation is never a tort unless such nonperformance is also the omission of a legal duty. *Council v. Dickerson's, Inc.* [233 N.C. 472, 64 S.E. 2d 551 (1951)]. The contract merely furnishes the occasion, or creates the relationship which furnishes the occasion, for the tort." *Id.* at 407.

Allegations in the complaint tending to support plaintiff's claim on the theory that defendant breached its contract with the State to provide specific safety measures are not "the disclosure of some fact which will defeat the claim." *Sutton v. Duke, supra.* In our opinion, the statement of plaintiff's claim in the complaint is sufficient to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of *res judicata,* and to show the type of case brought. *Sutton v. Duke, supra.*

Therefore, construing the complaint liberally in light of the foregoing principles of substance and procedure, plaintiff's allegations, if supported by competent evidence, are sufficient to permit a finding that the plaintiff, as an employee of a subcontractor, fell through an unguarded elevator shaft in a building under construction wherein the defendant was a general contractor, and that such fall was proximately caused by the negligence of the defendant in failing to exercise ordinary care

for the safety of persons rightfully on the premises in violation of the defendant's duty imposed by law to such persons.

For the reasons stated, the judgment appealed from is reversed and the cause is remanded to the Superior Court for further proceedings.

Reversed and remanded.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. JIMMY LEE STOKESBERRY

No. 753SC630

(Filed 17 December 1975)

1. **Larceny § 7— possession of recently stolen property — sufficiency of evidence**

In a prosecution for breaking and entering and larceny, testimony which placed the stolen guns in the unexplained possession of defendant so soon after the breaking and entering and larceny as to permit the jury to infer that defendant was the thief who took the guns after his felonious breaking and entering of the premises was sufficient to take the case to the jury.

2. **Criminal Law § 112— reasonable doubt — circumstantial evidence — instructions proper**

The trial court's instructions as to reasonable doubt and circumstantial evidence were proper.

APPEAL by defendant from *Smith, Judge.* Judgment entered 22 April 1975 in Superior Court, PITT County. Heard in the Court of Appeals 14 November 1975.

Defendant was charged in a bill of indictment with the crimes of felonious breaking and entering and felonious larceny. The State offered evidence which tended to show that on or about Sunday, 15 December 1974, Glenn Bowing, Jr., of Ayden, North Carolina, returned home from church to find a window pried open and approximately twenty-three guns missing from his collection. He had given no one permission to enter his home or remove his firearms and did not know the defendant.

On a subsequent Sunday morning just before Christmas 1974, defendant went to the home of Robert Smith to see if he

might be interested in the purchase of some guns. An exchange was negotiated and sometime thereafter, Smith was observed by a Pitt County Deputy Sheriff attempting to sell one of the weapons. The firearm was seized by the deputy and when he inquired as to where Smith had gotten the guns (a total of 3), Smith told him they came from the defendant, Jimmy Lee Stokesberry.

The State offered further evidence that defendant had also sold two guns to Rusty Willard. Bowing identified the weapons recovered from both Smith and Willard as being owned by him and being among those stolen from his home on the above referred to date.

Defendant was thereafter arrested and his mobile home searched. No property belonging to Bowing was found.

Defendant testified that on 15 December 1974, accompanied by his mother and his girl friend, he visited a prison unit in Maury, North Carolina. Upon his return, he had dinner at his mother's house and did not get back to his trailer until about eleven o'clock, at which time he went to bed.

Defendant further testified that he and Smith had "a few misunderstood words" resulting from his purchase of a rifle from Smith the third week in November and that he had never been to Smith's home nor the Bowing residence.

Defendant's mother and girl friend gave testimony corroborating that of the defendant, placing him in their presence on 15 December 1974 from about 8:30 a.m. until nearly 11:00 p.m. Pictures were taken of defendant in Maury on this day and the date 15 December 1974 was written on the back of the pictures by defendant's girl friend.

The defendant offered further evidence tending to show that he had never exchanged or sold any guns to Willard, but they had talked about the sale of some guns. He denied that he had ever seen the guns that were introduced in evidence as the stolen weapons.

From the jury's verdict of guilty as charged on both counts, and imposition of consecutive prison sentences, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Alfred N. Salley, for the State.

Richard Powell, for defendant appellant.

VAUGHN, Judge.

[1] Defendant assigns as error the submission of the case to the jury and the trial judge's failure to grant his motion for directed verdict.

> "One of the well recognized rules concerning sufficiency of evidence to withstand motion for nonsuit or motion for a directed verdict is that when the motion questions 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." *State v. Spencer*, 281 N.C. 121, 187 S.E. 2d 779, citing *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431.

Upon motion to nonsuit, the evidence must be considered in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom, and nonsuit should be denied where there is sufficient evidence, direct, circumstantial, or both, from which the jury could find that the offense charged has been committed and that defendant committed it. *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469.

In this case the testimony of Smith and others places the stolen goods in the unexplained possession of defendant so soon after the burglary and larceny as to permit the jury to infer that defendant was the thief who took the guns after his felonious breaking and entering of the premises and was sufficient to take the case to the jury.

[2] The defendant next assigns as error the trial court's failure to adequately and sufficiently define "reasonable doubt." Here the trial court defined reasonable doubt as follows:

> "A reasonable doubt, ladies and gentlemen, is a doubt based on reason and common sense arising out of some or all of the evidence or lack or insufficiency of the evidence as the case may be. Proof beyond a reasonable doubt means that you must be fully satisfied or entirely convinced or satisfied to a moral certainty of the defendant's guilt. As one of our appellate Courts said in an opinion recently, one of the best definitions of reasonable doubt is the words reasonable doubt themselves."

The instruction given is substantially in accord with the definition of reasonable doubt approved by the Supreme Court.

See State v. Mabery, 283 N.C. 254, 195 S.E. 2d 304; *State v. Bright,* 237 N.C. 475, 75 S.E. 2d 407; *State v. Bryant,* 236 N.C. 745, 73 S.E. 2d 791; *State v. Wood,* 235 N.C. 636, 70 S.E. 2d 665.

Defendant next contends that the trial judge committed prejudicial error by his inadequate statement of the definitions, rule and applications of circumstantial evidence.

That portion of the charge objected to reads as follows:

> "Now, there is no eyewitness testimony that the defendant in this case committed either one of the offenses which are charged in the bill of indictment. The State relies in part upon what is known as circumstantial evidence. The State contends that the circumstances and evidence taken together establish the guilt of the defendant. Now, circumstantial evidence is recognized and accepted as proof in a court of law, however, you must find this defendant not guilty unless all of the circumstances considered together exclude every reasonable possibility of innocence and point conclusively to the guilt of the defendant. Furthermore, before any circumstance upon which the State relies may be considered by you as tending to prove the defendant's guilt, the State must prove that particular circumstance beyond a reasonable doubt."

The trial court's instruction is almost identical to the instruction approved in *State v. Bauguess,* 10 N.C. App. 524, 179 S.E. 2d 5.

The applicable rule, with respect to the sufficiency of circumstantial evidence to carry a case to the jury has been adequately recorded by Branch, J., citing Higgins, J., as follows:

> " 'We are advertent to the intimation in some of the decisions involving circumstantial evidence that to withstand a motion for nonsuit the circumstances must be inconsistent with innocence and must exclude every reasonable hypothesis except that of guilt. We think the correct rule is given in *S. v. Simmons,* 240 N.C. 780, 83 S.E. 2d 904, quoting from *S. v. Johnson,* 199 N.C. 429, 154 S.E. 730: 'If there be any evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case

should be submitted to the jury.' The above is another way of saying there must be substantial evidence of all material elements to the offense to withstand the motion to dismiss. It is immaterial whether the substantial evidence is circumstantial or direct, or both. To hold that the court must grant a motion to dismiss unless, in the opinion of the court, the evidence excludes every reasonable hypothesis of innocence would in effect constitute the presiding judge the trier of facts. Substantial evidence of guilt is required before the court can send the case to the jury. Proof of guilt beyond a reasonable doubt is required before the jury can convict. What is substantial evidence is a question of law for the court. What that evidence proves or fails to prove is a question of fact for the jury. (Citing cases).'" *State v. Parker*, 268 N.C. 258, 150 S.E. 2d 428.

Defendant's assignment of error is overruled.

For his last two assignments of error, the defendant argues that the trial court committed prejudicial and reversible error by inadequately charging the jury as to the meaning and definition of the "doctrine of recent possession" and of alibi evidence. Defendant's argument, however, seems to be directed to what he contends is the insufficiency of the evidence. At any rate, the instructions given were in substantial compliance with what has, heretofore, been held to be correct by the appellate courts of this State.

Defendant received a fair and impartial trial, free from prejudicial error.

Affirmed.

Judges BRITT and ARNOLD concur.

A. P. PASK v. GIRARD CORBITT, GOLDEN EAGLE OF GREENSBORO, INC., A CORPORATION, AND PEN AND PENCIL, INC.

No. 7518SC445

(Filed 17 December 1975)

1. Notice § 1; Rules of Civil Procedure § 21— joinder of additional party defendant — notice to original defendant required

The trial court properly concluded that defendant Golden Eagle was entitled to notice and a hearing with respect to orders allowing

plaintiff to amend her complaint and to add an additional party defendant.

2. Notice § 1— right to notice

The right to notice and an opportunity to be heard on motions filed in a lawsuit is critically important to the non-movant and cannot be considered an insubstantial or inconsequential omission on the part of the movant and the court.

On *certiorari* by plaintiff from *Kivett, Judge.* Order entered 5 March 1975 in Superior Court, GUILFORD County. Heard in the Court of Appeals 18 September 1975.

In her original complaint, filed 5 March 1974, plaintiff alleged that "on the morning of December 16, 1973, at approximately 12:40 a.m. while . . . attending a telephone workers' Christmas party . . . in the downstairs convention center of the defendant Golden Eagle[,] . . . the plaintiff, a female, was assaulted with intent to commit rape by . . . defendant Corbitt, a male, approximately 17 years old." Plaintiff further alleged that defendant Corbitt was an employee for Golden Eagle and that Golden Eagle was liable for the physical and mental injuries sustained by plaintiff under the doctrine of respondeat superior.

At the time of oral argument, service upon Corbitt had not been effected.

Golden Eagle's answer to the original complaint was filed 14 May 1974 and denied that it was Corbitt's employer and contended that the purported assailant was an employee of Pen and Pencil, Inc., a restaurant and catering concern leasing space from Golden Eagle. This information was also contained in answers of Golden Eagle to interrogatories propounded by plaintiff on 18 April 1974 and answered by Golden Eagle on 3 May 1974. Based on this information, plaintiff on 16 December 1974 moved to join Pen and Pencil and to amend her original complaint. The Assistant Clerk of the Superior Court of Guilford County entered ex parte orders on 16 December 1974 joining Pen and Pencil and allowing amendment of the original complaint.

Both Golden Eagle and Pen and Pencil filed motions to vacate the ex parte orders and to strike the amended portions of plaintiff's complaint. Pursuant to defendants' motions, the Superior Court Judge vacated the ex parte orders and allowed defendants' motions to strike, holding that Golden Eagle had

the right to notice and a hearing and that the clerk's actions were without authority, improper, and without legal effect.

From the 5 March 1975 orders, vacating the ex parte orders entered by the Assistant Clerk of the Superior Court of Guilford County and striking portions of the plaintiff's amended complaint, plaintiff appealed and also petitioned this Court for a writ of certiorari.

Max D. Ballinger for plaintiff appellant.

Falk, Carruthers & Roth, by Walter Rand, and Jordan, Wright, Nichols, Caffrey and Hill, by Charles E. Nichols and Ronald P. Johnson, for defendant appellees.

MORRIS, Judge.

The plaintiff attempts to appeal from an order interlocutory in nature. Such orders are generally considered nonreviewable. 4 C.J.S., Appeal and Error, § 157, p. 528; 16 A.L.R. 2d, Appealability of Order With Respect to Motion for Joinder of Additional Parties, §§ 3, 6, pp. 1028-1040; *Sprague v. Bond,* 111 N.C. 425, 16 S.E. 412 (1892); *Lane v. Richardson,* 101 N.C. 181, 7 S.E. 710 (1888). Plaintiff has, however, filed a petition for a writ of certiorari which we have allowed.

[1] Plaintiff argues that Golden Eagle was not entitled to notice of a motion to make additional parties and the court, therefore, erred in its ruling that Golden Eagle was entitled to notice and an opportunity to be heard. We find no merit in plaintiff's position. Plaintiff contends that she was proceeding under G.S. 1A-1, Rule 15, and G.S. 1A-1, Rule 21, and that neither requires notice. The proposed amendment made no substantive changes in the original complaint other than to make the allegations applicable to Pen and Pencil. It is obvious that the only purpose of the proposed amendment was to bring in Pen and Pencil as a defendant. In truth and in fact, the essence of both motions was to make Pen and Pencil an additional party defendant. Where this is true, " . . . Rule 21 . . . controls and, to that extent, limits Rule 15(a). . . . " *International Bro. of Teamsters v. American Fed. of Labor,* 32 F.R.D. 441 (E.D. Mich. 1963).

Plaintiff is correct that Rule 21 does not specifically require notice. Rule 21 of the Federal Rules of Civil Procedure is identical in phraseology to G.S. 1A-1, Rule 21. A requirement of notice

to existing parties has been read into Rule 21, and courts generally uphold a requirement of notice as a condition precedent to entry of an order upon a motion made under the Rule. 7 Wright & Miller, Federal Practice and Procedure, § 1688 (1972) and cases cited therein; 3A Moore, Federal Practice ¶ 21.05(1) (1974) and cases cited therein; *Mitchell v. Carborundum Co.* 7 F.R.D. 523 (W.D.N.Y. 1947). Long prior to the adoption of G.S. 1A-1, Rule 21, North Carolina has held that existing parties to a lawsuit are entitled to notice of a motion to bring in additional parties. In *Young v. Rollins,* 90 N.C. 134 (1884), plaintiff moved to make the Western North Carolina Railroad Company a party defendant. Notice was served on the Railroad Company, but not on existing party defendants. The trial court denied the motion, and the Supreme Court affirmed saying that the court's order of denial ". . . derives support from the fact that no notice was given to the defendants who were entitled to the information of the intended motion, while the company, which really had no interest in the matter until served with summons, did have such notice." *Id.* at 136.

In *Collins v. Highway Commission,* 237 N.C. 277, 74 S.E. 2d 709 (1953), Justice Ervin discussed in detail requirement of notice of motions. Pertinent to the question before us is the following portion of that discussion:

> "Parties to civil actions or special proceedings are not bound to take notice of motions which are made out of term; and hence, except as to a motion grantable as a matter of course or a motion otherwise specially provided for by statute, notice of a motion made out of term must be given to an adversary party. (Citations omitted.) The Clerk of the Superior Court holds no terms of court. In consequence, all motions made before the Clerk other than those grantable as a matter of course or those otherwise specially provided for by law must be on notice. (Citation omitted.). . . ." "A practical criterion for determining when an adverse party is entitled to notice of a motion made out of term is furnished by a New York court. 'The true test as to necessity of notice of motion in a case not specially provided for, is . . . as follows: "If upon the particular facts presented the applicant is entitled to the precise order applied for as a matter of strict right, and the adversary party is powerless to oppose, the order may be granted *ex parte,*

even though it might be better practice to require notice to be given. But if the adverse party appears for any reason to be entitled to be heard in opposition to the whole or any part of the relief sought, the application must be made on notice to such adverse party." ' *Shaw v. Coleman,* 54 N.Y. Super. 3, 3 N.Y.St. 534." *Id.* at 282-283.

Here, Golden Eagle was entitled to notice of the motion to bring in a new party defendant. Notice was not given. Golden Eagle moved to set aside the order. The trial court's conclusion that Golden Eagle "was entitled to notice and a hearing with respect to the orders allowing the plaintiff to amend its (sic) complaint and to add an additional party defendant, and the signing of such orders without such notice and hearing is improper" is without error.

Alternatively, plaintiff contends that Golden Eagle had notice of plaintiff's intention to join Pen and Pencil and that the Superior Court erred in not so finding. Specifically, plaintiff avers that Golden Eagle must have known that Pen and Pencil would be joined since it was through Golden Eagle's own answers to plaintiff's interrogatories that plaintiff first learned of Pen and Pencil's alleged role in the altercation. Again, we must reject plaintiff's argument. There is no reason to believe that Golden Eagle would know or should have known that in view of its answers to interrogatories filed on 5 April 1974 and 3 May 1974 the plaintiff would move for joinder of Pen and Pencil on 16 December 1974.

[2] Finally, plaintiff avers that any lack of notice to Golden Eagle must be considered harmless. Again, we reject plaintiff's contention. The right to notice and an opportunity to be heard on motions filed in a lawsuit is critically important to the non-movant and cannot be considered an insubstantial or inconsequential omission on the part of the movant and the court. The non-movant " ' . . . has a right to resist the relief sought by the motion and principles of natural justice demand that his rights not be affected without an opportunity to be heard. . . . ' " *Hagins v. Redevelopment Comm.,* 275 N.C. 90, 101, 165 S.E. 2d 490 (1969), quoting from 60 C.J.S. Motions and Orders, § 15 (1949).

We do not reach the question of whether the Assistant Clerk exceeded his authority. Suffice it to say that we are of the opinion that Golden Eagle correctly moved in the Superior Court for vacation of the order.

Plaintiff further argues that as to Pen and Pencil's motion to strike and to vacate, the court's conclusions of law and the judgment entered are inconsistent. We disagree. The court concluded, and properly so, that Pen and Pencil was not entitled to notice and a hearing with respect to the orders allowing plaintiff to amend her complaint and to add an additional party. Obviously, it is not necessary to notify a party that he is about to be sued. The summons and complaint are adequate notice. The court then allowed Pen and Pencil's motion to strike and to dismiss the amended complaint. Clearly, if the order allowing the amendment and adding Pen and Pencil as a party defendant is void for lack of notice to Golden Eagle, it is void for all purposes.

Affirmed.

Judges HEDRICK and ARNOLD concur.

BOARD OF TRANSPORTATION, SUBSTITUTE PLAINTIFF v. HUBERT C. WILDER AND WIFE, JEANETTE P. WILDER, DEFENDANTS

No. 759SC654

(Filed 17 December 1975)

1. **Trial § 10— remarks by court to defendants' counsel — discrediting counsel — error**

Two sharp remarks by the trial court to defendants' counsel, together with unjustified remarks which amounted to a threat to find defendants' counsel in contempt of court, tended to discredit defendants' counsel, and hence their cause, in the eyes of the jury. G.S. 1A-1, Rule 51(a).

2. **Rules of Civil Procedure § 51; Trial § 36— jury instructions — defense counsel's argument discredited — error**

The trial court discredited the argument of defendants' counsel to the jury when the court instructed the jury, "Lawyers are permitted to argue to you what they believe the evidence means, but they don't testify. They don't themselves know anything about the matter. They are representing clients."

3. **Rules of Civil Procedure § 51; Trial § 36— jury instructions — expression of opinion**

In an action to condemn and appropriate for public highway purposes certain lands belonging to defendants, the trial court improperly expressed an opinion when he instructed the jury concerning imaginative or speculative value.

APPEAL by defendants from *Bailey, Judge.* Judgment entered 3 March 1975 in Superior Court, FRANKLIN County. Heard in the Court of Appeals 17 November 1975.

Plaintiff, or its predecessor, instituted this action to condemn and appropriate for public highway purposes certain lands belonging to defendants. The only issue at trial related to the value of the property taken, and the evidence tended to show:

On the date of taking, 4 October 1971, defendants owned approximately 449 acres of land situated on both sides of N. C. Highway No. 56, some 12 miles east of Louisburg, N. C. Defendants resided in a house on their land and near their home a rural paved road intersected the western side of Highway 56. In 1968, defendants acquired a small tract of land located in the southwest intersection of the two roads on which tract was situate a store building. The taking by plaintiff consisted of increasing the right-of-way of Highway 56 from 60 feet to 120 feet—an additional 30 feet on each side of the original right-of-way. This resulted in defendants' losing approximately five acres of land upon which were five or six tobacco barns and other buildings, a considerable amount of fencing, and numerous decorative trees and shrubs. The taking also resulted in substantial reduction of access from the public roads to the store building.

Plaintiff presented evidence tending to show that defendants' damage was not more than $11,000. Defendants presented evidence tending to show that their damage was between $37,797 and $100,000.

The jury returned a verdict of $15,000 and from judgment predicated on the verdict, defendants appealed.

Attorney General Edmisten, by Assistant Attorney General William F. Briley, for the State.

Charles M. Davis and Hill Yarborough for defendant appellants.

BRITT, Judge.

[1] First, defendants contend that the trial judge committed prejudicial error in various remarks which he directed to their counsel in the presence of the jury. The contention has merit.

The remarks complained of were made during the course of Defense Attorney Yarborough's cross-examination of plaintiff's witness Willard King. The first of these was the directive for counsel to "quit interrupting him and let him answer your question." Shortly thereafter the court admonished counsel: "Let's don't go speculating and don't argue with me either." Two pages later, the record reveals the following:

> Q. They were nice looking ornamental cedar trees in addition to being fence post trees?
>
> MR. BRILEY: OBJECTION to the technology of that question.
>
> THE COURT: SUSTAINED.
>
> The defendants Except.
>
> EXCEPTION No. 7.
>
> MR. YARBOROUGH: I think (thought) it was cross examination. Didn't they have some ornamental value?
>
> THE COURT: About two remarks like that, you are going to have more trouble than you have in your life.
>
> EXCEPTION No. 8.
>
> MR. YARBOROUGH: I don't remember what I said. If I'm wrong, I apologize.
>
> THE COURT: You think it over and don't say it again.
>
> EXCEPTION No. 9.

Appropriate at this point is the following statement by Justice Huskins in *State v. Frazier,* 278 N.C. 458, 460, 180 S.E. 2d 128, 130 (1971): "At the outset we are faced with the fact that oftentimes the printed word does not capture the emphasis and the nuances that may be conveyed by tone of voice, inflection, or facial expression. . . . Hence we can only read the record and adjudge by reason and deduction whether the remarks assigned as error were so disparaging in their effect that they could reasonably be said to have prejudiced the defendant." (Citations.)

While written in a criminal case, we think the following from Justice (now Chief Justice) Sharp's opinion in *State v.*

Lynch, 279 N.C. 1, 10, 181 S.E. 2d 561, 567 (1971), is pertinent to this appeal:

> In this day of congested criminal dockets and overcrowded calendars, a lawyer's objections and exceptions frequently harass the judge. However, it is a lawyer's duty to represent his client. *State v. Mansell,* 192 N.C. 20, 133 S.E. 190. In doing so he is required "to present everything admissible that favors his client and to scrutinize by cross-examination everything unfavorable. The inevitable result is that the lawyer usually feels that he is unfairly prodded by the judge, while the judge feels the lawyer obstinately drags his feet." Annot., 62 A.L.R. 2d 166, 237 (1958). This conflict tests the mettle of both as officers of the court. The trial judge, who occupies "an exalted position," must abstain from conduct or language which tends to discredit the defendant or his cause in the eyes of the jury. *State v. Carter, supra; Withers v. Lane,* 144 N.C. 184, 56 S.E. 855. An attorney must, upon all occasions, manifest "a marked respect for the court in which he practices, and for the judge thereof. . . . In return, he is entitled to similar treatment from the trial judge, and most certainly to the extent that the interest of his clients will not be prejudiced." *Dennison v. State,* 17 Ala. App. 674, 676, 88 So. 211, 213.

The effect of the above quoted remarks by the trial judge was to threaten to find defendants' counsel in contempt of court. From the record before us, we are unable to determine that the threat was justified. Closely following as it did two other sharp remarks by the court to defendants' counsel, we think the statements tended to discredit defendants' counsel, and hence their cause, in the eyes of the jury in violation of G.S. 1A-1, Rule 51(a).

Defendants contend the court committed numerous errors in its instructions to the jury. We will discuss only two of those challenged.

[2] With respect to consideration of the evidence, the court's instructions included the following:

> "While I am on the subject, Ladies and gentlemen, the law of this State requires that you decide this case on the basis of the evidence; argument of counsel is not evidence. (Lawyers are permitted to argue to you what they believe the evidence means, but they don't testify.

They don't themselves know anything about the matter. They are representing clients.)"

Defendants except to the portion indicated by parenthesis.

Defendants contend that the quoted instruction had the effect of discrediting their counsel's argument to the jury. In view of the sharp exchanges between the court and defendants' counsel during the presentation of evidence, we think the contention has merit. It is a basic right of a litigant to have his counsel argue his case to the jury on questions of law and of fact. G.S. 84-14; *Brown v. Vestal,* 231 N.C. 56, 55 S.E. 2d 797 (1949). "Frequently it is necessary for them to do so in order to present, in an intelligent manner, the facts they contend the jury should find from the evidence offered." *Brown v. Vestal, supra,* at p. 58, 55 S.E. 2d at 798; *Sears, Roebuck and Company v. Banking Company,* 191 N.C. 500, 132 S.E. 468 (1926). While it is true that usually lawyers do not testify in cases in which they appear as counsel, it is not accurate to say that "they don't themselves know anything about the matter."

[3] Defendants assign as error the following instruction:

"Purely imaginative or speculative value should not be considered. It is not for you to guess that Louisburg will grow twelve miles in that direction, and that General Motors will put a major plant on that property. It is purely imaginative and speculative.

"Anyhow, we are going to get that plant in Raleigh."

The court erred in giving this instruction. In the first place, we are unable to find in the record any evidence tending to show that Louisburg is or is not expected to grow to the extent that it will encompass the land in question, or that the property was under consideration as a site for a major industry or that the industry would locate in Raleigh.

In the second place, we think the instruction expressed an opinion by the court. "It is well recognized in this jurisdiction that a litigant has a right by law to have his cause tried before an impartial judge without any expressions from the trial judge which would intimate an opinion by him as to weight, importance or effect of the evidence. . . ." *Kanoy v. Hinshaw,* 273 N.C. 418, 426, 160 S.E. 2d 296, 302 (1968). "The slightest intimation from the judge as to the weight, importance or effect of the evidence has great weight with the jury, and,

therefore, we must be careful to see that neither party is unduly prejudiced by any expression from the bench which is likely to prevent a fair and impartial trial. . . ." *Upchurch v. Funeral Home,* 263 N.C. 560, 567, 140 S.E. 2d 17, 22 (1965).

We now face the question whether the errors committed by the trial judge were sufficiently prejudicial to defendants to entitle them to a new trial. While any one of the errors might not warrant a new trial, when we consider the combination of them, we think defendants were substantially prejudiced, whereupon, we order a

New trial.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. CECIL VAN ROGERS

No. 753SC443

(Filed 17 December 1975)

1. **Narcotics §§ 1, 2— transportation of narcotics — allegations treated as surplusage**

Since 1 January 1972 the transportation of a controlled substance is not a separate substantive criminal offense; therefore, where an indictment alleged that defendant feloniously possessed heroin and that he "did transport said substance," the allegations concerning transportation will be treated as surplusage and the indictment will be treated as one for possession of heroin.

2. **Narcotics § 4— possession of heroin found in car**

The State's evidence was sufficient for the jury on the issue of defendant's guilt of possession of heroin where it tended to show that defendant was the driver and in control of a car in which heroin was found on the floorboard, and that one packet of heroin was found on the driver's side of the front seat where, immediately prior thereto, defendant had been sitting.

3. **Narcotics § 3— identity of substance — lay testimony**

In this prosecution for possession of heroin, the trial court did not commit prejudicial error in the admission of testimony by a deputy sheriff that from his examination of white powder found in five tinfoil packets, in his opinion the powder contained heroin, where the witness had testified that he had twenty-five hours of training in the identification of controlled substances, that he had three and a half years of experience in working with drugs on the street, and that he had examined heroin numerous times.

4. Narcotics § 4.5— instructions on transportation of heroin

The trial court erred in instructing the jury that if they found that defendant possessed heroin or knowingly transported heroin, it should return a verdict of guilty as charged, "either guilty of possession of heroin or guilty of transporting heroin or both," since transportation of a controlled substance was not a substantive criminal offense.

ON *writ of certiorari* to review proceedings before *Cowper, Judge.* Judgment entered 30 October 1974 in Superior Court, PITT County. Heard in the Court of Appeals 17 September 1975.

Defendant, Cecil Van Rogers, was tried on his plea of not guilty to an indictment which charged that on 15 July 1974 he

> "did feloniously possess a controlled substance, to wit: heroin, which is included in Schedule I of the North Carolina Controlled Substances Act, and did transport said substance in a 1967 Chevrolet station wagon, N. C. License CJJ-879, serial No. 164457T 182607."

The State's evidence showed the following. On 15 July 1974 Pitt County deputy sheriff Garrison and other officers received information concerning a disturbance at a local club. On arriving at the club, they were informed that four men involved in the trouble had left in a brown Chevrolet station wagon and that one of them had a hand gun. Shortly thereafter, at approximately 12:05 a.m., the officers observed a brown station wagon occupied by four men which fit the description given them. They stopped the station wagon and found defendant to be the driver and one Amos Henry Jordan sitting on the right hand or passenger side of the front seat. Jordan and defendant Rogers were the only persons in the front seat. The other two men were seated in the rear seat. There was no one in the immediate area where the car was stopped other than the occupants in the car. The deputy asked defendant Rogers for his driver's license, which Rogers did not have with him. The deputy then asked Rogers to step out of the vehicle, which he did, and the deputy informed Rogers that he had been stopped because the officers had received a complaint that someone in the vehicle had a hand gun. Rogers denied knowledge of any gun. The deputy then went around to the right hand side of the vehicle and asked Jordan to step out, which he did. When this occurred, the deputy shone his flashlight in the vehicle and saw a small tinfoil packet on the floorboard on the right hand side. The deputy picked up the packet and

found it contained a white powder. Further investigation revealed four more packets, each similar to the first and each containing white powder. One of these, like the first, was on the right hand floorboard of the car. Another was on the left hand floorboard in the front, on the driver's side and on the left of and at the bottom of the transmission hump. Two of the packets were on the ground immediately outside of the car next to the right hand door. On discovering the packets, the deputy placed defendant Rogers and Jordan under arrest for possession and transportation of heroin. The five packets were delivered to the S.B.I. chemist at Raleigh, who analyzed the contents of one of the packets and found it contained heroin.

Defendant Rogers testified that he did not have any heroin in his possession and that there was no tinfoil packet on the floor at the time he got out of the car. Rogers testified that it was his brother's automobile which he was driving, but admitted it was under his possession and control. Jordan testified that he did not have any tinfoil packages in his possession and when he got out of the car there were no tinfoil packages on the floorboard.

The jury found defendant Rogers guilty of possession of a controlled substance, to wit: heroin and transporting said substance in the 1967 Chevrolet station wagon. Judgment was entered sentencing defendant Rogers to prison for a term of two years and ordering the automobile confiscated. Defendant Rogers appealed.

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

Paul, Keenan, Rowan & Galloway by James V. Rowan for defendant appellant.

PARKER, Judge.

[1] Prior to 1972, G.S. 90-111.2(a)(1), made it unlawful to "[t]ransport, carry, or convey any narcotic drug in, upon or by means of any vehicle, vessel or aircraft." That statute was enacted by Ch. 909, Sec. 5, of the 1953 Session Laws, which also provided for forfeiture of any vehicle used to transport a narcotic drug. That statute was a part of Article 5 of the General Statutes. When that Article was rewritten by Ch. 919 of the 1971 Session Laws, which became effective on 1 January 1972, the provision making it unlawful to transport a narcotic

drug was omitted, though the provision relating to forfeitures of "vehicles, vessels, or aircraft" was continued in present G.S. 90-112(a)(4). Thus, since 1 January 1972 the transportation of a controlled substance is not a separate substantive criminal offense. The indictment in the present case contains allegations charging that defendant "did feloniously possess" the controlled substance heroin and that he "did transport said substance." The allegations concerning transportation may be treated as surplusage. We find the remaining allegations adequate to charge the offense of unlawful possession of heroin, which is a felony under G.S. 90-95(b). Accordingly, we shall treat this case as one in which defendant is charged with the single offense of felonious possession of heroin.

[2] Defendant assigns error to the denial of his motion for nonsuit, contending the evidence was insufficient to warrant a jury finding that he "possessed" any heroin in a legal sense. "[T]he State may overcome a motion to dismiss or motion for judgment as of nonsuit by presenting evidence which places the accused 'within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession.'" *State v. Harvey,* 281 N.C. 1, 12, 187 S.E. 2d 706, 714 (1972). The evidence in the present case shows that defendant was the driver and in control of the car and that heroin was found on the floorboard of the car. One packet was on the driver's side of the front seat where, immediately prior thereto, defendant had been sitting. We have found substantially similar evidence sufficient to withstand the motion for nonsuit in *State v. Wolfe,* 26 N.C. App. 464, 216 S.E. 2d 470 (1975), *cert. denied,* 288 N.C. 252, 217 S.E. 2d 677 (1975) and in *State v. Bagnard,* 24 N.C. App. 54, 210 S.E. 2d 93 (1974) *cert. denied,* 286 N.C. 416, 211 S.E. 2d 796 (1975). In the present case we also find no error in the denial of the motion for nonsuit.

[3] Defendant assigns error to the court's overruling his objection and allowing deputy sheriff Garrison to testify that from his examination of the white powder found in the five tinfoil packets, in his opinion the white powder contained heroin. The witness had previously testified that he had approximately twenty-five hours training in the identification of controlled substances, both through the S.B.I. and the Federal Government, that he had three and a half years experience "working with drugs on the street," and that he had examined

heroin "numerous times." He was not asked, either on direct or on cross-examination, as to what his "examination" of the white powder consisted of, or as to what tests, if any, he made in the course of that "examination." Had such questions been asked, it would be easier to evaluate the witness's qualification to testify to the opinion called for, and the jury could have assessed more accurately the weight which it might give to the opinion expressed. In any event, in view of the subsequent testimony of the S.B.I. chemist, we find no prejudicial error in the court's ruling in the present case.

[4] In its charge, the court instructed the jury that if they found the defendant Rogers possessed heroin or if they found "that he knowingly transported the substance heroin, it would be [their] duty to return a verdict of guilty as charged, either guilty of possession of heroin or guilty of transporting heroin or both." As above noted, transportation of a controlled substance was not a substantive criminal offense at the time alleged in the bill of indictment. It was error for the court to instruct the jury as though transportation, as such, was a separate offense. Moreover, the quoted portion of the charge, expressed as it is in alternatives, makes it impossible to know upon what basis the jury returned its verdict. For the error in the charge, defendant is entitled to a

New trial.

Judges BRITT and CLARK concur.

BOARD OF TRANSPORTATION v. EASTERN DEVELOPERS AND RENTALS, INC., TIMOTHY G. WARNER, TRUSTEE, AND WILEY PARKER FARMS, INC.

No. 7518SC661

(Filed 17 December 1975)

1. Eminent Domain § 7— reference to access — stipulation — necessity for instruction

The trial court in a condemnation proceeding did not err in failing to instruct the jury *ex mero motu* to disregard the opening statement of counsel for the condemnor regarding access to a portion of the landowner's remaining property after the parties stipulated during trial that no reference would be made to such access.

2. **Eminent Domain § 6— sales price of nearby land — unresponsive testimony**

The trial court in a condemnation proceeding did not err in the exclusion of a witness's unresponsive answer regarding the sales price of a nearby tract.

3. **Eminent Domain § 6— sales price of nearby land — limited admissibility — necessity for instruction**

The trial court in a condemnation proceeding was not required to explain the limited admissibility of testimony as to the sales price of a nearby tract where no objection was made to the testimony.

4. **Eminent Domain § 6— limiting number of value witnesses**

In this condemnation proceeding, the landowner was not prejudiced when the trial court permitted only three value witnesses to testify for the landowner where the record does not show what a fourth value witness would have said if permitted to testify.

5. **Eminent Domain § 6— qualification of value expert**

The evidence in a condemnation proceeding supported the trial court's determination that a witness for the condemnor could testify as an expert on value.

APPEAL by defendant from *Collier, Judge.* Judgment entered 24 March 1975 in Superior Court, GUILFORD County. Heard in the Court of Appeals 18 November 1975.

The North Carolina Board of Transportation instituted this action for the condemnation of property owned by the Eastern Developers and Rentals, Inc. Prior to the taking defendants owned a tract of land containing 153.34 acres. The property condemned by the Board of Transportation consisted of an area containing 40.16 acres which ran through the eastern portion of defendant's property in a north-south direction. Defendant was left with two parcels of land on each side of the condemned property. The west parcel contained 99.41 acres and the east parcel contained 13.77 acres. Duke Power Company and Piedmont Gas Company had previously acquired easements of 4.83 acres on the northeast corner of defendant's property.

The case was tried solely on the issue of damages. The defendant presented four witnesses to testify to the extent of damages. Their testimony ranged from $307,246 to $694,000. The State Board of Transportation offered three estimates of damages ranging from $138,300 to $159,000.

The jury returned a verdict of $182,000 for the defendant. From the judgment, defendant appealed to this Court.

Attorney General Edmisten, by Assistant Attorney General H. A. Cole, Jr., for plaintiff appellee.

Comer, Dailey and Ling, by John F. Comer, for defendant appellant.

ARNOLD, Judge.

[1] Defendant contends that the trial court committed prejudicial error in failing to instruct the jury ex mero motu to disregard all statements of counsel for the Board of Transportation regarding the access point on the east side of the property. In his opening statement to the jury the Board of Transportation's attorney, while exhibiting a map (Exhibit A) of the controverted property to the jury, stated that the parties had stipulated that the defendant's remaining eastern tract of land would be "landlocked" (i.e. without access) after the taking. The jury was then sent out and a voir dire hearing was held on the issue of whether defendant would have access to the eastern tract. The court found that the defendant had access to the eastern tract but it had been appropriated by the taking. The trial court afforded the parties' experts on value the opportunity to reappraise the property since their original appraisals were made without considering that the eastern tract was accessible. Nevertheless, the parties chose to continue the trial without delay, stipulating "that no witness nor any attorney would make reference to the existence or non-existence of any access point on the east side of this property, either in the testimony of the witness, examination of any witness or argument to the jury." The jury returned and the trial proceeded without any instructions by the trial judge regarding the Board of Transportation's attorney's opening remarks.

We find no error in the failure of the court to instruct the jury to disregard the opening statement by plaintiff's attorney. It was stipulated that the map (Exhibit A) was a correct representation of the property, and it shows no access to the eastern tract. Moreover, any error in plaintiff's opening statement appears favorable to defendant since the statement that a portion of the land would be left without access after the taking would tend to increase defendant's damages rather than prejudice him.

[2] Defendant next contends that the trial court erred in its rulings regarding the exclusion of the landowner's witness's

testimony concerning prior specific sales prices. The testimony was as follows:

> MR. COLE [Attorney for the Board of Transportation]: You indicated you considered some twelve or so. Would you give me—for instance, give me a piece of property that you considered?
>
> A. The Ward property, it sold for $3,000 an acre back in 1968.
>
> Q. I asked you what you considered.
>
> A. I said the Ward property. It's a sale in 1968.
>
> THE COURT: It is improper to mention figures of other sales. That is not admissible before the jury. Don't consider any statement by the witness about any figure.

Defendant argues that the trial court erroneously excluded the testimony citing *Barnes v. Highway Comm.*, 250 N.C. 378, 109 S.E. 2d 219 (1959), as authority for the principle that a witness may be cross-examined regarding sales prices of nearby property to test the witness's knowledge. The witness was not being cross-examined regarding sales prices, but he was asked to state which properties were comparable to the property of the defendant. The trial judge did not err in excluding the witness's unresponsive answer.

[3] Plaintiff's attorney later, on cross-examination, asked defendant's witness how much the "Bundy tract" sold for, and, without objection, the witness answered $2,000 an acre. Defendant concedes that this was permissible cross-examination, but contends it was error for the court not to have explained the limited admissibility of the evidence.

In *Templeton v. Highway Commission,* 254 N.C. 337, 118 S.E. 2d 918 (1961), our Supreme Court said that "a value witness may be cross-examined with respect to sales prices of nearby property to test his knowledge of values. . . ." Since no objection was made by the defendant the court was not required to explain the limited admissibility of the evidence. *Cogdill v. Highway Comm.* and *Westfeldt v. Highway Comm.*, 279 N.C. 313, 182 S.E. 2d 373 (1971).

[4] At the conclusion of the testimony of two value witnesses and the chief executive officer of the defendant, the trial judge informed the landowner's attorney that only one additional

value witness would be allowed. Defendant asserts that it was error for the court to deny his motion to allow the testimony of an additional expert value witness. The trial judge stated that it was "his practice to limit either side to three value witnesses." Landowner's counsel replied that there was a signed and approved pretrial order providing for three value witnesses for the State, four value witnesses and the landowner (or chief executive) for the landowner. The trial judge reiterated that he thought three experts would be adequate. Counsel for the landowner made no attempt to offer his fourth value witness's testimony to be preserved for the record on appeal.

The North Carolina courts recognize that it is within the discretion of the trial judge to limit the number of expert witnesses. *State v. Wright,* 274 N.C. 380, 163 S.E. 2d 897 (1968). However, the trial judge is obligated to exercise his discretion reasonably and not arbitrarily. In this case we cannot say that defendant was prejudiced by the judge's limiting the number of value witnesses since the record does not show what the witness would have said if permitted to testify. *State v. Forehand,* 17 N.C. App. 287, 194 S.E. 2d 157 (1973).

[5] Finally, defendant contends that the trial court erred in allowing the Board of Transportation's witness Terry W. Caudle to testify as an expert value witness. We disagree. A witness's competency to testify as an expert is addressed primarily to the sound discretion of the trial court and its determination is ordinarily conclusive unless there is no evidence to support the finding or unless there is an abuse of discretion. *State v. Woods,* 286 N.C. 612, 213 S.E. 2d 214 (1975). There was more than sufficient evidence to support the court's determination that Caudle could testify as an expert and we can find no abuse of discretion.

Defendant's remaining assignment of error has been carefully reviewed and we can find no error.

No error.

Judges PARKER and HEDRICK concur.

CHARLES A. GRUPEN, EMPLOYEE v. THOMASVILLE FURNITURE INDUSTRIES, EMPLOYER, AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, CARRIER

No. 7518IC700

(Filed 17 December 1975)

1. **Rules of Civil Procedure § 60; Trial § 49— newly discovered evidence — medical examination**

An additional medical examination is not newly discovered evidence within the meaning of G.S. 1A-1, Rule 60(b).

2. **Rules of Civil Procedure § 60; Trial § 49— new trial for newly discovered evidence — time for motion**

A motion for a new trial on the ground of newly discovered evidence was properly denied where it was not made within the one year limitation provided in G.S. 1A-1, Rule 60(b).

APPEAL by plaintiff from an order of the North Carolina Industrial Commission entered 23 May 1975. Heard in the Court of Appeals 21 November 1975.

Plaintiff employee suffered a compensable injury on 17 September 1970 for which he received payments for temporary total disability and 20% permanent partial disability of the left arm. He received benefit payments until 20 December 1971. Plaintiff subsequently sought additional benefits alleging that he was experiencing dizzy spells. Pursuant to plaintiff's request, on 27 January 1972, a hearing was held before Deputy Commissioner Roney who concluded that plaintiff had not shown a loss of earning capacity, or a permanent partial disability beyond that for which he had already been compensated. Plaintiff's claim for additional benefits was denied.

On 10 January 1973, alleging a change in condition, plaintiff made a second request for a hearing. A hearing was held on 30 April 1973 and plaintiff reasserted his complaints of dizziness. Deputy Commissioner Dandelake concluded that there was no evidence of disability beyond that for which plaintiff had already been paid compensation, and plaintiff's claim for additional compensation was denied. Plaintiff appealed to the Full Commission. Deputy Commissioner Dandelake's findings of fact and conclusion of law affirming the prior opinion and award were adopted by the Full Commission.

From the Full Commission plaintiff appealed to this Court. However, upon the failure of the plaintiff to perfect his appeal,

the appeal was dismissed on 7 February 1975. On that same day, plaintiff filed a motion with the Industrial Commission requesting a rehearing on the ground of newly discovered evidence of permanent impairment of the cerebellum. This motion was based on an affidavit of Dr. Palmer, a neurologist and psychiatrist, concerning his examination of plaintiff on 27 January 1975. A full hearing was held and plaintiff's motion was denied. The Commission held that plaintiff failed to move for rehearing within the one-year limitation provision provided in G.S. 1A-1, Rule 60(b). The Commission further concluded that plaintiff failed to show that his evidence would entitle him to a different result.

From the opinion and award of the Commission denying plaintiff's motion, he appealed to this Court.

Harold I. Spainhour for plaintiff appellant.

Smith, Moore, Smith, Schell and Hunter, by J. Donald Cowan, Jr., for defendant appellees.

ARNOLD, Judge.

The basis for plaintiff's motion for rehearing is G.S. 1A-1, Rule 60(b) which provides that a court may relieve a party from a final judgment on the basis of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." (See Rule XX, 6, of the Rules of the North Carolina Industrial Commission.) A motion for further hearing on the grounds of introducing newly discovered evidence rests in the sound discretion of the Industrial Commission. *Mason v. Highway Commission,* 273 N.C. 36, 159 S.E. 2d 574 (1968); *Owens v. Mineral Co.,* 10 N.C. App. 84, 177 S.E. 2d 775 (1970).

Plaintiff's new evidence is Dr. Palmer's opinion that plaintiff's injury is permanent. Plaintiff contends that the type of injury to the brain involved in his case sometimes is of a varying duration and can be permanent if it persists long enough. He argues that a doctor cannot be expected to make a determination of permanency until a certain length of time is given to allow the condition to run its course.

[1] Defendant argues that another medical examination (by Dr. Palmer) is not "newly discovered evidence" within the meaning of G.S. 1A-1, Rule 60(b). We agree with this contention.

In *Harris v. Construction Company,* 10 N.C. App. 413, 179 S.E. 2d 148 (1971), the employee was examined by a physician a month following the hearing by the deputy commissioner. It was held that evidence of the result of the examination was not newly discovered evidence.

This Court, in *Harris v. Construction Company, supra,* cited *Ryan v. United States Lines Company,* 303 F. 2d 430 (2d Cir. 1962), where it was held that the results of a new physical examination was not "newly discovered evidence" which would allow reopening a judgment and granting a new trial under Rule 60(b) of the Federal Rules of Civil Procedure.

In the case of *Campbell v. American Foreign S. S. Corporation,* 116 F. 2d 926 (2d Cir. 1941), an employer moved for a new trial based on affidavits showing that subsequent to trial an injured seaman had been continuously employed. It was held that this did not constitute "newly discovered evidence" because it was not evidence of facts existing at the time of the trial.

We hold that evidence presented by Dr. Palmer's affidavit is not "newly discovered evidence" within the meaning of G.S. 1A-1, Rule 60(b). "If it were ground for a new trial that facts occurring subsequent to the trial have shown that the expert witnesses made an inaccurate prophecy of the prospective disability of the plaintiff, the litigation would never come to an end." *Campbell v. American Foreign S. S. Corporation, supra,* at 928.

[2] Even if plaintiff had presented "newly discovered evidence" the Commission correctly held that plaintiff had not moved for relief within one year as required by G.S. 1A-1, Rule 60(b). The Commission concluded that the one-year period began to run from Deputy Commissioner Dandelake's 31 May 1973 order.

Furthermore, we cannot say that plaintiff has exercised "due diligence" in pursuing his action. Plaintiff had two hearings before deputy commissioners concerning his change in condition, and he was also given an opportunity, prior to his scheduled hearing before the Full Commission, to develop his case. The Industrial Commission allowed plaintiff sufficient opportunity to develop his medical evidence and did not abuse its discretion in denying plaintiff's motion for rehearing on the basis of newly discovered evidence.

The opinion and award of the Commission granting the motion to dismiss plaintiff's petition for rehearing is affirmed.

Affirmed.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. TOMMIE LEE HARRIS

No. 7512SC631

(Filed 17 December 1975)

1. **Criminal Law § 118— instructions — equal emphasis to defendant's evidence**

The trial court did not fail to give equal emphasis to defendant's evidence when it summarized the evidence of each of the State's witnesses but did not summarize the evidence of each defense witness where the court fairly summarized the evidence presented by defendant.

2. **Criminal Law § 113— instructions on alibi**

The trial court in an armed robbery case correctly instructed the jury on the law of alibi and properly applied the law to defendant's evidence.

APPEAL by defendant from *Hobgood, Judge.* Judgments entered 28 February 1975 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 12 November 1975.

Defendant was charged with two counts of armed robbery. The State's evidence tends to show that defendant and two others entered Walter Guy Jewelers, tied up Walter Guy and Mary Howell, an employee, and robbed them at gunpoint of property worth $75,000.

A witness saw a group of men run from the jewelry store carrying a pillow case, enter a green car with a dark top and speed away. Defendant's fingerprints were found on a green car with a black top in which was found various items of stolen jewelry.

Both Walter Guy and Mary Howell identified defendant as one of the men who robbed them.

Evidence for the State further tends to show that defendant and his companions approached Gasford and Mamie Kayouk-

luk in the backyard of the Kayoukluk's home, took Mamie Kayoukluk's pocketbook containing $300, and then drove off with the Kayoukluk's car. Both Mr. and Mrs. Kayoukluk testified that defendant held a gun on them while the other two stole their money and car.

Defendant offered the testimony of an assistant public defender who testified that Walter Guy's identification of defendant at a lineup was uncertain, and that both Guy and Mary Howell had an opportunity to observe defendant in the courtroom during preliminary hearing.

Rev. Charles Kirk testified that defendant was with him during the time of the robberies, and four other witnesses stated that they saw defendant with Rev. Kirk during the time period in question. Defendant also testified that he was with Rev. Kirk during the time of the robberies.

From verdicts of guilty in both cases and judgments imposing prison sentences defendant appealed to this Court.

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

Doran J. Berry for defendant appellant.

ARNOLD, Judge.

[1] Defendant contends that the trial court failed to give equal emphasis to his evidence and contentions. We disagree.

In support of his contention defendant argues that the court summarized the evidence of each of the State's witnesses but did not summarize the evidence of each defense witness. The court fairly summarized defendant's evidence and we fail to see that unequal emphasis was given defendant's evidence because the testimony of each individual witness was not summarized in detail.

The equal stress which is required to be given to the contentions of the State and the defendant does not mean that the statement of the contentions of each must be equal in length. *State v. King,* 256 N.C. 236, 123 S.E. 2d 486 (1962).

In *State v. King, supra,* the defendant's contentions as stated by the court were in general, brief terms of only three sentences, and not based on defendant's evidence at all. The

State correctly distinguishes *State v. King, supra,* from the case at bar where defendant's contention of alibi was adequately and specifically stated and based upon defendant's evidence.

[2] Defendant testified that he was somewhere else at the time of the robberies. His witnesses testified in support of his alibi. It is argued by defendant that the judge's charge did not apply the law to his evidence. The court charged, relating to alibi, as follows:

> "Now, Members of the Jury, the defendant has offered evidence of several witnesses in his defense in that he has offered evidence of several witnesses by way of an alibi. And I will now instruct you in reference to that. He contends that he is not guilty. And he further contends and has offered evidence that he was in another series of places right before and during the time of and right after the alleged robbery which was alleged to have taken place at the Guy Jewelers, Inc., and the alleged robbery of the car which was alleged to take place at Mr. and Mrs. Kayoukluk's home. Now this type of evidence is what is known as an alibi. The word alibi simply means somewhere else, and he was somewhere else and therefore he could not be guilty. . . . The burden of proof with the alibi does not rest upon the defendant. To establish the defendant's guilt, the State must prove beyond a reasonable doubt that the defendant was present at and participated in these armed robberies, or either one, as you might find the case to be."

After reviewing defendant's evidence which tended to show alibi, and stating defendant's contention, the court correctly instructed the jury on the law of alibi and applied the law to defendant's evidence so that the jury could clearly understand its significance in this case. *State v. Lovedahl,* 2. N.C. App. 513, 163 S.E. 2d 413 (1968).

In addition to the already quoted portion of its charge the court pointed out that defendant's "defense is that he was not there. He has never been to the Westwood Shopping Center, never been to Mrs. Kayoukluk's yard, that he's never stole any jewelry on any occasion and specifically the 2nd of October, from Guy's Jewelers, Inc., at Westwood Shopping Center, and he has not from Mrs. Kayoukluk's yard, by armed robbery, taken this car, simply because he was not there. He knows nothing about it and he was elsewhere, and his contention is

that he has shown that fact to you from the evidence of his witnesses."

A review of the entire charge indicates that the court properly applied the law to defendant's evidence and gave equal emphasis to his evidence and contentions.

We can find no prejudicial error in the trial.

No error.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. JIMMY LAWRENCE McNEIL AND ROBERT ATKINS

No. 7510SC487

(Filed 17 December 1975)

1. **Indictment and Warrant § 17— breaking and entering indictment — house used as dwelling — no variance with proof**

There was no fatal variance between the indictment and the proof in a breaking and entering case where both indictment and proof indicated the location of a house which was broken and entered and whose custody and control rested in J. M. Chambers, and the statement in the indictment that the house was used as a dwelling house was surplusage.

2. **Criminal Law § 162— motion to strike testimony — lack of specificity**

Where defendants failed to single out the objectionable statement in the trial court's instruction following defendant's objection to testimony, and defendants did not make that alone the subject matter of their motion to strike, defendants cannot complain that the court struck the wrong testimony.

APPEAL by defendants from *Chess, Judge.* Judgment entered 14 March 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 24 September 1975.

Defendants were tried on indictments charging each of them with felonious breaking or entering.

Evidence for the State tended to show that Mr. Chambers resided at Route 10, Raleigh on 18 October 1973; that on that date someone tore down the doors to the house he was renting, went in and took certain items of furniture of the approximate

value of between $2,000 and $3,000. Mr. Chambers was not living in the house that was broken into and the address of the house he was living in was Route 10, Raleigh.

Anna Faison Lyons, a State's witness, testified that she was on probation for breaking and entering Chambers' house at Route 10, on the 18th of October 1973 across from Holding Technical Institute. She stated that she had discovered the house with the furniture in it at an earlier time. She and her boyfriend later stole several items and she told the defendants McNeil and Atkins about the house. She and the two defendants went to the house and she saw the two defendants inside taking a vacuum cleaner and some blankets. She denied that she received probation in return for her plea of guilty and said that although she was placed on probation she entered her plea without receiving any promise as to punishment.

Defendants offered no evidence.

From a verdict of guilty of felonious breaking or entering as to each defendant and judgment of imprisonment pronounced thereon, the defendants appealed.

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

Joyner and Howison, by Odes L. Stroupe, Jr., for defendant appellant Jimmy Lawrence McNeil.

Howard P. Satisky, for defendant appellant Robert Atkins.

MARTIN, Judge.

[1] Defendants' first assignment of error is directed at the denial of their motions for nonsuit based on an alleged fatal variance between the evidence and the bills of indictment.

The indictments of each defendant charge breaking and entering a "building occupied by J. M. Chambers used as a dwelling house located at Route 10, Box 257A, Raleigh, North Carolina." G.S. 14-54 provides that "any person who breaks or enters any building with intent to commit any felony or larceny therein is guilty of a felony and is punishable under G.S. 14-2." The statute defines "building" as "dwelling, dwelling house, uninhabited house . . . and any other structure designed to house or secure within it any activity or property."

Thus, the indictment would, in this pertinent part have been sufficient if it had stated "building occupied by J. M. Chambers located at Route 10, Box 257A, Raleigh, North Carolina." *State v. Davis,* 282 N.C. 107, 191 S.E. 2d 664 (1972).

Additional allegations of the indictment are surplusage.

Defendants' contention that it is the "uncontradicted evidence" of the State that the building broken into was not located at the address stated in the indictment ignores the testimony of Anna Faison Lyons. Without objection, she testified "[a]s to whether or not I did break into Mr. Chambers' house at Route 10 on the 18th of October, 1973, across from Holding Technical Institute, yes, I did." Her subsequent testimony and the prior evidence of Mr. Chambers clearly identify the building involved and distinguish it from the personal residence of Mr. Chambers.

The cases of *State v. Brown,* 263 N.C. 786, 140 S.E. 2d 413 (1965); *State v. Miller,* 271 N.C. 646, 157 S.E. 2d 335 (1967); and *State v. Watson,* 272 N.C. 526, 158 S.E. 2d 334 (1968), relied upon by the defendants are distinguishable. In each case, corporations were involved in the variance between indictment and proof. In this case, there is no question that the custody and control of the building involved was vested in J. M. Chambers as set forth in the indictment. We hold that there is no fatal variance between the indictment and the evidence. This assignment of error is overruled.

[2] The defendants' second assignment of error is that "The court committed prejudicial error during the course of the trial by improperly expressing an opinion with regard to an objection made by defendant." This assignment of error is based on defendants' exception number 1 which was taken during direct examination of State's witness James M. Chambers and when the following occurred:

> "My name is James M. Chambers. As of the 18th of October, 1973, I was living out on—known as Old Smithfield Road, RF 10 out of Raleigh. Route 10, near Holding Technical Institute. As to what sort of premises I was living in, I was living in my house. As to how long I had been living in that house, as of the 18th of October, oh, about a little over two and a half years. Now, I was not living in the house that was broken into.
>
> Mr. Satisky: Objection.

Mr. Stroupe: Objection and motion to strike.

The Court: Members of the jury, disregard the testimony of the witness to the fact that he was not living in the house that was broken into.

EXCEPTION NO. 1."

Defendants say they were objecting and moving to strike the response of the witness because it assumed that a house was "broken into." They argue that the judge should have instructed the jury to disregard the implication by the witness that the house was in fact broken into but instead instructed the jury in such a manner that this implication was reinforced. Thus, they say, the court expressed an opinion on the evidence in violation of G.S. 1-180.

Defendants did not specify what portion of the testimony they wanted stricken and the judge, quite reasonably, struck the sentence immediately preceding the objection that contained the offensive testimony.

For failure of the defendants to single out the objectionable statement and make that alone the subject matter of their motion, the court could have properly overruled the objection. The court's action in striking the last full sentence of the witness's testimony appears reasonable under the circumstances. This assignment of error is overruled.

We have carefully examined all of defendants' remaining assignments of error and find no prejudicial error such as would warrant the granting of a new trial.

Accordingly, in the trial and judgments appealed from we find

No error.

Chief Judge BROCK and Judge VAUGHN concur.

ALEXANDER B. DENSON, GUARDIAN AD LITEM FOR TERRY GLEN STEWART, MINOR; LUCILLE RICE, GUARDIAN AD LITEM FOR ROBIN GAIL STEWART, MINOR; GUY ANTHONY STEWART, SON; PAULINE JOHNSON STEWART, WIFE; ANNA LOUISE HATCHETT STEWART, WIFE; LOLA LOUISE GILMORE, ALLEGED DEPENDENT OF JAMES D. STEWART, DECEASED, EMPLOYEE v. C. R. FISH GRADING CO., INC., EMPLOYER; U. S. FIDELITY & GUARANTY CO., CARRIER

No. 7510IC619

(Filed 17 December 1975)

1. **Marriage § 2— second marriage — presumption of validity**

When two marriages of the same person are shown, the second marriage is presumed to be valid, and a person who attacks the second marriage has the burden of showing its invalidity.

2. **Marriage § 2; Master and Servant § 79— workmen's compensation — widow's benefits — validity of second marriage**

In this workmen's compensation proceeding, the Industrial Commission did not err in finding that deceased employee's first wife had failed to overcome the presumption of the validity of deceased's second marriage where the first wife testified only that she had not divorced deceased and had never had any notice of any divorce obtained by him, and there was no other attempt to prove there had been no divorce.

APPEAL by Pauline Johnson Stewart from opinion and award of the North Carolina Industrial Commission filed 28 April 1975. Heard in the Court of Appeals 12 November 1975.

This is a proceeding under the Workman's Compensation Act to determine to whom compensation benefits should be paid due to the death of James D. Stewart, the deceased employee, who died on 19 March 1974 as a result of injuries received that day by accident arising out of and in the course of his employment. Awards for the benefit of three minor children are not questioned on this appeal, and the sole question at issue is which of the two claimants, Pauline Johnson (Pauline) or Anna Hatchett (Anna), is entitled to receive benefits as widow of the deceased employee.

At the hearing before Commissioner William H. Stephenson, evidence was introduced to show the following:

James D. Stewart was married to Pauline 5 April 1942, and they lived together as man and wife until about the first of 1947, when they separated. Thereafter, James D. Stewart moved to New York and took up residence with Louise Gilmore

(Louise), fathering four children by her. Louise never claimed to be the wife of James D. Stewart and in this litigation has claimed only on behalf of two minor children. During the period of residence in Niagara Falls, New York, James D. Stewart established a relationship with Lucille Rice (Lucille) and fathered three children by her. She has never claimed to be the wife of James D. Stewart and in this litigation has claimed only on behalf of a minor child.

In 1958 James D. Stewart left New York and went to California, taking Louise and her children with him.

In 1969 James D. Stewart left California and returned to North Carolina to live with his mother. On 24 July 1971, James D. Stewart and Anna Hatchett were married in Fuquay Varina. They lived together as man and wife from that time until the date of his death.

Pauline never remarried, never obtained a divorce from the decedent, and never was served with notice of divorce proceedings.

Both Pauline and Anna claim to be the widow of the decedent.

The Commission found as facts: that Anna was the widow of James D. Stewart and is entitled to the widow's share of the compensation due in this case. Lola Louise Gilmore was never married to James D. Stewart and claims no compensation for herself by reason of his death. Pauline was not the widow of the deceased, he having divorced her prior to his marriage to Anna. James D. Stewart left surviving him as his sole whole dependents his widow, Anna, and three minor acknowledged illegitimate children, to wit: Guy Anthony Stewart; Terry Glen Stewart; and Robin Gail Stewart. Said four dependents are entitled to all compensation due by reason of the death of James D. Stewart. On these findings the Commission entered an award directing payments to Anna as the widow and the three minor children, as whole dependents, of the deceased employee.

Upon appeal by Pauline to the Full Commission, the opinion and award of Commissioner Stephenson was amended by striking therefrom the findings of fact that James D. Stewart divorced Pauline prior to his marriage to Anna. With this amendment, the Full Commission adopted as its own the opin-

ion and award of Commissioner Stephenson and affirmed the results reached by him.

To these findings and award of the Full Commission, Pauline duly excepted and appealed.

Mitchiner, DeMent, Redwine and Yeargan, by Phillip O. Redwine, for appellant Pauline Johnson Stewart.

Ernest E. Ratliff, for appellee Anna Hatchett Stewart.

MARTIN, Judge.

[1] "The decided weight of authority . . . is that when two marriages of the same person are shown, the second marriage is presumed to be valid; that such presumption is stronger than or overcomes the presumption of the continuance of the first marriage, so that a person who attacks a second marriage has the burden of producing evidence of its invalidity. When both parties to the first marriage are shown to be living at the time of the second marriage, it is presumed in favor of the second marriage that the first was dissolved by divorce. These presumptions arise, it is said, because the law presumes morality and legitimacy, not immorality and bastardy." *Parker v. American Lumber Corp.*, 190 Va. 181, 56 S.E. 2d 214 (1949).

[2] The marriage of Anna to James D. Stewart, his second marriage, was duly proved. The marriage ceremony was performed in Fuquay Varina, North Carolina. The burden was then on Pauline, his first wife, to produce evidence to show the invalidity of that marriage. She proved that James D. Stewart was married to her on 5 April 1942, and she testified that she had not divorced him and had never had any notice of any divorce obtained by him. There was no other attempt to prove there had been no divorce.

The mere proof that one party had not obtained a divorce is not sufficient to overcome the presumption, since the other party might have obtained a divorce.

Pauline was aware of James D. Stewart's return to North Carolina in 1969. He told her he was married to Anna, and she knew they lived together as man and wife at his mother's home. There is no evidence that Pauline made any claim that James D. Stewart was her husband.

Our Supreme Court in *Chalmers v. Womack,* 269 N.C. 433, 152 S.E. 2d 505 (1967), held that the issue as to the validity of a subsequent marriage was properly submitted to the finders of the fact, in that case a jury, and found no error in a judgment entered upon a verdict finding the subsequent marriage valid. The opinion in that case quoted with approval from the decision in *Kearney v. Thomas,* 225 N.C. 156, 33 S.E. 2d 871 (1945), as follows:

> " '"A second or subsequent marriage is presumed legal until the contrary be proved, and he who asserts its illegality must prove it. In such case the presumption of innocence and morality prevail over the presumption of the continuance of the first or former marriage." . . . (I)t is always for the jury where the demand is for an affirmative finding in favor of the party having the burden, even though the evidence may be uncontradicted. . . . Moreover, proof of the second marriage adduced by the defendant, if sufficient to establish it before the jury, raises a presumption of its validity, upon which property rights growing out of its validity must be based.' "

The Industrial Commission, as finder of the facts, has found in effect that Pauline has failed to overcome the presumption of the validity of the second marriage and this finding will not be disturbed on this appeal.

The opinion and award of the Industrial Commission is

Affirmed.

Judges MORRIS and PARKER concur.

DOXOL GAS OF ANGIER, INC. v. GRAHAM HOWARD, SR.

No. 7511SC520

(Filed 17 December 1975)

Execution § 16; Receivers § 1— receiver in aid of execution — appointment proper

In a proceeding for the appointment of a receiver in aid of execution, the trial court properly treated the parties' verified pleadings as affidavits and found that plaintiff was entitled pursuant to G.S.

1-363 to the appointment of a receiver in aid of execution; and it was not required that plaintiff prove pursuant to G.S. 1-502(3) that defendant judgment debtor had property which he was refusing to apply to the satisfaction of the judgment.

APPEAL by defendant from *Hall, Judge.* Judgment entered 1 April 1975 in Superior Court, HARNETT County. Heard in the Court of Appeals 15 October 1975.

On 1 October 1968 plaintiff obtained a judgment against defendant for $4,920.59. After a series of unsuccessful levies of execution, plaintiff, on 31 January 1975, petitioned the Superior Court for the appointment of a temporary receiver. In his verified petition, plaintiff alleged upon information and belief that defendant owned leviable property but that defendant was ". . . attempting to conceal or dispose of [it] in order to avoid the payment of said judgment. . . ." Plaintiff further alleged that its belief was based upon the following: that defendant possessed and maintained automobiles and trucks; that he operated an extensive tobacco farming operation for several years; that he acquired one of the more advanced mechanized tobacco operations in this State several years ago and continues to operate that operation; that he listed property for tax purposes in Harnett County; that he owned real estate in Harnett County which has been placed in the names of others but defendant continued to obtain financing for maintaining and acquiring the property; and that defendant maintained various checking accounts and had negotiated for acquisition of farm goods and supplies and held himself out as the principal owner of the farm. Based on this information, plaintiff alleged "[t]hat unless a receiver . . . is appointed by this Court the defendant may dispose of his property and collect the amount due to him, and the plaintiff will suffer great loss and irreparable loss, unless a receiver for said property and funds be appointed by this Court."

Defendant's verified response to the petition admitted that plaintiff had pursued unsuccessful levies of execution, but denied all of plaintiff's substantive allegations with respect to the debt owed and the purported property holdings and business interests of the defendant.

Based on the verified pleadings and a stipulation that there was no other pending bankruptcy or receivership action, the Superior Court on 1 April 1975, appointed a receiver in aid of execution. From the order entered, defendant appealed.

James F. Penny, Jr., for plaintiff appellee.

Edgar R. Bain and L. Holt Felmet for defendant appellant.

MORRIS, Judge.

Though the question is not raised by either party, we must first determine whether this matter is presently appealable. In support of our determination that this case is properly before this Court, we note the decision of our Supreme Court in *Jones v. Thorne,* 80 N.C. 72, 75 (1879), wherein the then Chief Justice Smith wrote that "[t]he granting or refusing an order . . . for the appointment of a receiver is not a mere matter of discretion in the judge, and either party dissatisfied with his ruling may have it reviewed." See also G.S. 1A-1, Rule 62(a).

Defendant basically contends that plaintiff is proceeding under G.S. 1-502(3) and had to prove that defendant judgment debtor had ". . . property which he is refusing to apply to the satisfaction of the judgment." He argues that plaintiff relied solely on its verified petition which, standing by itself, is not competent to support appointment of a receiver; especially when defendant's response denies plaintiff's material allegations. We disagree. The trial court appointed the receiver pursuant to G.S. 1-363. Under G.S. 1-363,

> "[t]he court or judge having jurisdiction over the appointment of receivers may also by order in like manner, and with like authority, appoint a receiver in proceedings under this article of the property of the judgment debtor, whether subject or not to be sold under execution, except the homestead and personal property exemptions. But before the appointment of the receiver, the court or judge shall ascertain if practicable, by the oath of the party or otherwise, whether any other supplementary proceedings are pending against the judgment debtor, and if so, the plaintiff therein shall have notice to appear before him, and shall likewise have notice of all subsequent proceedings in relation to the receivership. No more than one receiver of the property of a judgment debtor shall be appointed. The title of the receiver relates back to the service of the restraining order, herein provided for."

In an application for appointment of a receiver, the motion may be ". . . supported by affidavits and other written or documentary evidence." *Coates v. Wilkes,* 92 N.C. 377, 383 (1885);

also see G.S. 1A-1, Rule 43(e). This rule stated in *Coates* turned on Code Sec. 494, which essentially remains intact under present day G.S. 1-363. As we have previously stated "[t]here has been no amendment or change in phraseology since that time." *Massey v. Cates,* 2 N.C. App. 162, 164, 162 S.E. 2d 589 (1968). There we said, quoting from *Coates v. Wilkes, supra:*

> "In discussing the evidence sufficient to warrant the appointment of a receiver, the Court said:
>
> 'Indeed, a receiver is appointed almost as of course, where it appears that the judgment debtor has, or probably has, property that ought to be so subjected to the satisfaction of the judgment, after the return of the execution unsatisfied. . . .'
>
> '. . . To warrant the appointment of a receiver, it need not appear, certainly or conclusively, that the defendant has property that he ought to apply to the judgment—if there is evidence tending in a reasonable degree to show that he probably has such property, this is sufficient; . . .'" *Id.* at 165.

Though the parties here utilized verified pleadings, we hold that they essentially operate as affidavits in this matter and should be construed accordingly. The trial court stated in his judgment that the matter was heard "upon affidavit and motion of the plaintiff for the appointment of a receiver in aid of execution." He found that plaintiff was entitled "pursuant to G.S. 1-363 to the appointment of a receiver in aid of execution." We find no error in the trial court's determination that a receiver is necessary to expedite resolution and retirement of this debt.

Affirmed.

Judges PARKER and MARTIN concur.

STATE OF NORTH CAROLINA v. DONALD RAY JACKSON

No. 7518SC510

(Filed 17 December 1975)

1. **Criminal Law § 33; Robbery § 3— checks taken in robbery — automobile registration card — relevancy**

In this armed robbery prosecution, evidence that two checks taken in the robbery and an automobile registration card issued to defendant's wife were found together on a city street was relevant and properly admitted.

2. **Criminal Law § 112— failure to charge on circumstantial evidence**

In absence of special request, failure of the court to charge on circumstantial evidence was not error where the evidence was largely direct and the only circumstantial evidence was in corroboration of and incidental to the direct evidence.

3. **Criminal Law § 66— identification of defendant — independent origin**

The evidence supported the trial court's determination that a robbery victim's identifications of defendant from photographs, at the preliminary hearing, and at trial were of independent origin and not the result of impermissibly suggestive procedures.

4. **Criminal Law § 117—interested witnesses — instructions**

The trial court's instruction in regard to interested witnesses applied equally to witnesses for both the State and defendant and was not prejudicial to defendant.

APPEAL by defendant from *Kivett, Judge.* Judgment entered 17 January 1975 in Superior Court, GUILFORD County. Heard in the Court of Appeals 13 October 1975.

On 28 June, 1974 approximately $668 in cash and checks belonging to the Ma-Jik Market was stolen. Evidence for the State tended to show that the defendant, accompanied by a co-assailant, entered the store at approximately 11:00 p.m. He pointed a handgun at the cashier, Debra Williams, and ordered her to turn over all the cash. In addition to the cash, the defendant and his co-assailant absconded with two checks; one, a personal check drawn by Miss Williams and the other, a United Parcel payroll check. Miss Williams gave the investigating officers a description of defendant.

Sometime after the robbery in June, the checks were found on a street in High Point by one Paul Wilson. Along with the checks, Wilson also found an automobile registration card issued to defendant's wife.

Miss Williams identified the defendant from photographs shown her, identified him at a preliminary hearing at which time defendant was brought in the courtroom with other male persons in custody, and also identified him in the courtroom at the time of this trial.

Defendant was charged with armed robbery, entered a plea of not guilty and was found guilty by the jury. From judgment sentencing him to a term of imprisonment, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Isham B. Hudson, Jr., for the State.

White and Crumpler, by Michael J. Lewis, for defendant appellant.

MORRIS, Judge.

[1] Defendant first contends that the trial court erred by allowing into evidence the automobile registration card along with the stolen checks. Defendant argues that the items were not admissible under the doctrine of possession of recently stolen property because that rule only applies "when the property is found in the possession of the defendant and not someone else." The general rule in North Carolina is that "[e]very circumstance calculated to throw any light upon the crime charged is admissible in criminal cases." *State v. Robbins,* 287 N.C. 483, 490, 214 S.E. 2d 756 (1975); *State v. Hamilton,* 264 N.C. 277, 286-287, 141 S.E. 2d 506 (1965), cert. denied 384 U.S. 1020; 2 Strong, N. C. Index 2d, Criminal Law, § 33, p. 531. Here, the stolen items and the circumstances surrounding their recovery are relevant, and " ' . . . any object which has a relevant connection with the case is admissible in evidence, in both civil and criminal trials.' " *State v. Robbins, supra,* at 490, quoting from 1 Stansbury, N. C. Evidence, § 118 (Brandis rev. 1973).

[2] Defendant next contends that if the trial court correctly admitted the registration card, it erred in failing properly to charge the jury with respect to the manner in which the jury could consider the evidence. Defendant urges that the court should have instructed on the doctrine of possession of recently stolen property and on circumstantial evidence. The evidence did not require an instruction on the doctrine of possession of recently stolen property. The evidence was largely direct and

the only circumstantial evidence was that with respect to the finding of the stolen checks. It was in corroboration of and incidental to the direct evidence. In absence of special request, the failure of the court to charge on circumstantial evidence was not error. *State v. Stevens,* 244 N.C. 40, 44, 92 S.E. 2d 409 (1956) ; 7 Strong, N. C. Index 2d, Trials, § 38, p. 347.

[3] Defendant also contends that the trial court erred in finding that the identification of defendant by Debra Williams on all three occasions was of independent origin and not so impermissibly suggestive as to violate defendant's constitutional rights. We again disagree. The record is plenary and that Miss Williams's identifications of defendant were of an independent origin and based on her observation of defendant during the robbery. *State v. Williams,* 279 N.C. 515, 526, 184 S.E. 2d 282 (1971) ; *State v. Cole,* 14 N.C. App. 733, 735, 189 S.E. 2d 510 (1972) ; 2 Strong, N. C. Index 2d, Criminal Law, § 66, p. 568.

[4] Defendant next maintains that the trial court erred in improperly instructing the jury in regard to interested witnesses. Defendant argues that "the Court's instruction led the jury to believe that certain witnesses for the defendant may have been interested and in so charging the jury, the Court likely prejudiced the jury into disbelieving the evidence of the defendant." We believe defendant has misconstrued the intent of this charge. During his charge to the jury the trial court stated:

> "You may find that a witness either for the State or the defendant is interested in the outcome of this trial. In deciding whether or not to believe such a witness, you may take his or her interest into account, if you find such to be true. If, after doing so, however, you believe his or her testimony in whole or in part, you should treat that which you believe the same as you would any other believable evidence."

We cannot see how this portion of the charge could have prejudiced the defendant. It applied equally to both the defendant and the State and to all witnesses alike. It is only a caution to the jury and not directed to any particular witness or either party. Our Supreme Court, moreover, has held that a similar charge, albeit in a civil case, was not improper. *Herndon v. R. R.,* 162 N.C. 317, 78 S.E. 287 (1913).

We have considered the other contentions raised by defendant and find them also to be without merit.

No error.

Judges HEDRICK and ARNOLD concur.

PERRY E. PIATT v. KRISPY KREME DOUGHNUT CORPORATION

No. 7521SC473

(Filed 17 December 1975)

Contracts § 3— "Rough Draft" — enforceable contract

A paper writing labeled "Rough Draft" was not unenforceable as a contract as a matter of law where plaintiff alleged that the "Rough Draft," which was submitted by plaintiff to defendant, was accepted by defendant as the contract between the parties.

APPEAL by plaintiff from *Walker, Judge.* Judgment entered 19 March 1975 in Superior Court, FORSYTH County. Heard in the Court of Appeals 23 September 1975.

This is an action for breach of contract. In pertinent part, plaintiff alleged the following:

"2. The plaintiff, on or about April 11, 1973, submitted his resignation as Vice President, member of the Board of Directors, and employee of the defendant corporation in a letter addressed to Vernon C. Rudolph who was the principal shareholder, Chairman of the Board of Directors, and chief operating officer of the defendant corporation. A copy of this letter is attached hereto as Exhibit A.

3. Responding to the plaintiff's letter, the defendant, through Mr. Rudolph, requested the plaintiff to discuss the matter of his resignation. The plaintiff did discuss this matter with Mr. Rudolph on April 14, 1973, at which time, the defendant corporation, through Mr. Rudolph, requested the plaintiff to propose the terms of a contract which would satisfy the plaintiff. Pursuant to this request made by the defendant, the plaintiff prepared a 'rough draft' of the 'basic essentials' for a contract between him and the defendant. This 'rough draft' was delivered to Mr. Rudolph on April 27, 1973. A copy of this writing is attached hereto as Exhibit B.

4. After reviewing the terms of the plaintiff's rough draft of the basic essentials of a contract (Exhibit B)

between the plaintiff and the defendant, Mr. Rudolph contacted the plaintiff and informed the plaintiff that the defendant accepted all of the terms of Exhibit B.

5. On or about May 2, 1973, the defendant, acting through Mr. Rudolph, agreed with the plaintiff upon the amount of the fee referred to in paragraph 4 of Exhibit B. The plaintiff and the defendant agreed upon a fee of One Hundred Dollars ($100.00) per day. Mr. Rudolph then called the defendant's attorney, John Minor, who came promptly to the defendant's office and conferred with Mr. Rudolph and the plaintiff, together, they went over Exhibit B item by item. The defendant, through Mr. Rudolph, told Mr. Minor that the defendant agreed to these terms, and asked Mr. Minor to prepare a formal written document based thereon. Mr. Minor was supplied with a copy of Exhibit B on which he made some notes for the purpose of completing the details of the formal document. At the same time, and in the presence of Mr. Rudolph, the plaintiff informed Mr. Minor that he had agreed upon the terms of the contract contained in Exhibit B. Mr. Minor said that he would prepare the formal document.

6. Mr. Minor did work with both the plaintiff and with the defendant, through Mr. Rudolph, on the details of a formal document incorporating the terms of Exhibit B, but Mr. Rudolph died on August 16, 1973, before a formal document could be signed.

7. At all times mentioned herein, Mr. Vernon C. Rudolph was acting as the agent of the defendant and within the scope of his authority as principal shareholder, Chairman of the Board of Directors, and chief operating officer of the defendant.

8. Exhibit B attached hereto and the further agreements alleged in paragraph 5, above, constitute a valid and binding contract between the plaintiff and the defendant, based upon valid considerations. All of the substantial terms of the contract between the plaintiff and the defendant are contained therein. The details left to be worked out with Mr. Minor are not essential to the validity of said contract.

9. Following Mr. Rudolph's death, the defendant refused to honor the said contract and has breached the same by not performing any of its obligations thereunder.

10. The plaintiff stands ready, able and willing to perform all obligations imposed upon him under the contract between him and the defendant."

Exhibit B of the complaint is as follows:

"EXHIBIT B April 27, 1973

ROUGH DRAFT

Basic essentials for contract between Krispy Kreme Doughnut Corporation and Perry Piatt.

PURPOSE

1. To allow Perry Piatt to semiretire without severing his employment with Krispy Kreme.

2. To further compensate Perry Piatt for past contributions to Krispy Kreme's success.

3. To make available to Krispy Kreme but to no competitor Perry Piatt's knowledge and experience gained while employed by Krispy Kreme.

TERMS AND CONDITIONS

1. Contract to be for ten years.

2. This contract would wipe out any past offers or promises made to Perry Piatt by Krispy Kreme.

3. Perry Piatt will not make his knowledge or experience available to anyone or in any way that would be competitive or detrimental to Krispy Kreme.

4. Perry Piatt will make his services available to Krispy Kreme on a consulting basis for a fee, but would not otherwise be required to report to work.

5. Krispy Kreme Doughnut Corporation will pay Perry Piatt or his survivors $25,000.00 per year.

6. Krispy Creme will furnish Perry Piatt a company car.

7. Perry Piatt will continue in the pension plan with his equity to be paid to him in a lump sum at the end of this contract or to his survivors at the time of his death, should he die before the expiration of this contract.

8. Perry Piatt will continue in the hospitalization and life insurance plans of Krispy Kreme as he now does for a period of the remainder of his life.

DETAILS TO BE WORKED OUT WITH JOHN MINOR."

Defendant moved for dismissal under Rule 12 and the motion was allowed.

W. P. Sandridge and W. Andrew Copenhaver, for plaintiff appellant.

Ralph M. Stockton, Jr., J. Robert Elater and Steven E. Philo, for defendant appellee.

VAUGHN, Judge.

A complaint should not be dismissed for failure to state a valid claim 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. Unless the face of the complaint shows an insurmountable bar to recovery, plaintiff's action should not be dismissed on the pleading. *Sutton v. Duke,* 277 N.C. 94, 176 S.E. 2d 161.

Defendant urges that, on its face the paper labeled "Rough Draft" was only a preliminary negotiating agreement and that the parties did not intend to be bound until the execution of a formal document. Defendant relies to a great extent on *Boyce v. McMahan,* 285 N.C. 730, 208 S.E. 2d 692. Although we do not necessarily agree that the document here, standing alone, "shows its incompleteness by emphasizing its preliminary character," *Boyce,* p. 734, plaintiff's case does not have to stand or fall on the face of that document. Here, plaintiff alleges that the "Rough Draft" he submitted was accepted by defendant as the contract between the parties. Broadly reading his pleadings, the document thereupon ceased to be a rough draft and became the contract between the parties. We hold that the Exhibit B, when read in the light of the remainder of the complaint, does not itself carry the terms that "destroy its efficiency as a contract." That being true, the question of whether the agreement is complete or partial must be left to inference or further proof. It cannot be said as a matter of law that the execution of a more formal agreement was a condition to any contractual right that might otherwise pertain. *Bank v. Wallens* and *Schaaf v. Longiotti,* 26 N.C. App. 580, or that the alleged agreement did

not contain all material and essential terms of the parties' agreement.

Able counsel for defendant attacks the complaint on many fronts. We have carefully considered all of their well reasoned arguments but conclude, nevertheless, that no insurmountable bar to some recovery appears on the face of the complaint and attached exhibits.

Other questions of law that might arise cannot be resolved until plaintiff has the opportunity to come forward with his proof.

The judgment dismissing the action is reversed.

Reversed.

Chief Judge BROCK and Judge MARTIN concur.

BROOKS & BROOKS, LTD. v. EASTON'S CULLIGAN WATER CONDITIONING, OF R. D. 1

No. 758SC623

(Filed 17 December 1975)

1. **Evidence § 41— direct examination of witness — no invasion of province of jury**

   Questions put to plaintiff's secretary-treasurer by counsel for plaintiff concerning changes made by the witness in an offer to purchase did not call for an expression of opinion by the witness on a question of law and did not invade the province of the jury.

2. **Contracts § 26— breach of contract — competency of evidence**

   In an action for breach of contract to purchase a water treatment business, the trial court did not admit incompetent evidence by allowing officers of plaintiff to testify that the average life of a water tank was 20 years, that the business had good potential for growth, and the reasons for offering the business for sale, since the testimony was based on the personal knowledge of the witnesses gained through their own experience with the business.

APPEAL by defendant from *Webb, Judge.* Judgment entered 22 February 1975 in Superior Court, LENOIR County. Heard in the Court of Appeals 12 November 1975.

This is an action for breach of contract, with a counterclaim by defendant.

Plaintiff offered evidence tending to show the following: Until 2 January 1973 it was the owner of a water treatment business in Wilmington. On 21 November 1972 defendant submitted a written offer to purchase the assets of the business. The offer provided that among the assets of the business to be turned over to defendant, there would be 615 water treatment tanks, warranted to be in usable condition. If less than 615 tanks were turned over to defendant in usable condition, the purchase price would be reduced by $50.00 for each missing or unusable tank. Similar reductions in the purchase price would be made if other assets of the business were not provided to defendant as specified in the offer to purchase. Plaintiff's secretary-treasurer, Craven Brooks, crossed out the figure "615" wherever it appeared on the written offer to purchase, replaced it with the figure "515," and initialed each such change. On 20 December 1972 plaintiff agreed to sell the business to defendant, and it was agreed that the purchase price would be $42,000.00, with $32,000.00 to be paid immediately and $10,000.00 within ninety days. On 2 January 1973 plaintiff and defendant executed a written "Sales Agreement," which incorporated by reference the offer to purchase. The offer to purchase, with the changes made by plaintiff's secretary-treasurer, was attached to the "Sales Agreement." Defendant failed to make the $10,000.00 payment required within 90 days of the sale. Plaintiff admitted that defendant was entitled to certain minor adjustments in the purchase price, totaling $952.58, but aside from these minor adjustments, the assets of the business were turned over to defendant in usable condition.

Defendant offered evidence tending to show the following: At a negotiating session on 20 December 1972, it was agreed that the number of tanks to be turned over to defendant in usable condition would be increased from 515 back to the original figure of 615. Many of the tanks that were turned over were not in usable condition. Instead of supplying 615 usable tanks, plaintiff supplied only 386, for a deficiency of 229 tanks, entitling defendant to a reduction of $11,450.00 in the purchase price. There were also numerous other deficiencies in the business assets turned over to defendant, entitling defendant to additional reductions in the purchase price. Since the reductions in the purchase price were greater than the unpaid balance of

$10,000.00, defendant owed plaintiff nothing and was entitled to a recovery from plaintiff.

The jury returned a verdict for plaintiff in the amount of $6,461.00. Judgment was entered accordingly, and defendant appealed.

Jeffress, Hodges, Morris & Rochelle, P.A., by Thomas H. Morris, for plaintiff appellee.

White, Allen, Hooten & Hines, P.A., by Thomas J. White III, for defendant appellant.

VAUGHN, Judge.

It was defendant's position in the pleadings, and its contention at the trial, that the initial offer to purchase made by defendant was rejected by plaintiff by making alterations thereon as to the number of tanks to be guaranteed and the form and manner of payment. Defendant further alleged and contended that the number of tanks to be guaranteed and the purchase price and manner of payment and provision for adjustments was subsequently agreed upon on December 20, 1972, and that the formal sales agreement dated January 2, 1973 carried forward the understanding of the parties as contended by defendant. Plaintiff, on the other hand, contended that the alterations made by one of its officers on the original offer to purchase was acceded to and accepted by defendant and that the number of tanks stated therein, and not the number of tanks stated in the bill of sale, was the number of tanks guaranteed when the documents were attached to the formal sales agreement as exhibits thereto when the formal sales agreement was ultimately executed January 2, 1973.

[1] When examining Craven Brooks about defendant's offer to purchase and the agreements of 20 December 1972 and 2 January 1973, counsel for plaintiff referred to the offer to purchase as the "agreement" that "was entered into first" and asked whether Brooks had "amended" the offer to purchase by striking out the figure "615" and inserting "515." Defendant contends in its first argument that these questions called for an expression of opinion on a question of law and invaded the province of the jury. The questions did not invade the province of the jury, but were merely designed to bring out the facts concerning the chronology of the transaction and the changes

made by Brooks in the written document submitted by defendant. The testimony elicited was relevant and material.

[2] In its second argument, defendant contends that the court admitted incompetent evidence by allowing officers of plaintiff to testify that the average life of a water tank was 20 years, that the business had a good potential for growth and the reasons for offering the business for sale. It seems to us that the testimony was based on the personal knowledge of the witnesses, gained through their own experience with the business and was properly admitted. Defendant, on cross-examination, had previously elicited testimony from plaintiff's witnesses relating to their reasons for offering the business for sale.

We have carefully examined defendant's assignments of error directed to the charge of the court. We find no error in the charge that could have been prejudicial to defendant.

No error.

Judges BRITT and ARNOLD concur.

STATE OF NORTH CAROLINA v. WILLIAM CLYDE BALLARD

No. 7529SC409

(Filed 17 December 1975)

1. Kidnapping § 1— absence of physical force—threats and intimidation

The use of actual physical force is not essential to the commission of the offense of kidnapping, but the offense may be committed by threats and intimidation and appeals to the fears of the victim which are sufficient to put an ordinarily prudent person in fear for his life or personal safety, and to overcome the will of the victim and secure control of his person without his consent and against his will.

2. Kidnapping § 1— sufficiency of evidence

The State's evidence was sufficient to support a jury finding that defendant's conduct constituted such a threat as to put an ordinarily prudent person in fear for her life or personal safety so as to secure control of her person against her will where it tended to show that the victim was a young woman alone in her automobile, defendant, whom she did not know, suddenly got in her automobile when she stopped for a red light, defendant directed her to drive toward a country club, the victim drove several blocks and told defendant she had taken him far enough, defendant pulled the victim's hair back

and told her to drive, and the victim drove to a point near the country club where defendant pushed her out of the car and drove away in her car.

ON *writ of certiorari* to review proceedings before *Ervin, Judge.* Judgment entered 19 December 1974 in Superior Court, HENDERSON County. Heard in the Court of Appeals 4 September 1975.

Defendant was indicted for kidnapping and pled not guilty. The State offered evidence tending to show that at approximately 5:30 p.m. on 13 August 1974 Karen Ann Lynch was seated alone in her car stopped at a red light in Hendersonville. Defendant, whom she had never seen before, got in the car on the passenger's side. Miss Lynch asked what he wanted, and defendant replied that his name was John Smith and he wanted a ride home. Miss Lynch testified that she was surprised at first and then was afraid that if she did not do what he said, he would harm her in some way, because she did not know him. She considered getting out of the car but was afraid to do so because defendant was sitting in such a position that she was afraid he would hold her in the car and she saw no people around and was afraid she wouldn't be able to get help. She asked where she was to go, and defendant told her just to drive and he would tell her where to go. She drove several blocks as defendant directed. During this time she looked for people but could not find anyone from whom she could get help. He directed her to go toward the Country Club. She said, "I believe I have taken you far enough." Defendant replied, "Just take me to the Country Club, I work there." When she told him she had never seen him there, defendant pulled her hair back and told her she was just to drive. Miss Lynch was very frightened. When the car was above the tennis courts of the Country Club, she shifted gears and let the clutch out so as to stall the car. Then she started blowing the horn and screaming for help. When she pulled the keys from the ignition and had her door open, defendant pulled her back into the car by her hair, "sort of down and into his lap." Defendant pulled an object from his pocket and said, "I'm going to cut you." Defendant bit her hand until she let go of the keys. He knocked her out of the car to the ground, and then drove away in the car.

Defendant did not testify, but presented the testimony of his wife and other witnesses, whose testimony tended to establish an alibi.

The jury found defendant guilty. From judgment on the verdict imposing a prison sentence, defendant appealed.

Attorney General Edmisten by Assistant Attorney General Alfred N. Salley for the State.

Don H. Garren for defendant appellant.

PARKER, Judge.

Defendant's only assignments of error are directed to the denial of his motions for nonsuit. He contends that nonsuit should have been allowed because the evidence fails to show the use of force, either physical or constructive, against the victim until the car reached the vicinity of the tennis courts, and that, though the evidence shows force was used at that point, there was no showing of any asportation thereafter. We do not agree.

[1] The crime of kidnapping, as referred to in our statute, G.S. 14-39, was in effect and applicable to the offense for which defendant was here tried, is "the unlawful taking and carrying away of a person by force and against his will." *State v. Hudson,* 281 N.C. 100, 104, 187 S.E. 2d 756, 759 (1972). However, the use of actual physical force is not essential to the commission of the offense, and the crime of kidnapping may be committed "by threats and intimidation and appeals to the fears of the victim which are sufficent to put an ordinarily prudent person in fear for his life or personal safety, and to overcome the will of the victim and secure control of his person without his consent and against his will, and are equivalent to the use of actual physical force or violence." *State v. Bruce,* 268 N.C. 174, 182, 150 S.E. 2d 216, 223 (1966).

[2] Here, the evidence shows that the victim of the offense was a young woman alone in her automobile when defendant, whom she did not know, suddenly got in beside her. There was no one around to whom she could appeal for help. Threats by actions may be more effective than when made by mere words, and defendant's uninvited entrance into the car under these circumstances in itself constituted a threat. Miss Lynch testified that she considered getting out of the car at that point, but was afraid to do so because she "saw no people around" and was afraid she "wouldn't be able to get help." She also testified that she did not voluntarily take the defendant to the Country Club and was afraid that if she did not do what he said, he would harm her in some way. We find the evidence sufficient to sup-

port a jury finding that defendant's conduct on first entering the car and in directing Miss Lynch where to drive under the circumstances here disclosed constituted such a threat as to put an ordinarily prudent person in fear for her life or personal safety so as to secure control of her person against her will. From that point on there was an ample showing of asportation to constitute the crime of kidnapping. Defendant's subsequent conduct establishes that Miss Lynch's fears, first aroused when defendant got into her car, were far from groundless. Defendant's motions for nonsuit were properly denied.

No error.

Judges BRITT and CLARK concur.

STATE OF NORTH CAROLINA v. BILLY LEE HANCOCK

No. 7522SC702

(Filed 17 December 1975)

Homicide § 30— intentional use of gun — failure to submit involuntary manslaughter

The trial court in a homicide case did not err in failing to submit involuntary manslaughter as a permissible verdict where all of the evidence tended to show that the victim's death was caused by the intentional use of a gun by defendant, notwithstanding defendant testified the gun was fired in the air two or three times and the gun thereafter snapped twice when he pulled the trigger and he "thought the gun was empty."

APPEAL by defendant from *Seay, Judge.* Judgment entered 19 March 1975 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 21 November 1975.

The defendant was charged in a bill of indictment, proper in form, with the murder of Pearl Eugene McWilliams. On the defendant's plea of not guilty the State offered evidence tending to show the following:

In the afternoon of 1 June 1974 Pearl Eugene "Codger" McWilliams and Homer Hancock, brother of the defendant, were involved in a fight; and Homer had struck Codger in the head with a metal bar. After the fight was broken up, Codger, along with Bobby Trivette and Paul Daniels, went looking for a gun;

but they had been unsuccessful. They went finally to Charlie Hill's house on Noahtown Road near Thomasville, North Carolina; and as they began backing out of the Hill's driveway, the defendant's car drove up, blocking them in, followed by Homer in his car. As Codger got out of the car, the defendant threatened him with a .22 pistol. Codger went over to the defendant and struck him with his fist. A struggle ensued with Codger trying to take the gun away. Several shots were fired in the air before the defendant knocked Codger back away from him. As Codger came at the defendant again, the defendant shot him in the stomach. Codger was taken to the hospital where he died as a result of the gunshot wounds.

The defendant's evidence tended to show that as Homer and the defendant were driving home in their cars, Codger had blocked Noahtown Road with Trivette's car and stopped both Homer's and the defendant's cars near Charlie Hill's house. Codger and Bobby Trivette got out of Trivette's car and started back toward Homer's car. Codger had a tire tool in his hand and threatened to kill Homer. It was then that the defendant intervened. The fight between defendant and Codger ensued, and the defendant shot Codger as he was coming toward the defendant with the tire tool.

From a verdict of guilty of voluntary manslaughter and a judgment imposing a prison sentence of twenty (20) years, defendant appealed.

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

Charles F. Lambeth, Jr., for defendant appellant.

HEDRICK, Judge.

The defendant assigns as error the trial court's failure to submit involuntary manslaughter as a permissible verdict. The defendant contends that his statement, "I thought the gun was empty," particularly when coupled with other evidence in this case, is sufficient to require the question of involuntary manslaughter to be presented to the jury.

"Where, under a bill of indictment, it is permissible to convict defendant of a lesser degree of the crime charged, and there is evidence to support a milder verdict, defendant is entitled to have the different permissible verdicts arising on the

evidence presented to the jury under proper instructions. (Citations omitted.)" *State v. Wrenn,* 279 N.C. 676, 681, 185 S.E. 2d 129, 132 (1971). "The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor." *State v. Hicks,* 241 N.C. 156, 159, 84 S.E. 2d 545, 547 (1954); *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).

Involuntary manslaughter is the unlawful killing of a human being unintentionally and without malice but proximately resulting from the commission of an unlawful act not amounting to a felony, or some act done in an unlawful or culpably negligent manner, (citations omitted), and where fatal consequences of a negligent act were not improbable under all the facts existent at the time." *State v. Williams,* 231 N.C. 214, 215-16, 56 S.E. 2d 574, 574-75 (1949).

With respect to the gun and its use, defendant testified:

"[T]here was a .22 under the seat. * * * When I see the gun I jerked it up and from the side you load it you could see two bullets. I didn't know how many it held or how many more were in it—I stuck it in my pocket and jumped out."

"When the Trivette boy and Codger started with the tire tool I jerked the gun out then and pointed it at him and told him not to come at me with the tire tool. If he did I would shoot him. * * * I throwed it straight up in the air. Then the gun went off three or four times and snapped two or three times. I don't know exactly how many times. * * * I thought the gun was empty. I didn't know how many it held. I didn't know how many times it had fired or snapped."

"When he started at me again I pulled the trigger and when I pulled the trigger the gun snapped. He heard it snap and stopped just a second. When he seen it didn't fire he had the tire tool in his hand when he started at me the second time. I pulled the trigger. The gun snapped again. He heard it snap, stopped just a second and seen it didn't fire; started a third time; by this time he was about three feet from me,

I guess, done up on the shoulder of the road there. Third time when he started at me, that's when I pulled the trigger again. The gun fired and shot him in the lower part of the stomach."

The defendant relies heavily on the following statement from *State v. Foust,* 258 N.C. 453, 459, 128 S.E. 2d 889, 893 (1963):

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

The quoted statement has no application in this case, since all of the evidence tends to show that Codger's death was proximately caused by the *intentional* use of a gun by the defendant, rather than "a wanton or reckless use of firearms" as described in Foust, *supra.*

In our opinion, any construction of defendant's evidence manifests his intention to fire the gun at Codger. For defendant's subjective self-serving declaration that he thought the gun was empty to be sufficient to require the submission of involuntary manslaughter as a permissible verdict, it must be accompanied by evidence of other facts and circumstances sufficient to raise an inference that the discharge of the firearm was in fact unintentional. The defendant's one assignment of error is not sustained.

No error.

Judges PARKER and ARNOLD concur.

WALLACE MEN'S WEAR, INC. (FORMERLY KNOWN AS COFFMAN-WALLACE, INC.) v. REID V. HARRIS AND MARY A. HARRIS

No. 757DC625

(Filed 17 December 1975)

1. **Accounts § 1— charge account — itemized statement — admissibility at trial**

In an action to recover for credit purchases made from plaintiff's clothing store, an itemized statement of account was properly admitted into evidence, without regard to whether the statement was prepared contemporaneously with the purchase of the clothing, since defendant stipulated in the "order on Pretrial Conference" that the statement could be received into evidence if relevant and material.

2. **Accounts § 1; Husband and Wife § 3— charge account — wife as agent of husband in purchasing — sufficiency of evidence**

In an action to recover for credit purchases made from plaintiff's clothing store, evidence was sufficient to withstand a motion for directed verdict where it tended to show that defendant and his wife agreed to accept plaintiff's offer of a charge account, it was defendant husband who stated to plaintiff that he and his wife would like to use the charge account, thus establishing the inference that defendant made his wife his agent to purchase clothes, purchases were made by the wife, and payment was due.

3. **Rules of Civil Procedure §§ 8, 15; Usury § 2— usury — failure to plead or raise in trial court — no consideration on appeal**

Defendant may not contend on appeal that plaintiff was allowed to collect interest on his charge account at a usurious rate, since defendant did not raise the issue of usury in his pleadings or at trial.

APPEAL by defendant from *Harrell, Judge.* Judgment entered 2 April 1975 in District Court, NASH County. Heard in the Court of Appeals 12 November 1975.

Plaintiff instituted this action against defendants, Reid V. and Mary A. Harris, for credit purchases made from plaintiff's clothing store. Plaintiff alleged that various items of clothing had been sold pursuant to a contract with one or both defendants and that the defendants owe the plaintiff the price of the clothing plus interest.

Defendant Reid Harris answered and denied liability alleging that he had not purchased any of the clothing. Defendant alleged that if his wife had in fact made the purchases, she made them without his knowledge, consent, permission, approval, or authority. Defendant further alleged that the items purchased were luxury items and not necessities. Defendant Mary Harris

did not file an answer and a judgment was entered against her by default.

The case of plaintiff against Reid Harris was tried in District Court before Harrell, Judge, sitting without a jury. Plaintiff's evidence tended to establish that the defendant and Mrs. Harris visited plaintiff's store in October 1971. Plaintiff's president, William H. Wallace, informed defendant and Mrs. Harris that the store had charge account services that he would make available to them. None of the regular credit checks were made because plaintiff's president knew the defendant during their college days some ten years prior to the charges constituting the account sued on. Plaintiff's evidence further established that defendant's wife charged various items of clothing purchased at plaintiff's store pursuant to the charge plan. Plaintiff offered into evidence an "Itemized Statement of Account" which placed the value of the articles of clothing charged, in addition to interest, at $4,035.87.

Defendant testified that he and his wife became separated before October 28, 1971, the date of his wife's first credit purchase from plaintiff. Defendant further testified that his wife had ample clothing of good quality and that the purchases charged at plaintiff's store were made without his authorization or consent. Mr. Harris stated that he did not know that merchandise was charged to him by his wife until he received a statement of account following the institution of this action, and therefore he could not take any action to discourage the sale of the merchandise to his wife.

The trial court found that defendant Reid V. Harris agreed with plaintiff to pay for goods sold and delivered to Mary A. Harris. The court further found that the defendant had abandoned Mary Harris and that all goods sold to Mrs. Harris were necessities that she purchased as an "agent of necessity" of her husband. Judgment was entered for the plaintiff and defendant appealed to this Court.

Battle, Winslow, Scott and Wiley, P.A., by Jasper L. Cummings, Jr., for plaintiff appellee.

Allsbrook, Benton, Knott, Allsbrook, and Crawford, by J. E. Knott, Jr., for defendant appellant.

ARNOLD, Judge.

[1] In his first assignment of error defendant contends that it was error to admit into evidence the plaintiff's itemized statement of account. He argues that the evidence is hearsay, and that the statement was not prepared contemporaneously with the purchase of the clothes and therefore does not come within the hearsay exception for business records. Plaintiff argues that the statement was timely prepared and therefore admissible.

We need not rule on whether the itemized statement was timely prepared in this case because the defendant stipulated in the "Order on Pretrial Conference" that it could be received into evidence if relevant and material. Stipulations duly entered during the course of a trial are binding judicial admissions which are binding on the parties. 7 N. C. Index, "Trial" § 6, p. 262; *see Hayes v. Ricard,* 251 N.C. 485, 112 S.E. 2d 123 (1960). Clearly, the statement was relevant and material.

Defendant next assigns error to the court's failing to grant his motion for directed verdict. He argues that there was no evidence that he contracted with plaintiff to create an agency relationship whereby the wife was authorized to charge clothing to the husband's account.

In passing upon a motion for directed verdict all the evidence tending to support plaintiff's claim has to be taken as true and considered in the most favorable light to plaintiff, giving plaintiff the benefit of every reasonable inference which legitimately may be drawn therefrom, and resolving all contradictions, conflicts and inconsistencies therein in plaintiff's favor. Defendant's evidence which contradicts or tends to show a different state of facts is disregarded, and only that which is favorable to plaintiff can be considered. *Carter v. Murray,* 7 N.C. App. 171, 171 S.E. 2d 810 (1970).

[2] The plaintiff's evidence is sufficient to overcome a motion for directed verdict. Viewed in the light most favorable to plaintiff the evidence tends to show that defendant and his wife agreed to accept plaintiff's offer of a charge account; that purchases were made by the wife; and that payment was due. Further evidence tended to show that it was the defendant (husband) who stated to plaintiff that he and his wife would like to use the charge account, thus establishing the inference that defendant made his wife his agent to purchase clothes.

[3] In defendant's final assignment of error he contends that plaintiff was allowed to collect interest on the account at a usurious rate. Plaintiff correctly argues that usury is an affirmative defense and must be pleaded. G.S. 1A-1, Rule 8(c). When not raised by the pleading the issue may still be tried if raised by the express or implied consent of the parties at trial. G.S. 1A-1, Rule 15(b). However, defendant not only failed to raise the issue of usury in his pleadings but the record reveals no showing that the issue was raised at the trial. Not having raised the issue in his pleadings or at trial defendant cannot now present this defense before this Court. *Grissett v. Ward*, 10 N.C. App. 685, 179 S.E. 2d 867 (1971).

The judgment is

Affirmed.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. JAMES G. LEE AND JOHNNY ALLEN WOODLE

No. 7512SC456

(Filed 17 December 1975)

1. **Criminal Law § 92— coerced actions by codefendant — consolidated trial**

Pleas of not guilty by one defendant and the second defendant's contention that his actions were coerced by the first defendant's threats were not antagonistic defenses that required separate trials of defendants on identical charges of armed robbery and kidnapping.

2. **Criminal Law § 113— two defendants — conflicting instructions as to permissible verdicts**

The court in a consolidated trial of two defendants erred in giving the jury conflicting instructions with respect to the permissible verdicts as to each defendant.

APPEAL by defendants from *Bailey, Judge.* Judgment entered 20 January 1975 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 18 September 1975.

Defendant Lee was tried on separate bills of indictment for the kidnapping and armed robbery of Fred Yarborough and the kidnapping and armed robbery of Terry Ann Green.

Defendant Woodle was tried on similar bills for the same offenses. Over defendants' objections the cases were consolidated for trial.

The evidence, in the light most favorable to the State, tends to show the following.

About 10:45 p.m. on 3 May 1974, Terry Ann Green and Fred Yarborough were in an automobile which was parked in a field near Hope Mills. Defendants, carrying flashlights and a gun, came up to the car. Lee pretended that he and Woodle were policemen looking for trespassers, liquor and dope. Defendant Lee pointed a gun at Yarborough's head. Defendant Woodle opened the door on Green's side of the car and told her to empty her purse into her lap. Woodle was holding a pool stick that looked like a gun to Green. Nothing was taken from either victim at that time. Green and Yarborough were ordered out of the automobile and made to walk along a railroad until they reached a trestle. It developed that Lee and Yarborough were acquainted. Lee began hitting Yarborough over the back of the head with the pool stick. Lee then demanded Yarborough's money. Yarborough gave him some money but not all that he had. Lee again struck Yarborough whereupon Yarborough gave Lee the rest of his money. During this beating Woodle was holding the gun. Lee told Woodle to take Green's money. Woodle asked how much she had and when she responded that she did not know, Woodle directed her to take it out. She handed Woodle her billfold, which he refused, saying that he "just wanted the money." She took about $73.00 from her billfold and handed it to Lee. Lee then looked at the injuries to Yarborough's head and said that he would have to finish him off. Yarborough stumbled or ran down the hill towards the water under the trestle. Lee shot at him several times and then told Woodle to shoot and see if he could hit Yarborough. Woodle shot at him several times. Yarborough went under the water, came up and was hit by one of the bullets. He then stayed low in the water and crawled into some weeds. He was later able to make his way to safety. Woodle marched Green across the trestle at gunpoint while Lee attempted to determine whether Yarborough was dead. At one point, Woodle placed the gun at Green's temple. Lee then came back, reported that Yarborough was dead and left. Woodle then, at gunpoint, forced Green to walk back to Yarborough's car. They drove away and met Lee. The three then rode around in Lee's automobile. Lee told Woodle

that he was going to kill Green but Woodle apparently persuaded him to relase her a short distance from her home. Before letting her out of the car, Lee told Green that it would only take two sticks of dynamite to blow up her house if she talked to the police.

Defendants' motions for nonsuit on the kidnapping charges were allowed at the close of the State's evidence.

Woodle testified in his own behalf. He said he had known Lee since 1968 when Lee married his sister. Earlier, on the evening of the robbery, the pair had been shooting pool. Later they took Woodle's loaded rifle and flashlights and walked along a dirt road, intending to shoot rabbits. When they saw the parked automobile, Lee suggested that they play a joke on the occupants and told Woodle if he didn't go along with what he was about to do, that he would shoot him. His description of the events that took place thereafter was, in most material respects, substantially as related by the victims. He did, however, deny that he robbed or intended to rob or assault either of the victims. He claimed that when he fired the rifle he shot in the air in an effort to empty the rifle. He further stated that both victims volunteered to give Lee their money. A law enforcement officer, testifying for Woodle, said that a few days after the robbery Woodle gave him a statement substantially in accord with Woodle's testimony at trial. Woodle also offered evidence calculated to show that his character and reputation were good.

Lee offered no evidence.

The jury found Lee guilty of armed robbery in both cases. It found Woodle guilty of common law robbery of Yarborough and assault with a deadly weapon on Green.

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

Smith & Geimer, P.A., by W. S. Geimer and Kenneth Glusman, for defendant appellant James G. Lee.

James D. Little, Public Defender, Twelfth Judicial District, for defendant appellant Johnny Allen Woodle.

VAUGHN, Judge.

The evidence was sufficient to permit the jury to find defendants guilty as charged. There was, therefore, no error in failing to grant defendants' motions for nonsuit.

[1] Defendant Lee contends that it was prejudicial error to consolidate the cases against him with those against Woodle. He argues primarily that Lee's denial of any guilt by his plea of not guilty and Woodle's contention that his actions were coerced by Lee's threats are antagonistic defenses that require separate trials as a matter of law. We reject this argument. Certainly Woodle's testimony was antagonistic to Lee's plea of not guilty. That fact standing alone, however, is not sufficient to require separate trials. All of the competent evidence introduced at the joint trial would have been competent against Lee at a separate trial. They were charged with identical crimes that occurred at the same time and place. The court, therefore, did not abuse its discretion in ordering that the cases be consolidated.

[2] Both defendants bring forward assignments of error directed at the charge of the court. The judge who presided over this trial is able and experienced and it clearly appears that he endeavored to conduct a fair and impartial trial. Nevertheless, we must agree that the charge, when taken as a whole, contains erroneous and conflicting instructions on material questions that the jury was called upon to resolve. In particular, he gave conflicting instructions with respect to the permissible verdicts as to each defendant. The charge takes up about 33 pages in the record and we do not elect to reproduce it here in order to illustrate the prejudice to defendants.

Counsel for appellant Lee aptly observes that a correct charge could be gleaned from the whole if the conflicting instructions could be removed. In part the State responds, "[i]n a case involving multiple defendants, multiple victims, and multiple charges with numerous lesser included offenses, it is quite easy to confuse a jury even when a proper instruction is given." Even if that is the case, we simply say that the confusion is assured when incorrect and conflicting instructions are given. We also realize the almost impossible burden the case law of this State has imposed on the trial judges with reference to their instructions to the jury and that the burden was made heavier when all of these cases were consolidated.

Nevertheless, the court elected to compound its burden when it granted the State's motion to consolidate the cases. Each defendant is entitled to the same clarity in the instructions necessary to promote a fair determination of his guilt or innocence of each offense in a joint trial, as he would be given if tried separately.

For the reasons stated there must be new trials of all of the cases.

New trials.

Chief Judge BROCK and Judge MARTIN concur.

RONALD OR SALLY A. BERUBE v. MOBILE HOMES SALES AND SERVICE

No. 754DC506

(Filed 17 December 1975)

1. **Uniform Commercial Code § 17— sale of mobile home — tender of full payment — other agreement**

   In an action to recover a deposit on a mobile home, plaintiff's evidence was sufficient to support a jury finding that defendant seller agreed to install the mobile home before full payment was received and that tender of payment was therefore not a condition precedent to the seller's duty of delivery. G.S. 25-2-511(1).

2. **Uniform Commercial Code § 17— sale of mobile home — delivery before payment — necessity for instructions**

   In an action to recover a deposit on a mobile home, the trial court erred in failing to instruct the jury as to the existence or nonexistence of an agreement to install the mobile home before full payment was received and the resultant consequences.

APPEAL by defendant from *Crumpler, Judge.* Judgment entered 6 May 1975 in District Court, ONSLOW County. Heard in the Court of Appeals 25 September 1975.

Plaintiffs brought this small claim action to recover $500.00 which they had paid defendant as a deposit on a mobile home. The Magistrate gave judgment for plaintiffs in the sum of $300.00 and plaintiffs appealed. On trial de novo before judge and jury in the District Court, plaintiffs' evidence showed the following. On 29 October 1974 plaintiffs agreed to buy a mobile

home from defendant for $8,600.00. Plaintiffs were to pay a deposit of $500.00 and planned to obtain the balance of $8,100.00 by borrowing from Navy Federal Credit Union. On 6 November 1974 plaintiffs reported to defendant's salesman that their application for the loan had been approved by the Credit Union, and they asked if defendant would "set up" the mobile home for them if they paid the $500.00 deposit. The salesman told plaintiffs it was company policy not to set up a trailer until they had all the money, but he would ask defendant's president and perhaps he would approve it. The next day the salesman informed plaintiffs they could have their trailer prepared on Monday, 11 November 1974. On Friday, 8 November, plaintiffs paid defendant the $500.00 deposit plus $53.00 for insurance, with the agreement that the trailer would be set up for them on the following Monday. However, defendant did not set up the trailer on Monday as agreed, and as a result plaintiffs incurred extra expense in returning their furniture to storage. On Monday night plaintiffs told defendant's salesman they wanted their deposit returned because defendant had not moved the trailer as promised. The salesman replied, "Well, there's no problem with the $500.00, you can have that back." On Friday, 15 November, plaintiffs told the salesman they still wanted the trailer but also wanted the deposit back. The salesman again assured plaintiffs there was "no problem," that if they needed it, they could "just come in and get it." On Monday, 18 November 1974, plaintiffs went to defendant's office and demanded return of their $500.00 deposit. Defendant's president refused to return the full amount of the deposit and offered to return only $275.00. He told plaintiffs they had until noon of the following day to come in and accept the deal originally made for the trailer, or take the $275.00, or defendant would "just call the whole deal off." On the following day, 19 November 1974, plaintiffs brought this action.

Defendant offered evidence that the salesman told plaintiffs that they had to await delivery of the trailer until check from Navy Federal Credit Union was in hand. This was in accordance with company policy not to set up a trailer until the full purchase price was paid, unless the loan was obtained through certain approved lenders, not including Navy Federal Credit Union. Defendant never agreed to install the trailer before payment of the full purchase price, and no mention was made of guranteed delivery by a certain date. When plaintiffs asked to have their full deposit refunded, defendant did not at

any time agree to do so because it had gone to some expense winterizing the mobile home when this sale fell through, and this expense would not have been necessary if plaintiffs had purchased the trailer as they had agreed to do.

The jury returned a verdict for plaintiffs in the amount of $499.00 and judgment was entered accordingly. Defendant appealed.

Billy Sandlin for plaintiff appellees.

Zennie L. Riggs for defendant appellant.

PARKER, Judge.

[1] Defendant first assigns error to denial of his motions for dismissal. Defendant argues that under G.S. 25-2-511(1), tender of payment is a condition precedent to the seller's duty of delivery, and therefore it did not breach the contract by refusing to install the trailer until the full purchase price was paid. Defendant contends that all the evidence shows it was the plaintiffs, not the defendant, who breached the contract by refusing to go through with purchase of the trailer as originally agreed. However, G.S. 25-2-511(1) provides that "[u]*nless otherwise agreed* tender of payment is a condition to the seller's duty to tender and complete any delivery." (Emphasis added.) Here, according to plaintiffs' evidence, the parties did otherwise agree. We find no error in the denial of defendant's motions for dismissal.

[2] Defendant further contends the court erred in its charge to the jury in not declaring and explaining the law arising on the evidence given in this case as required by G.S. 1A-1, Rule 51(a). The factual issue around which this case revolves is whether the defendant agreed to install the mobile home before full payment was received. If plaintiffs' evidence is accepted as true, defendant did make such an agreement and it breached the agreement by failing to set up the trailer on 11 November as it had agreed to do. On the other hand if defendant's evidence is believed, no such agreement was made, and plaintiffs breached the contract by repudiating it. The court did not instruct the jury as to the issue of the existence or nonexistence of such an agreement and the resultant consequences, but instead explained the issue as being "whether the plaintiff Berube rejected the deal, or accepted it," defining the terms "acceptance" and "rejection," concepts which do not appear to be

directly relevant to the facts of this case. The jurors were not correctly apprised of the issue before them and the law relevant thereto. For failure of the trial judge to comply with the mandate of Rule 51(a), defendant is entitled to a

New trial.

Judges BRITT and CLARK concur.

STATE OF NORTH CAROLINA v. THOMAS HOWELL BUCHANAN

No. 7529SC695

(Filed 17 December 1975)

Assault and Battery § 15— instructions — nightstick as deadly weapon

In a prosecution for assault with a deadly weapon, a policeman's nightstick, with intent to kill inflicting serious injury, the trial court erred in giving the jury an instruction which removed from the jury's consideration the question of whether the nightstick was a deadly weapon and which amounted to a declaration by the court that the nightstick was a deadly weapon as a matter of law.

APPEAL by defendant from *Friday, Judge.* Judgment entered 7 January 1975 in Superior Court, MCDOWELL County. Heard in the Court of Appeals 21 November 1975.

The defendant, Thomas Howell Buchanan, was charged in a bill of indictment, proper in form, with assaulting Officer Tommy M. Bryant with a deadly weapon, to wit a "nightstick," with intent to kill inflicting serious injury.

Upon the defendant's plea of not guilty, the State offered evidence tending to show the following:

Officer Tommy M. Bryant, with the Marion Police Department, was on duty in the early morning hours of 16 October 1974, when he stopped defendant's van on a routine check at about 1:15 a.m. As Officer Bryant got out of his car, he was cursed and assaulted by the defendant who struck Bryant with his fist. A scuffle ensued, and the defendant grabbed Bryant's nightstick out of the ring on his belt and hit Bryant several times over the head and across the chest. The defendant threatened to kill Bryant and as they were scuffling for Bryant's pistol, Officer Jack D. Causby arrived and apprehended the

defendant. As a result of the assault, Bryant received a cut over his eye and a four-inch cut on the top of his head which required hospitalization for treatment.

The defendant testified that when he was stopped he got out of his van, and as he walked toward Bryant he said: "[W]hat in the hell are you stopping me for again." Bryant did not answer but went for his nightstick. The defendant then hit Bryant with his fist, knocking him down, because the defendant said he "knew [Bryant] was going to hit [him]. . . ." As they scuffled, the defendant took the nightstick away from Bryant and hit him with it. They then agreed to separate; but as they separated, Bryant went for his pistol and the defendant grabbed him again. As they wrestled on the ground, Officer Causby intervened and broke up the fight.

From a verdict of guilty of assault with a deadly weapon inflicting serious injury and a judgment imposing a prison sentence of twenty-four to forty-eight months, defendant appealed.

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

Swain and Leake, by Robert S. Swain and Joel Stevenson for defendant appellant.

HEDRICK, Judge.

Defendant excepted to and assigns as error the following portion of the court's final mandate to the jury:

> "Now, members of the jury, in connection with the second issue, you will recall the definitions which the court earlier gave to you on assault with a deadly weapon and so forth. So the court instructs you that if you find from the evidence and beyond a reasonable doubt that the defendant, Thomas Howell Buchanan, on or about this 16th day of October, 1974, did hit the prosecuting witness, Thomas M. Bryant, with this night stick, as alleged in the bill of indictment, and that as a result thereof, the proximate result thereof, the defendant inflicted serious injuries on the person of the said Thomas M. Bryant, not resulting in his death, then you so being satisfied of these elements beyond a reasonable doubt, would return a verdict of guilty of assault with a deadly weapon inflicting serious bodily

injury and you would return your verdict into open court in those words, that is 'guilty as to the second issue,' submitted to you."

Defendant argues that the foregoing instruction is erroneous and prejudicial because it invades the province of the jury to determine whether the nightstick used by the defendant was a "deadly weapon," and that the judge violated G.S. 1-180 by clearly expressing an opinion that the nightstick was in fact a deadly weapon. The State, citing *State v. Smith,* 187 N.C. 469, 121 S.E. 737 (1924), and *State v. Parker,* 7 N.C. App. 191, 171 S.E. 2d 665 (1970), argues that since the court could declare the nightstick in question to be a deadly weapon as a matter of law, the instruction complained of was not error.

In *State v. Parker, supra,* citing *State v. Smith, supra,* this court held that the trial court did not err in declaring as a matter of law that a steak knife with "a sharp, sawtooth blade approximately four and one-half inches long with a keen point and a handle approximately four inches long," when used as a knife was a deadly weapon *per se.*

In *State v. Smith, supra,* at 470, our Supreme Court said:

"Any instrument which is likely to produce death or great bodily harm, under the circumstances of its use, is properly denominated a deadly weapon. *S. v. Craton,* 28 N.C., p. 179. The deadly character of the weapon depends sometimes more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself. *S. v. Archbell,* 139 N.C., 537; *S. v. Sinclair,* 120 N.C., 603; *S. v. Norwood,* 115 N.C., 789.

Where the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly within the foregoing definition is one of law, and the Court must take the responsibility of so declaring. *S. v. Sinclair, supra.* But where it may or may not be likely to produce fatal results, according to the manner of its use, or the part of the body at which the blow is aimed, its alleged deadly character is one of fact to be determined by the jury. *S. v. West,* 51 N.C., 505; *Krchnavy v. State,* 43 Neb., 337."

The bill of indictment charges the defendant with a felonious assault with a deadly weapon "to wit a night stick."

Throughout the evidence the weapon is referred to as a nightstick, and in the testimony of the defendant's wife a "billy stick." Although the alleged deadly weapon was introduced into evidence, there is no verbal description in the record of its length, breadth, and weight, nor was it sent up to this court as an exhibit as in the case of *Parker, supra.* Apparently, the trial judge felt that the question of whether the nightstick was a deadly weapon was a fact to be determined by the jury, for he instructed the jury, after defining a deadly weapon, that "the alleged deadly character of the weapon is one of fact to be determined by you, the jury, so it is for you to say, members of the jury, whether the night stick used under the circumstances of its use was a deadly weapon. . . ."

We agree with the defendant that the instruction challenged by this assignment of error removed from the jury's consideration the question of whether the nightstick was a deadly weapon and amounted to a declaration by the court that the nightstick was a deadly weapon as a matter of law. Under the circumstances here presented, we cannot say that "the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion. . . ." *Smith, supra.*

For the reasons stated, the defendant is entitled to a new trial.

New trial.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. JOHN JOHNSON, BOBBY RAY DANIELS AND ILEFONSO VAZQUES SANTOS

No. 7520SC672

(Filed 17 December 1975)

1. Kidnapping § 1— kidnapping at knifepoint — sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for kidnapping where it tended to show that defendant and two others escaped from jail and broke into an unoccupied house, when a woman entered the house to turn on the lights, she was grabbed by one of defendant's companions, all three of the men carried knives, the woman was forced outside at knifepoint and was forced into the

car driven by her friend from which she had just alighted, and the friend was forced to drive the car with defendant, his companions, and their first kidnap victim as passengers for some 30 to 40 minutes before police intercepted the automobile.

2. **Criminal Law § 89— cross-examination of defendant — prior reprehensible conduct — cross-examination proper**

The trial court did not err in permitting the district attorney to cross-examine defendant about being in, and escaping from, jail prior to the offenses in question, since defendant was not cross-examined about any indictment but was properly questioned about prior reprehensible conduct.

3. **Criminal Law § 168— no request for instruction — duty of court to instruct anyway — failure as harmless error**

Even though defendant failed to request an instruction on aiding and abetting, the trial court should have given such an instruction; however, the court's error in failing so to instruct was harmless beyond a reasonable doubt.

APPEAL by defendant Daniels from *Gavin, Judge.* Judgments entered 7 March 1975 in Superior Court, MOORE County. Heard in the Court of Appeals 19 November 1975.

John Johnson, named above as a defendant, also appealed to this court but on 13 November 1975 his motion for permission to withdraw his appeal was allowed. Hereinafter, the term "defendant" will refer only to Daniels.

In two bills of indictment, defendant, together with Ilefonso Vazques Santos and John Johnson, was charged with (1) kidnapping Laura Rose Tyson and (2) kidnapping Alice Lucille Morrison. The offenses allegedly occurred on 6 December 1974.

Over their objections, Johnson and defendant were tried together. They pled not guilty, a jury found them guilty as charged, and as to defendant the court entered judgments imposing two 20-year prison sentences, the sentence in the Tyson case to begin at expiration of sentence imposed in the Morrison case.

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

Hurley E. Thompson, Jr., for defendant appellant.

BRITT, Judge.

By his first assignment of error, defendant contends the court erred in consolidating the cases against him and those

against Johnson for trial. The assignment has no merit. The question of consolidation was addressed to the sound discretion of the trial judge, 2 N. C. Index 2d, Criminal Law, § 92, and no abuse of discretion has been shown.

[1] By his second assignment of error, defendant contends the court erred in denying his motions for nonsuit. This assignment is without merit. Evidence presented by the State is summarized in pertinent part as follows:

On 6 December 1974, Mrs. Morrison lived in the Town of Carthage and worked for Lyle Turner. Around 5:00 p.m. on that date, Mrs. Tyson, accompanied by her 14-year-old son, carried Mrs. Morrison in Mrs. Tyson's automobile to the Turner home on Highway 27, in or near the Town of Carthage, to turn on the lights. After Mrs. Morrison unlocked the door and entered the house, she was grabbed by Santos. She got loose and ran out the door at which time Santos said, "If you run, I'll stab you." With a butcher knife in his hand, Santos followed Mrs. Morrison to the car where she first saw Johnson who told Santos to stab her if she screamed. Mrs. Tyson's son had gotten out of the car and was running down the road to a store. Johnson had taken Mrs. Tyson into the house. Santos and Johnson escorted Mrs. Morrison back into the house and soon thereafter forced both ladies to go with them to the car. As they were going out the door, Santos or Johnson called to defendant and he entered the yard from a side door of the house. Defendant was holding a knife by his side at the time.

When Santos, Johnson and the ladies returned to the car, defendant was sitting in the back seat and helped pull Mrs. Morrison into the car. With Mrs. Morrison sitting in the back between Santos and defendant, both of whom had knives, and with Johnson, who also had a knife, sitting in the front, Mrs. Tyson was required to drive the car up Highway 27 to Highway 22 and on toward Putnam. Johnson then ordered her to turn the car around and go back to Carthage for purpose of getting gas. On returning to Carthage, some 30 to 40 minutes after leaving the house, police intercepted the Tyson automobile and defendants were arrested. One of the officers saw defendant, before he got out of the car, push a knife with his foot under the front seat.

Defendant's testimony is summarized in pertinent part as follows: He is 21 and a resident of Montgomery, Alabama. On

6 December 1974, he, Santos, and Johnson were in the Turner house. He did not like staying in the house because he knew he would get in trouble "if something led to the police." He stayed in the house and then went with Santos and Johnson in the Tyson automobile because he was scared of Johnson. He denied having a knife. On cross-examination he stated that he met Johnson in Florida around November 1st and they became close friends; that he, Santos, and Johnson had been together since November; that he entered the Turner house after Santos or Johnson entered it; that prior to entering the Turner house they had been incarcerated in the Moore County Jail; that Johnson effectuated an escape from the jail and he escaped also because Johnson told him he had to go too; that one of the other two broke into the house next to the Turner house after they escaped from jail and they spent a night there.

Johnson testified and on cross-examination stated that he was from North Salem, New York, and had never resided in Moore County; that he, defendant and another person came to North Carolina from Florida; that he had been convicted of burglary, armed robbery and escape in the State of New York.

We hold that the evidence was more than sufficient to withstand the motions for nonsuit.

[2] By his third assignment of error, defendant contends the court erred in permitting the district attorney to cross-examine him about being in, and escaping from, jail prior to the offenses in question. Defendant argues that the effect of the cross-examination was to interrogate him regarding unrelated offenses for which he had been indicted but not convicted. The assignment has no merit. Defendant was not cross-examined about any indictment but was properly questioned about prior reprehensible conduct. *See State v. Gainey,* 280 N.C. 366, 185 S.E. 2d 874 (1972); *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174 (1971).

By his assignments 5, 6, 7 and 8, defendant contends the court erred in giving certain instructions to the jury and in failing to give other instructions. We deem it necessary to discuss only the questions raised by assignments 6 and 7, that the court erred in not instructing the jury with respect to aiding and abetting.

[3] While defendant did not request instructions on aiding and abetting, the trial court is required by G.S. 1-180 " . . . to de-

clare and explain the law arising on the evidence given in the case. . . . " The jury charge included the following instruction:

> "Now, further, the Court instructs you that, for a person to be guilty of a crime, it is not necessary that he, himself, do all of the acts necessary to constitute the crime. If two or more persons act together with a common purpose to commit the crime of Kidnapping, each of them is held responsible for the acts of the others done in the commission of the crime of kidnapping."

Defendant argues that " . . . the jury should have been charged that mere presence at the scene of the crime even with the knowledge of a criminal act or for that matter silent approval of a criminal act is not sufficient to establish aiding and abetting on the part of the defendant who is merely present."

We think the court erred in failing to give instructions on aiding and abetting. However, we think the error was harmless beyond a reasonable doubt. The only evidence that would require the instructions was the testimony of defendant to the effect that he was with Johnson and Santos and rode in the Tyson car because he was afraid not to; that he was scared of Johnson. Pitted against his testimony was the State's evidence summarized above including the showing that when defendant came out of the Turner house he was holding a knife by his side, that he helped pull Mrs. Morrison into the backseat of the automobile, and when the police stopped them, he was seen pushing a knife under the seat; also his testimony on cross-examination that he and Johnson were good friends, they had come to North Carolina from Florida, that he escaped from the Moore County Jail with Johnson, and that he feloniously entered the house next to the Turner house with Johnson and Santos and spent the night. With all of the opportunities defendant had to separate himself from Johnson, it is inconceivable that a jury would disregard all of the evidence against him and conclude that he was a forced participant in the kidnappings.

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

For the reasons stated, we conclude that defendant received a fair trial free from reversible error.

No error.

Chief Judge BROCK and Judge MORRIS concur.

CLARENCE PHARO, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR DANNY PHARO v. STANLEY W. PEARSON AND FAITH S. PEARSON

No. 758SC639

(Filed 17 December 1975)

1. **Animals § 2— dog bite — evidence of subsequent viciousness — exclusion improper**

In an action to recover for personal injuries sustained when the minor plaintiff was bitten by defendants' dog, the trial court erred in refusing to admit testimony that approximately four weeks after the event in question defendants' dog again came onto plaintiffs' premises, growled at the minor plaintiff and tried to jump him.

2. **Animals § 2; Rules of Civil Procedure § 51— ordinance requiring leashes on dogs — failure to instruct on ordinance — error**

By alleging a city ordinance requiring dogs to be muzzled or leashed, introducing the ordinance, which was not inconsistent with the State statute on the subject, G.S. 106-381, and by presenting testimony tending to show violation of the ordinance by defendants, plaintiffs made the ordinance a substantial feature of the case, and the trial judge was thereby under a positive duty to give appropriate jury instructions with respect to the ordinance.

APPEAL by plaintiffs from *Peel, Judge.* Judgment entered 24 April 1975 in Superior Court, LENOIR County. Heard in the Court of Appeals 14 November 1975.

In this action plaintiffs seek to recover for personal injuries (and medical expenses) resulting from the minor plaintiff's being bitten by defendants' dog. Plaintiffs' evidence tended to show:

On 5 October 1971 the nine-year-old minor plaintiff was playing with his dog in the yard of his parents' home in Kinston. Defendants' dog, an English Setter, and another dog entered plaintiffs' yard and began fighting with their dog. The minor plaintiff attempted to break up the fight by grabbing the collar of defendants' dog. Defendants' dog turned on the minor plaintiff, biting his right little finger and his left index finger, resulting in the loss of the former. Defendants' dog was

not kept muzzled or leashed, he had a reputation for being mean, and on two occasions in September of 1971, he growled and snarled at people in the neighborhood. Plaintiffs attempted to show that defendants' dog tried to bite the minor plaintiff some four weeks subsequent to the day in question but the court disallowed the testimony.

Defendants' evidence tended to show that their dog was not vicious, that he had a reputation for being gentle, that they had never received any complaints about him, that no dogs in the neighborhood were kept muzzled or leashed, that plaintiffs' dog was vicious and that it was he that bit the minor plaintiff.

For their verdict, the jury found (1) that defendants' dog bit the minor plaintiff as alleged in the complaint but (2) his injuries and damages were not caused by the negligence of defendants. From judgment predicated on the verdict, dismissing their action, plaintiffs appealed.

Gerrans & Spence, P.A., by William D. Spence, for plaintiff appellants.

Jeffress, Hodges, Morris & Rochelle, P.A., by A. G. Jeffress, for defendant appellees.

BRITT, Judge.

[1] By their first assignment of error, plaintiffs contend the trial court erred in excluding testimony tending to show the vicous propensity of defendants' dog approximately four weeks subsequent to the date on which the minor plaintiff was bitten. The assignment has merit.

In the trial of this action, it was proper, if not necessary, for plaintiffs to show that defendants' dog was "dangerous, vicious, mischievous, or ferocious, or one termed in law as possessing a vicious propensity; . . . . " *Swain v. Tillett,* 269 N.C. 46, 51, 152 S.E. 2d 297, 301 (1967), and cases therein cited. In addition to evidence as to what happened on the day the minor plaintiff was bitten, plaintiffs introduced evidence tending to show that defendants' dog growled and snarled at, and nearly attacked, one Connie Garner prior to 5 October 1971. Later, plaintiffs offered testimony by the minor plaintiff and his mother showing that approximately four weeks after he was bitten, and while he was on his parents' premises, defendants' dog again growled at him and tried to "jump him"; that the

mother was present and chased the dog away with a broom. The court refused to admit the testimony.

In 4 Am. Jur. 2d, Animals, § 125, p. 376, we find: "Where prior vicious habits or conduct of an animal have been shown, evidence of subsequent vicious conduct of the same nature is admissible." In 3A, C.J.S., Animals, § 221, p. 725, we find: "In an action to recover damages for personal injuries or damage to animals arising from the conduct of domestic animals, the general rules as to competency and relevancy of evidence apply in determining the admissibility of evidence concerning the character of the animal causing the injury. Evidence of specific instances of viciousness . . . is admissible. Also, evidence of the disposition and temperament of the animal both before and after the occurrence in question is admissible. . . . [A]nd evidence that it subsequently manifested a similar disposition is competent to prove that its previous conduct was not accidental or unusual, but the result of a fixed habit, provided that such evidence is not too remote in point of time."

We hold that the court erred in excluding the testimony.

[2] By their other assignment of error, plaintiffs contend the court erred in failing to charge the jury with respect to Section 4-6 of the Code of Ordinances of the City of Kinston. We think the assignment has merit.

G.S. 1A-1, Rule 51(a), clearly imposes on the trial judge the duty to "declare and explain the law arising on the evidence given in the case." The ordinance in question provides as follows:

> "It shall be unlawful for any dogs to be running at large without a muzzle on the streets or sidewalks of the City of Kinston, unless under the control of the owner, a member of his immediate family, or his authorized agent, either by leash, collar, chain, or otherwise."

In their complaint, plaintiffs pled this violation of the ordinance as one of the grounds of negligence and at trial introduced the ordinance into evidence and offered testimony tending to show its violation by defendants.

G.S. 14-4 makes the violation of a municipal ordinance a misdemeanor. In *Bell v. Page*, 271 N.C. 396, 399, 156 S.E. 2d 711, 715 (1967), we find: "The violation of a municipal ordinance imposing a public duty and designed for the protection

of life and limb is negligence *per se.*" But defendants argue that the subject matter of the ordinance in question has been preempted by a statewide statute, therefore, the ordinance has no validity.

G.S. 106-381 provides: "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."

G.S. 160A-174(a) authorizes a city to enact ordinances to " . . . define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city . . . . " G.S. 160A-174(b) requires that ordinances be consistent with the constitutions and laws of the State and nation and sets forth certain instances in which an ordinance would not be consistent with State or federal law. The section concludes with the following sentence: "The fact that a State or federal law, standing alone, makes a given act, omission, or condition unlawful shall not preclude city ordinances requiring a higher standard of conduct or condition." *See State v. Tenore,* 280 N.C. 238, 247, 185 S.E. 2d 644, 650 (1972).

We hold that the ordinance in question is not inconsistent with G.S. 106-381. The statute is designed to provide minimum protection against vicious dogs in all parts of the State—rural, urban, small villages and large cities. It stands to reason that with more concentrated population, cities are justified in adopting stricter regulations for dogs. The City of Kinston is authorized to require "a higher standard of conduct or condition" with respect to the keeping of dogs within its corporate limits than is required by G.S. 106-381 for the State generally.

By alleging the ordinance, introducing it in evidence, and presenting testimony tending to show its violation by defendants, plaintiffs made the ordinance a substantial feature of the case, thereby imposing on the trial judge a positive duty to give appropriate jury instructions with respect to the ordinance.

For the reasons stated, we order a new trial on all issues.

New trial.

Judges VAUGHN and ARNOLD concur.

REISDORF & JAFFE, P.A. v. EDMUND LANGHORNE

No. 7521DC567

(Filed 17 December 1975)

Judgments § 51— foreign judgment — acknowledgment of service — general appearance — jurisdiction — default judgment

Defendant, a resident of North Carolina, made a general appearance in a New Jersey annulment action and submitted himself to the jurisdiction of the New Jersey court when he filed an acknowledgment of service of process in that action, and the New Jersey court had jurisdiction of the subject matter, including the annulment, counsel fees and court costs, and jurisdiction over the person of the defendant; however, where defendant included in his acknowledgment of service a statement that he was contesting any award of counsel fees and court costs, he had the right to be heard on those issues, and default judgment for counsel fees and court costs could not properly be entered against him without giving him notice of at least five days prior to the hearing on the application for default judgment.

APPEAL by defendant from *Clifford, Judge.* Judgment entered 16 April 1975, District Court, FORSYTH County. Heard in the Court of Appeals 20 October 1975.

In 1972 Angela Piper, represented by attorneys Reisdorf and Jaffe, instituted an action for annulment of her purported marriage to defendant, on the ground that he had a spouse living.

At the beginning of Mrs. Piper's suit in New Jersey, summons was issued to defendant who was then living in Forsyth County, North Carolina. On 8 June 1972 defendant signed an acknowledgment of service of process, to which he added, "Defendant contests the payment of court costs and attorney fees."

A default judgment of annulment was rendered in the Superior Court of Sussex County, New Jersey, on 3 April 1973. As a part of the judgment, defendant was ordered to pay "the plaintiff's counsel fees in the amount of $750.00 plus costs."

Suit was filed in Forsyth County to collect under the New Jersey judgment and defendant answered denying liability. A hearing was held in District Court and defendant testified that following acknowledgment of summons he received no further notice until judgment had been entered and he was billed for $863.50. Judgment was entered by the North Carolina court finding facts and concluding that the New Jersey court had no

jurisdiction to order Langhorne to pay attorney fees and court costs. From this judgment, plaintiffs appeal.

Craige, Brawley by C. Thomas Ross for plaintiff.

White and Crumpler by Michael J. Lewis for defendant.

CLARK, Judge.

The plaintiff assigns as error the conclusion in the District Court judgment that "the Court of New Jersey was without jurisdiction to render its judgment ordering payment of attorney fees and court costs . . . . "

Article IV, Section 1, of the Constitution of the United States provides: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." Nevertheless, in this case North Carolina is under no obligation to give full faith and credit to the New Jersey judgment if invalid in that state because offensive to the "due process clause" of the Fourteenth Amendment, Constitution of the United States. The mere recital in the judgment that the court rendering it had jurisdiction is not conclusive; the court of another state, in which the judgment is asserted as a cause of action, or as a defense, may, within limits, make its own independent inquiry into the jurisdiction of the court which rendered the judgment. *Hosiery Mills v. Burlington Industries,* 285 N.C. 344, 204 S.E. 2d 834 (1974).

In determining the validity of the New Jersey judgment, first we must examine the applicable laws of that State relating to jurisdiction over the subject matter and jurisdiction over the person to see that these laws have been complied with, before reaching any conclusion as to the validity of these applicable laws. *Marketing Systems v. Realty Co.,* 277 N.C. 230, 176 S.E. 2d 775 (1970).

New Jersey Statutes Annotated (hereinafter cited as N.J.S.A.) 2A:34-11 (1975) provides:

> "In divorce and nullity actions, the jurisdiction of the court over the defendant's person for all purposes of the action shall be fully established by the filing of an acknowledgment of service, or an appearance, or of an answer by the defendant pro se or on his behalf by a duly authorized attorney, in such manner as may be prescribed by rules of the supreme court."

New Jersey Rules of Court for Superior, County and Surrogates Court (hereinafter cited as N.J. Court Rule) 4:78-3 (1974) provides that "Upon the filing of subject acknowledgment . . . plaintiff shall be under no further obligation to have the defendant served personally."

The defendant filed in the New Jersey action an "acknowledgment of service" as provided by N.J.S.A. 2A:34-11 (1975); in so doing he made a general appearance and submitted himself to the jurisdiction of the Superior Court of New Jersey. Thereafter, the Superior Court of New Jersey had jurisdiction over the subject matter, including the annulment and counsel fees and court costs, and jurisdiction over the person of the defendant. But the defendant went further than filing an "acknowledgment of service"; he included in this acknowledgment the statement that he was contesting any award of counsel fees and court costs. N.J. Court Rule 4:79-3 (1975) provides: "A defendant in a matrimonial action may enter a written appearance and, without filing an answer, be heard on issues of custody of children, . . counsel fees and costs." It is clear under this Rule that though the defendant did not contest the annulment, he had the right to be heard on the issues of counsel fees and other costs.

Since the New Jersey judgment included in its preamble that "defendant Edmund Langhorne, having defaulted in this action," we take note of N.J. Court Rule 4:43-2(b) (1975) which provides for notice of at least five days prior to hearing on an application for default judgment, if the defaulting party has appeared in the action. The defendant appeared in the New Jersey action. If, *arguendo,* he defaulted and N.J. Court Rule 4:43-2(b) is applicable, defendant should have been given at least five days' notice prior to the hearing on the application for default judgment.

The defendant alleges lack of jurisdiction by the New Jersey court, and the District Court so ruled, but defendant's evidence tended to show entry of judgment without notice to a nonresident defendant who had appeared and by his "answer" raised the issues of counsel fees and court costs. Defendant also alleges, or attempts to allege, fraud in the procurement of the New Jersey judgment. Since we find that the District Court erroneously concluded that the New Jersey court did not have jurisdiction, we reverse the judgment and remand for a new hearing. If properly presented under the pleadings and evidence, the Dis-

trict Court must determine whether due process (other than jurisdiction) was denied, whether there was fraud in the procurement of the judgment, whether the plaintiff is the real party in interest, and any other issues of fact and law aptly presented to the Court.

Reversed and remanded.

Chief Judge BROCK and Judge HEDRICK concur.

MARY KISTLER STONEY; ANDREW M. KISTLER II; ANDREW M. KISTLER III; MARGARET CHRISTINE KISTLER; DOROTHY E. KISTLER AND MARGARET J. KISTLER, GUARDIAN AD LITEM FOR THE INFANT PLAINTIFFS ANDREW M. KISTLER III; MARGARET CHRISTINE KISTLER, AND DOROTHY E. KISTLER; AND ALL PERSONS WHO MAY NOW OR HEREAFTER AT ANY TIME HAVE OR CLAIM TO HAVE THROUGH ANY OF SAID INFANT PLAINTIFFS ANY INTEREST UNDER ARTICLE TENTH OF THE WILL OF CHARLES E. KISTLER v. RODERICK M. MACDOUGALL, TRUSTEE UNDER THE WILL OF CHARLES E. KISTLER; MARY KISTLER STAHL; CHARLES E. KISTLER III; JOHN F. KISTLER II; KAREN M. KISTLER; DELL E. KISTLER; JAMES B. CRAVEN III; STEPHEN K. CRAVEN; JAMES B. CRAVEN IV; JOSEPH H. CRAVEN, SARA H. CRAVEN, GUARDIAN AD LITEM FOR THE INFANT DEFENDANTS JAMES B. CRAVEN IV AND JOSEPH H. CRAVEN AND ALL PERSONS WHO MAY NOW OR HEREAFTER AT ANY TIME HAVE OR CLAIM TO HAVE THROUGH ANY OF THE SAID INFANT DEFENDANTS ANY INTEREST UNDER ARTICLE TENTH OF THE WILL OF CHARLES E. KISTLER; AND MARY K. STAHL, ELIZABETH M. STAHL AND WAYNE W. MARTIN GUARDIAN AD LITEM FOR THE INFANT DEFENDANTS MARY K. STAHL AND ELIZABETH M. STAHL, AND ALL UNKNOWN AND UNBORN PERSONS WHO MAY NOW OR HEREAFTER AT ANY TIME HAVE OR CLAIM TO HAVE ANY INTEREST UNDER ARTICLE TENTH OF THE WILL OF CHARLES E. KISTLER AND ARE NOT REPRESENTED BY MARGARET J. KISTLER, GUARDIAN AD LITEM FOR THE INFANT PLAINTIFFS

No. 7525SC523

(Filed 17 December 1975)

Wills § 48— adopted children as "issue"

Children of testator's son adopted by the son after testator's death in 1936 are entitled to share in the distribution of the principal of a trust under a provision of testator's will providing that upon termination of the trust the principal was to be distributed to testator's "issue," since under G.S. 48-23, enacted in 1963, the word "issue" includes any adopted person unless the contrary plainly appears by the terms of the will itself, and such construction applies whether the

will was executed before or after the final order of adoption and irrespective of whether the will was executed before or after enactment of the statute.

APPEAL by defendants from *Ervin, Judge.* Judgment entered 29 March 1975 in Superior Court, BURKE County. Heard in the Court of Appeals 15 October 1975.

A declaratory judgment action was instituted to obtain construction of Article Ten of the Will of Charles E. Kistler. The plaintiffs and defendants comprised all persons, born and unborn, with an interest in the residuary trust created by that article. The complaint seeks a declaration as to the rights of three minor plaintiffs who are the adopted children of testator's son Andrew.

The evidence shows that Charles E. Kistler died 8 December 1936 leaving a will and three codicils which were probated. Article Ten of the will created a trust which was to terminate upon the death of the last survivor of Mary K. Stoney (testator's wife), Charles E. Kistler, Jr., Mary K. Stahl, and Andrew M. Kistler II (testator's three children). Two-thirds of the trust income was to be distributed to Mary K. Stoney during her lifetime, and one-third of the trust income was to be distributed to the three children for their lifetimes. If Mary Stoney died before termination of the trust, her share of the trust income was to be distributed among the children. If any of the children died before termination of the trust, their share of the trust income was to be distributed to their issue, or failing such issue, to the testator's other children or their issue. Upon termination of the trust, testator provided for the distribution of the principal to "my issue" or, failing such issue to his heirs by the intestacy statutes.

Andrew adopted three children (Andrew M. Kistler III, Margaret C. Kistler, and Dorothy E. Kistler). When G.S. 48-23 took effect in 1963, testator was deceased, and the trust income was being distributed in accordance with the terms of the trust indenture. Based upon these facts, the superior court concluded that Andrew's three adopted children "have the rights of beneficiaries under the said will in the same manner and with the same effect as if they were natural legitimate issue of Andrew M. Kistler II, and natural legitimate issue of Charles E. Kistler." Two of testator's minor grandchildren have appealed.

Hudson, Petree, Stockton, Stockton, and Robinson, by H. G. Hudson, for plaintiff appellees.

Everett, Everett, Creech, and Craven, by James B. Craven III, for defendant appellees.

Simpson, Martin, Baker & Aycock, by Wayne W. Martin, for defendant appellants.

MARTIN, Judge.

The question presented by this appeal is whether the court erred in finding as a fact and concluding as a matter of law that the adopted children of Andrew M. Kistler II, and their issue, are and will be issue of Charles E. Kistler under Article Ten, Paragraph 2(h) of the will of Charles E. Kistler, and, as such issue, whether they have the rights of beneficiaries under the said will in the same manner and with the same effect as if they were natural legitimate issue of Charles E. Kistler.

The adopted children of Andrew Kistler II, were not born when Charles E. Kistler died. Moreover, at the time Charles E. Kistler executed his will, an adopted child was incapable of inheriting from the ancestor of the adoptive parents. Consequently, at the time Charles E. Kistler executed his will, there was nothing in our statutes of descent and distribution or in our adoption laws to indicate that he had any idea that by creating a trust providing that upon its termination the principal was to be distributed to "my issue," he would or could include any child except a child or children of his blood.

After having been amended and rewritten from time to time following the death of Charles E. Kistler, the statute was again rewritten in 1963, and now, under the designation of G.S. 48-23, provides, in its pertinent parts:

> "The following legal effects shall result from the entry of every final order of adoption:
>
> . . .
>
> (3) From and after the entry of the final order of adoption, the words 'child,' 'grandchild,' 'heir,' 'issue,' 'descendant,' or an equivalent, or the plural forms thereof, or any other word of like import in any deed, grant, will or other written instrument shall be held to include any adopted person, unless the contrary plainly appears by the terms thereof, whether such instrument was executed be-

fore or after the entry of the final order of adoption and whether such instrument was executed before or after the enactment of this section."

Clearly, the express provision of the statute is that in any will, the word "issue" shall be held to include any adopted person, unless the contrary plainly appears by the terms of the will itself. It is also expressly provided by the statute that such rule of construction shall apply whether the will was executed before or after the final order of adoption and irrespective of whether the will was executed before or after the enactment of the statute. *Peele v. Finch,* 284 N.C. 375, 200 S.E. 2d 635 (1973).

Appellants contend that by using the phrase "my issue," the testator intended to exclude adopted persons from distribution of the principal upon termination of the trust. The use of the words, "my issue" is not a plain indication of a contrary intent by the terms of the will sufficient to prevent the adopted children of Andrew M. Kistler II from sharing in the distribution of the principal upon termination of the trust.

For the reasons stated, the judgment appealed from is

Affirmed.

Judges MORRIS and PARKER concur.

ALFRED JUDGE CLARK v. LUCY SULLIVAN MOORE

No. 7520SC648

(Filed 17 December 1975)

Automobiles § 54— passing motorcyclist traveling in same direction — automobile driver not negligent

In an action for personal injury arising from an automobile-motorcycle collision, evidence was sufficient to support the trial court's findings and conclusion that there was no actionable negligence on defendant's part where the evidence tended to show that defendant in her automobile came up behind plaintiff on his motorcycle, defendant slowed down and followed plaintiff at a very slow speed for approximately 150 feet, with no traffic approaching from the opposite direction defendant sounded her horn, crossed the centerline of the highway to her left and attempted to pass plaintiff, and plaintiff turned his motorcycle left into defendant's car while defendant was passing him.

APPEAL by plaintiff from *Long, Judge.* Judgment entered 2 April 1975 in Superior Court, ANSON County. Heard in the Court of Appeals 10 November 1975.

This litigation arose out of an automobile-motorcycle collision on 4 April 1971. In his complaint, plaintiff motorcyclist alleged that defendant, driving her automobile at an excessive rate of speed, " . . . failed to yield the right of way to the plaintiff in accordance with his [i.e. plaintiff's] left turn signal . . . [and] [d]efendant failed to keep a proper lookout and decrease her speed in order to avoid colliding with the motorcycle of the plaintiff. . . . As a result thereof, the plaintiff had his left leg broken in several places and suffered permanent injuries to his left leg. . . . " Plaintiff also raised the issue of damage to his motorcycle and sought damages for both his personal injuries and property damage.

Defendant's answer, denying the material allegations raised in plaintiff's complaint, averred that while travelling behind the slow-moving plaintiff, she decided to pass and only made her move into the left lane after sounding her horn and thus warning the plaintiff. While passing, " . . . the plaintiff suddenly and without [signalling any] warning [to the defendant] turned his motorcycle to his left across the center of the highway and ran the same side into the right side and front fender . . . " of her car. Defendant further maintained upon information and belief that immediately preceding the collision the plaintiff suddenly attempted " . . . to make a U-turn in the highway. . . . "

At trial, plaintiff testified that he had been travelling along the southbound lane with two other cyclists and turned back by himself to retrieve a face shield that he had seen lying along the roadbed. The two other cyclists remained behind to wait for plaintiff's return. Plaintiff stated that:

> "When I pulled out in 52 headed north I did not see any approaching vehicles. After I pulled out I saw a vehicle approaching me from the rear after I had gone about 50 feet. I later determined who the operator and owner of that automobile was. It was Mrs. Lucy Sullivan Moore. The defendant in this lawsuit. I would say I traveled up No. 52 150 feet or more. My motorcycle was equipped with electrical turning devices. Signal devices. I gave a turn signal a distance of 100 feet. This was after I proceeded back north. I gave a turn signal. I gave a left turn signal. I'd say that

after I entered No. 52 headed north I had traveled about 50 feet when I gave the signal. I did make a left turn. I couldn't tell the distance that the car was from my motorcycle at the time I first noticed the approaching vehicle in my rear view mirror, but I could see it plain. I don't have an opinion as to how fast the car was traveling at the time I first noticed it. I observed it again before I made my turn. Well, it was getting close then. I don't have an opinion as to how close it was to my motorcycle when I made the turn. I don't. At the time I did observe it last in my rear view mirror it was close but I couldn't tell the distance.

When I turned I didn't see the vehicle any more. As I turned I didn't see it any more but she was there when I turned. That's right. I had observed it just prior to my turning. There was a collision between my motorcycle and this approaching vehicle that was being driven by Mrs. Moore. It occurred on the left side of the road. That was the southbound lane of traffic. There was a center line marking in the road. I was on the southbound lane of traffic. That was at the point of collision. The point of the impact on my motorcycle was on the left rear end. My motorcycle was struck on the left rear end. Part of my body was hit in the accident. It was my left leg. I heard a sound, a horn, from the approaching vehicle as I made my turn. Just as I turned. That's right. Just as I turned I heard a horn. I heard a horn and slammed about the same time. I was injured in that collision. I was taken to the hospital. . . . I had a broken leg."

Plaintiff further testified that he never told defendant at the scene of the wreck that the collision was his fault. The two other cyclists, who witnessed the wreck from their vantage point several hundred feet away, testified and corroborated plaintiff's version of the mishap.

Defendant testified that:

"As we rounded a curve in the highway we saw motorcycles parked over on the shoulder on the road. There were two of them. At that time as I rounded the curve I was doing approximately 55. I did see another motorcycle on the highway ahead of me. It was quite some distance ahead of me going north in the same direction as I was.

> Well, I immediately broke my speed and drove with caution behind him for quite some time. I broke my speed, I slowed down and drove behind him for awhile to see if he was going to make a turn or anything. Well, I drove with caution and watched his actions to see what, if anything, he was going to do. He was driving very slow looking down toward the right shoulder and he did that for quite some time without looking behind, so I thought I'd pass and I blew my horn, pulled over to my left in the left lane passing going north and just as I got against him he pulled toward me. I blew my horn again but it was too late by that time and we collided. He hit my right front fender. As to how I blew my horn when I first blew it, I blew it and stopped, I didn't just stomp on it, mash on it real hard and hold it, I blew long enough just to give him a signal and then I let off because I thought he knew I was passing.
>
> When I got against him, I saw him pulling over into me and I blew it again, but didn't have time to hold it that time because I was too busy trying to keep from colliding with him. I was in my left lane going north when he collided against me. At that time I couldn't have been going more than 35. My right front fender came in contact with the motorcycle."

Defendant also recalled that when she approached the injured plaintiff he told her that " ' . . . it was my [*i.e.* plaintiff's] fault because I was looking for something.' " Passengers in defendant's car testified and corroborated the defendant's testimony.

Heard without a jury, the trial court in pertinent part found that:

> "On April 4, 1971, at approximately 2:00 p.m., the defendant was driving her automobile northward on U.S. Highway #52 at a speed of 50 to 55 miles per hour. She passed the two parked motorcycles and came up behind the motorcycle which was being operated by the plaintiff in a northerly direction on the highway. She then reduced the speed of her car and followed said motorcycle for approximately 150 feet. With no traffic approaching from the opposite direction, the defendant sounded her horn, crossed the centerline of the highway to her left, and attempted to pass the motorcycle which was then being operated by the plaintiff to his right of the center of the highway. While

the defendant was in said act of passing, the plaintiff turned his motorcycle to his left across the center of the highway and collided with the right front bumper and fender of the defendant's automobile, and in said collision the plaintiff received serious personal injuries."

Based on the foregoing facts, the trial court concluded as a matter of law that "[t]he defendant complied with all legal requirements in attempting to pass the motorcycle operated by the plaintiff . . . [and committed] no actionable negligence. . . . " From judgment for the defendant, plaintiff appealed.

Coble, Morton, Grigg & Odom, by Robert W. Odom, for plaintiff appellant.

Brown, Brown & Brown, by Richard L. Brown, Jr., for defendant appellee.

MORRIS, Judge.

Plaintiff contends that the trial court erred in finding as a fact and concluding as a matter of law that there was no actionable negligence on defendant's part and that defendant complied with all legal requirements in attempting to pass. We find no merit in plaintiff appellant's contention.

> "The court's findings of fact are conclusive if supported by any competent evidence, and judgment supported by such findings will be affirmed, even though there is evidence to the contrary. . . . Findings of fact made by the court which resolve conflicts in the evidence are binding on appellate courts." *Trotter v. Hewitt,* 19 N.C. App. 253, 254, 198 S.E. 2d 465 (1973), cert. denied 284 N.C. 124 (1973).

We have carefully reviewed the evidence in this case and " . . . find that the trial court's findings of fact are supported by competent evidence and that the conclusions of law in the judgment are supported by the findings of fact." *Id.* at 254.

Affirmed.

Judges PARKER and MARTIN concur.

STATE OF NORTH CAROLINA v. CHARLES RAY ADAMS

No. 7526SC650

(Filed 17 December 1975)

1. **Criminal Law § 76— admissibility of confession — absence of findings**

Where no conflicting testimony was offered on *voir dire* to determine the admissibility of a confession, the trial court did not err in failing to make findings of fact in support of its conclusion that the confession was admissible.

2. **Burglary and Unlawful Breakings § 4; Larceny § 6— stolen items — admissibility**

In a prosecution for breaking and entering of a service station and larceny of property therefrom, the trial court properly admitted two credit cards, cans of motor oil and cans of automobile treatment fluid found in a car in which defendant had been riding where the service station manager identified the credit cards as property of the station and testified the cans of motor oil and fluid were similar or the same brand as merchandise taken from the station on the night of the crimes.

3. **Larceny § 8— instruction on possession of recently stolen property — harmless error**

In a prosecution for breaking and entering and larceny, error, if any, in instructing on the doctrine of possession of recently stolen property on the ground defendant was not in possession of property found in a car of which he was neither the owner nor the driver was harmless beyond a reasonable doubt where three black males were observed carrying items from a service station to a yellow Falcon, a short time later three black males, including defendant, were arrested while standing near a yellow Falcon containing the stolen property, and defendant confessed to the crimes.

APPEAL by defendant from *Falls, Judge.* Judgment entered 9 April 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 14 November 1975.

Defendant entered a plea of not guilty to an indictment charging felonious breaking and entering and larceny. The State's evidence tended to establish that on the morning of August 1, 1973, Roy Helms discovered that the Pilot Oil Corporation station which he managed had been broken into and that a quantity of motor oil, two credit cards, and other items had been stolen. Fred Strickhouser testified that at approximately 3:45 a.m. on August 1, 1973 he saw three black males in the station lot carry racks of cans from an outbuilding to an early model yellow Falcon, and place the cans in the car's trunk.

Strickhouser called the police and gave them a description of the car and the direction in which the car was traveling.

Deputy Sheriff A. W. Barringer testified that at approximately 4:00 a.m. on August 1, 1973 he discovered and examined an abandoned Oldsmobile on Highway 29. Upon returning to the abandoned vehicle an hour later, he noticed a Ford Falcon parked behind the Oldsmobile matching the description given by Strickhouser. Further examination of the area revealed three black males standing in a ditch beside the road. The men were taken into custody and read their rights. Two Pilot Oil credit cards, motor oil and other items were found in the Falcon.

Officer W. J. Horner testified that defendant made a statement to him concerning the crime. The court ruled on voir dire that the statement was admissible. The statement was in fact a confession of guilt by the defendant.

Defendant testified in his own behalf that he was flagged down by Donald Stitt and Jeffery Cousar who were traveling in a 1962 yellow Falcon. Defendant further testified that he and his two companions drove down Highway 77 to smoke marijuana. Defendant said he later fell asleep and did not wake up until they parked behind the Oldsmobile on Highway 29 in Cabarrus County. Defendant denied having taken part in the break-in of the Pilot Oil Station, and stated that he did not remember making a statement to Officer Horner.

The jury returned a verdict of guilty as charged. From a judgment imposing a prison sentence defendant appealed to this Court.

Attorney General Edmisten, by Associate Attorney William H. Guy, for the State.

Franklin L. Teague for defendant appellant.

ARNOLD, Judge.

[1] We disagree with defendant's argument that the trial judge erred in failing to make findings of fact, and failing to enter an adjudication based on its findings, as to the voluntariness of his confession at the conclusion of a voir dire hearing.

There was competent testimony on voir dire by Officer Horner to support the court's finding "as a fact that the defendant was questioned by the officer in the interrogation room at

the Cabarrus County Law Enforcement Center; that he was advised of his rights and understood the rights that were advised him and that any statement which he made was freely, voluntarily and without any fear or coercion or promise or hope of reward and may be admitted into evidence." Defendant offered no evidence on the voir dire hearing.

The courts of North Carolina recognize that it is the better practice for the court to find the facts upon which it concludes a confession is admissible. However, as in this case, when no conflicting testimony is offered on vire dire, it is not error for the judge to admit the confession without making specific findings. *State v. Simmons,* 286 N.C. 681, 213 S.E. 2d 280 (1975); *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561 (1971); *State v. Keith,* 266 N.C. 263, 145 S.E. 2d 841 (1966); *In re Simmons,* 24 N.C. App. 28, 210 S.E. 2d 84 (1974).

[2] Defendant next contends that the trial court erred when it allowed into evidence State's exhibits 1-A, 1-B (credit cards), 2-A, 2B (cans of motor oil), 3 and 4 (cans of automobile treatment fluid). Defendant argues that there was no evidence that the items were the property of Pilot Oil Corporation or that they had been stolen from the Woodlawn Road Station. We see no merit in defendant's argument.

It is competent in a prosecution for breaking and entering and larceny to show all the goods lost from a store and to trace some or all of the articles to a defendant. *State v. Richardson,* 8 N.C. App. 298, 174 S.E. 2d 77 (1970). The manager of the Pilot Corp. Station, Mr. Helms, positively identified the credit cards as the property of the Pilot Corp. Station he managed. Mr. Helms further testified that the other exhibits were similar or of the same brand as the merchandise taken from the station on the night of the alleged offense.

[3] Finally, defendant argues that the trial court erred in instructing the jury on the doctrine of possession of recently stolen property. It is defendant's position that he was not in active or constructive possession of the stolen property since he was not the owner or driver of the car in which the property was discovered.

At the time of the robbery a witness observed three black males carrying items from the station to a yellow Falcon. The police were notified and given a description of the yellow Falcon. Less than two hours later three black males were arrested in a

ditch near a yellow Falcon in which the police found the stolen property. One of these three men was the defendant, and following his arrest defendant confessed to the crime.

Any error in the court's instruction regarding the doctrine of possession of recently stolen property was harmless beyond a reasonable doubt as to this defendant.

The defendant had a fair trial, and we can find no prejudicial error.

No error.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. JOSEPH MARION HEAD, JR.

No. 7529SC449

(Filed 17 December 1975)

Constitutional Law § 37; Criminal Law § 75— no waiver of right to counsel — confession inadmissible

Defendant is entitled to a new trial where the trial court allowed into evidence a confession of defendant without first finding that defendant expressly waived his right to counsel before making the confession.

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 for the first degree murder of James Michael Richards. Defendant entered a plea of not guilty after the State announced that it would seek no greater verdict than for second degree murder.

The State's evidence tended to establish that James Michael Richards was shot to death by Joseph Marion Head, Jr., the defendant. Richards' body contained nine bullet holes, most of which were in the head.

The State introduced evidence of a statement made by the defendant to Deputy Sheriff Pressley at the scene of the crime. The officer testified that the defendant said that Rich-

ards came to the defendant's house to see his girl friend and an argument ensued. Richards shot the defendant in the arm with a .25 caliber automatic pistol, and the defendant returned the fire, emptying his .25 caliber automatic pistol into Richards. The defendant then went into his house and brought out a .22 caliber automatic rifle and emptied the rifle into the deceased.

Before Officer Pressley testified as to statements which defendant made, a voir dire hearing was held. Evidence offered at the voir dire established that the defendant was advised of his constitutional rights, and stated that he understood them, prior to answering the officer's questions.

Defendant offered no evidence on the voir dire or at the trial. He was found guilty of voluntary manslaughter and given an active sentence. Defendant appealed to this Court.

Attorney General Edmisten, by Assistant Attorney General Charles J. Murray, for the State.

Robert W. Wolf and Robert L. Harris for defendant appellant.

ARNOLD, Judge.

In his first assignment of error defendant challenges the admissibility of the testimony of Officer Pressley concerning statements made to him by defendant. Defendant contends that the court's findings of fact are not supported by the evidence in that there was no testimony that he expressly waived counsel.

In *State v. Blackmon*, 284 N.C. 1, 9, 199 S.E. 2d 431 (1973), Huskins, J., speaking for the court, said:

> "Consequently, it is established that defendant was fully advised and understood that he had the right to remain silent; that anything he said could and would be used against him in a court of law; that he had the right to have a lawyer present during interrogation and to confer with counsel before any questioning if he so desired; that if he could not hire his own attorney the State would appoint and pay a lawyer to represent him; and that if he chose to answer questions or make a statement he could stop talking at any time. The findings further establish that defendant never requested the presence of counsel but never said he did not want a lawyer. Finally, the findings establish that his later statement was not coerced but was freely and

voluntarily made. These facts, however, are not sufficient to constitute a waiver of counsel. There is neither evidence nor findings of fact to show that defendant expressly waived his right to counsel, either in writing or orally, within the meaning of *Miranda* on which our decision in *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123 (1971), is based."

We cannot distinguish *Blackmon, supra,* from this case where it is undisputed that defendant was fully advised of his constitutional rights and that he understood these rights. However, there is no evidence or finding of fact to support a conclusion that defendant expressly waived his right to counsel. The defendant did not orally, or in writing, expressly state that he waived his right to counsel. *See State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123 (1971); *State v. Thacker,* 281 N.C. 447, 189 S.E. 2d 145 (1972); *State v. Harris,* 27 N.C. App. 412, 219 S.E. 2d 266 (1975).

In view of the fact that our Supreme Court has held that there is no waiver of counsel in factual situations similar to this case, defendant is entitled to a new trial. We find it unnecessary to discuss defendant's remaining assignments of error.

New trial.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. EDDIE RAY PIERCE

No. 759SC681

(Filed 17 December 1975)

1. **Criminal Law § 89— prior consistent statements — admissibility for corroboration**

It was not error for the court to allow prior consistent declarations made by a witness when he had not been impeached, since the evidence was admitted for the purpose of corroboration, and prior consistent statements are admissible for corroborative purposes even though the witness has not been impeached.

2. **Robbery § 5— aiding and abetting — failure to instruct — no error**

The trial court did not err in failing to instruct the jury on the law of aiding and abetting where the evidence tended to show that

defendant and two others all had guns drawn and all three acted in concert in the robbery.

3. **Criminal Law § 134— sentence to be served in county jail — authority of court**

The trial court was authorized by G.S. 148-30 to sentence defendant to a term of years to be served in the county jail.

APPEAL by defendant from *Clark, Judge.* Judgment entered 13 May 1975 in Superior Court, PERSON County. Heard in the Court of Appeals 19 November 1975.

Defendant entered a plea of not guilty to an indictment charging him with armed robbery. The State's evidence tended to establish that the defendant and two other men entered the Cash Store in Roxboro and forced Weldon Swink, the manager of the store, at gunpoint to surrender the money in the cash register.

Defendant offered evidence of alibi. Abura Jackson, the defendant's girl friend, testified that the defendant was in Durham with her at the time of the robbery. Mrs. Bernice Jackson, the mother of Abura Jackson, offered testimony corroborative of her daughter.

The jury returned a verdict of guilty and defendant was sentenced as a regular youthful offender after a finding that he would derive no benefit as a committed youthful offender. Defendant appealed to this Court.

Attorney General Edmisten, by Associate Attorney Claudette Hardaway, for the State.

Ramsey, Jackson, Hubbard and Galloway, by Charles E. Hubbard and Mark Galloway, for defendant appellant.

ARNOLD, Judge.

[1] On direct examination Weldon Swink was allowed to testify concerning what he told the investigating officer, Mr. Ashley, about the description of the robbers. Responding to the court's question as to the purpose for which the testimony was offered the State replied that it was offered to get into evidence statements Officer Ashley could corroborate. The court stated that it was received for that purpose. Defendant made no request for further instructions as to the limited use of the testimony. Officer Ashley's testimony did tend to corroborate the statements made by Mr. Swink.

We reject defendant's argument that it was error to allow prior consistent declarations made by the witness when he had not been impeached. The court admitted the evidence for the purpose of corroboration, and prior consistent statements are admissible for corroborative purposes even though the witness has not been impeached. *State v. Best,* 280 N.C. 413, 186 S.E. 2d 1 (1971). In addition to giving limiting instructions at the time the evidence was admitted the court also gave proper limiting instructions in its charge to the jury. *State v. Moseley,* 251 N.C. 285, 111 S.E. 2d 308 (1959).

[2] Defendant next asserts that it was error for the trial judge not to instruct the jury on the law of aiding and abetting, and to require a finding that defendant shared the felonious intent of the other perpetrators.

Evidence in this case shows that all three men had guns drawn, and that all three acted in concert in the robbery. The trial judge properly instructed the jury as follows:

> "I instruct you that if you should find from the evidence in this case that the defendant was present and participating in the robbery, although he may not have been the one that actually reached his hand in the cash register and took the money, that nevertheless, he would be a perpetrator in the robbery, . . . "

[3] We find no merit in defendant's argument that it was error for the trial court to sentence him to a term of years to be served in the Person County Jail under the supervision of the Department of Corrections. G.S. 148-30 provides for sentencing to county jails, and the prisoner is thereafter transferred to a camp or station designated by the Department of Corrections.

We have carefully considered all defendant's remaining assignments of error and find no prejudicial error in the trial or judgment imposing sentence.

No error.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. DELTON ROBERTS

No. 7512SC665

(Filed 17 December 1975)

1. **Criminal Law § 99— statement limiting confession testimony — no expression of opinion**

When an officer was about to give testimony before the jury concerning defendant's confession, the trial court did not express an opinion in stating, "Now, I want this limited to just this robbery."

2. **Criminal Law § 79— testimony that accomplices are in prison**

In this armed robbery prosecution the admission of an officer's testimony that defendant's alleged accomplices were in prison did not constitute prejudicial error.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 3 June 1975 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 18 November 1975.

The defendant, Delton Roberts, was charged in a bill of indictment, proper in form, with the armed robbery of Garry Welchman of $125.00. Upon defendant's plea of not guilty, the State offered evidence tending to show the following:

At about 1:45 a.m. on 11 October 1974, Garry Welchman was on duty at the Little Giant Food Mart in Fayetteville, North Carolina. Two black men came into the store and robbed Welchman of approximately $125.00 belonging to the Little Giant Food Corporation. One of the men used a nickle-plated revolver in the robbery. Welchman immediately notified the police and gave them a description of the two men; however, at trial he was unable to identify the defendant, Roberts, as one of the perpetrators of the offense.

Detective J. R. Cook investigated the robbery and on 16 October 1974 arrested the defendant, who made an oral confession of the robbery of the Little Giant Food Mart to the detective. This oral confession was reduced to writing and signed by the defendant. The defendant stated that he and Leroy Bryant were driven to a point near the Little Giant Food Mart in question by Ruth Berry for the purpose of robbing the store. The defendant and Bryant both entered the store and with the use of guns robbed Garry Welchman of an unknown sum of money. After the robbery, they returned to Ruth Berry's auto and were driven away.

The defendant offered no evidence.

From a verdict of guilty as charged and a prison sentence imposed of twenty-five to twenty-seven years, defendant appealed.

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

Blackwell, Thompson, Swaringen, Johnson & Thompson by E. Lynn Johnson for defendant appellant.

HEDRICK, Judge.

[1] When Officer Cook was about to testify before the jury as to the confession of the defendant, Judge Bailey cautioned him as follows: "Now, I want this limited to just this robbery." Based on an exception to the judge's statement to the witness, the defendant contends the court expressed an opinion on the evidence in violation of G.S. 1-180. On voir dire to determine the admissibility of the defendant's alleged confession, Officer Cook testified that the defendant confessed to numerous criminal offenses including several robberies, as well as to the particular offense for which he was then on trial. Obviously, the trial judge by making the statement complained of, undertook to prevent the witness from mentioning defendant's implication in other offenses which might prejudice him in the minds of the jury. We think the judge's cautionary remark was appropriate and in no way amounted to an expression of opinion on the evidence. This assignment of error is overruled.

[2] Citing *State v. Atkinson,* 25 N.C. App. 575, 214 S.E. 2d 270 (1975), defendant contends the court erred in allowing Officer Cook to testify on direct examination that Ruth Berry and Leroy Bryant, alleged accomplices of the defendant, were in prison. Defendant argues that the admission of the challenged testimony was prejudicial error because it carried to the jury the implication that " . . . if the State's evidence was sufficient to establish guilt of the co-defendants, it must be sufficient to establish guilt in this case." In *Atkinson, supra,* the defendant was charged along with eleven others with conspiracy to violate North Carolina's Controlled Substances Act. During the selection of the jury, the prosecuting attorney referred to the fact that other co-defendants named in the bill of indictment had entered pleas of guilty. Upon defendant Atkinson's objection, the trial court instructed the jury not to consider such a statement by

the prosecution. On five separate occasions thereafter, over defendant's objection, the prosecuting attorney referred to the fact that co-defendants had pled guilty. In awarding the defendant a new trial, this court held:

> "Such repeated violations in the face of consistent rulings of the court can only be ascribed to a studied, deliberate and intentional effort to force inadmissible evidence into the minds of the jurors."

In the present case, however, while the testimony that the accomplices, Berry and Bryant, were in prison was not relevant to the issue of defendant's guilt or innocence, we cannot say that the admission of the evidence in this case amounted to prejudicial error. We hold the defendant had a fair trial free from prejudicial error.

No error.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. EDGLEE EDWARDS

No. 7525SC426

(Filed 17 December 1975)

Assault and Battery § 15— failure to instruct on defense of home

Where there was evidence that defendant acted in defense of his home in this prosecution for assault with a deadly weapon, the trial court erred in instructing the jury on defendant's right to act in self-defense without also instructing on his right to act in defense of his home.

APPEAL by defendant from *Ferrell, Judge.* Judgment entered 9 January 1975 in Superior Court, CALDWELL County. Heard in the Court of Appeals 16 September 1975.

Defendant was charged by warrant with an assault with a deadly weapon on one E. L. Brown. After trial and 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 offered testimony of E. L. Brown tending to show that about 7:00 p.m. on 13 April 1974 Brown drove his

pickup truck into the yard of defendant's home, blew his horn, and yelled at defendant to come out and talk. Defendant came to the door, saw Brown, went back into the house, got his shotgun, returned to the door, and shot, hitting Brown's truck and knocking holes in the radiator and chipping the windshield. Brown testified that he did not get out of his truck and did not have any weapon with him when he was at defendant's house. After the shooting, Brown left the premises in his truck. The State also offered testimony of Brown's wife, son, and a friend of his son to the effect that when Brown left in his truck he did not have a weapon with him.

Defendant offered evidence tending to show that he, along with some friends and their children, was inside his house on the night in question when Brown drove into defendant's yard and parked his truck with the headlights shining in the door of defendant's home. Defendant went to the door and saw the truck and a car sitting outside. Brown stepped out and told defendant "to come out there that he was going to kill" defendant. Defendant then turned back into the house and got his shotgun, which accidentally went off and shot through the bottom of the door. When the shotgun went off, "somebody or Mr. Brown" fired from outside into the house. Defendant cut off the lights, went back on the porch, and fired three times at the truck. Mr. Brown then left immediately and defendant went back in the house.

The jury found defendant guilty as charged, whereupon he was sentenced to serve an active sentence of not less than 12 nor more than 18 months. Defendant appealed.

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

Fate J. Beal for defendant appellant.

PARKER, Judge.

Defendant contends that the trial judge committed error in his instructions to the jury in that, although the jury was instructed as to the justification of a defendant to act in defense of self, there was no instruction as to the right of the defendant to act in defense of his home.

Defendant offered evidence that he was in his home when he was threatened by the prosecuting witness and "somebody or

Mr. Brown" subsequently fired a gunshot into the house. "Ordinarily, when a person, who is free from fault in bringing on a difficulty, is attacked in his own dwelling, or home, or place of business, or on his own premises, the law imposes upon him no duty to retreat before he can justify his fighting in self-defense, regardless of the character of the assault." *State v. Walker,* 236 N.C. 742, 744, 73 S.E. 2d 868, 870 (1953). The right to defend one's home from attack is a substantive right. *State v. Spruill,* 225 N.C. 356, 34 S.E. 2d 142 (1945). This, of course, does not sanction the defendant in using excessive force in repelling the attack, *State v. Sally,* 233 N.C. 225, 63 S.E. 2d 151 (1951), but it is for the jury, under proper instructions, to be the judge of the reasonableness of defendant's actions.

Where, as here, there is evidence that defendant acted in defense of his home, an instruction on the defendant's right to act in self-defense without an instruction also on the defendant's right to act in defense of home contains prejudicial error. *State v. Miller,* 267 N.C. 409, 148 S.E. 2d 279 (1966).

New trial.

Judges BRITT and CLARK concur.

STATE OF NORTH CAROLINA v. RICKY RAY TUTTLE

No. 7521SC468

(Filed 17 December 1975)

1. **Criminal Law § 88; Rape § 4— cross-examination of prosecutrix — prior sexual conduct — limitation — harmless error**

In a prosecution for second degree rape, the trial court's error in limiting cross-examination of the prosecutrix concerning a specific prior act of unchastity was not sufficiently prejudicial to warrant a new trial.

2. **Criminal Law § 86— juvenile defendant — cross-examination — prior adjudication of guilt**

For purposes of impeachment, it is permissible to cross-examine a juvenile defendant with reference to his prior convictions or adjudications of guilt of prior conduct which, if committed by an adult, would have constituted a conviction of crime.

State v. Tuttle

APPEAL by defendant from *Albright, Judge.* Judgment entered 18 March 1975 in Superior Court, FORSYTH County. Heard in the Court of Appeals 23 September 1975.

Defendant was tried upon a bill of indictment charging him with rape in the second degree.

The evidence tends to show that the prosecutrix, Lorraine Ahern, was driving home from her boyfriend's house on 15 October 1974, when she swerved to avoid a car that was stopped sideways across a lane of traffic. When approached by the defendant, she asked him if he needed assistance. Upon his request, she agreed to take him to get some jumper cables. After directing her over a circuitous route, the defendant told her to stop along a gravel road. The defendant then grabbed the prosecutrix and a struggle ensued. After about fifteen minutes, the defendant was able to force her to submit to his wishes, whereupon he had intercourse with her against her will.

Testifying in his own behalf, the defendant said that he had asked prosecutrix for a ride in order to avoid the police because he was driving his mother's car without a license. He directed the prosecutrix to drive in a circle in order to lose anyone who might be following them. He said that prosecutrix and he smoked a joint of marijuana before he left the car and went to his uncle's house. He testified that "[n]othing else took place other than what I have related to you."

Attorney General Edmisten, by Assistant Attorney General John M. Silverstein, for the State.

Nelson, Clayton and Boyles, by Laurel O. Boyles, for defendant appellant.

MARTIN, Judge.

[1] Defendant contends that the trial court committed prejudicial error in not allowing defendant's counsel to cross-examine the prosecutrix as to her sexual past.

The general character of the prosecutrix in a rape case may be shown as bearing upon the question of consent. *State v. Grundler,* 251 N.C. 177, 111 S.E. 2d 1 (1959). However, specific acts of unchastity with persons other than defendant are inadmissible in such cases. *State v. Grundler, supra.* Of course, the prosecutrix may be cross-examined concerning specific acts of unchastity for the sole purpose of impeaching credibility,

State v. Murray, 63 N.C. 31 (1868), but the defendant is bound by her answer. 1 Stansbury, N. C. Evidence, § 111 (Brandis Rev. 1973). A witness called by the defendant cannot be asked about specific acts of misconduct by prosecutrix. This witness must confine himself to testimony concerning general reputation for chastity. *State v. Hairston,* 121 N.C. 579, 28 S.E. 492 (1897).

On cross-examination the prosecutrix was asked the following question:

"Q. How long prior to this night, Miss Ahern, was the first time you ever had sexual experiences?

Mr. Lyle: Objection.

The Court: Sustained.

Exception No. 1."

The witness had previously testified on cross-examination that she had had intercourse previous to that night. The question related to a specific act of unchastity and was competent for the purpose of impeaching credibility. *State v. Murray, supra.* However, we hold that its exclusion under all of the circumstances of this case was not sufficiently prejudicial to warrant another trial. The evidence of independent witnesses as to the physical condition of the prosecutrix on the night the intercourse occurred corroborates her testimony.

[2] The defendant next contends that the cross-examination of the defendant as to his court record while a juvenile was reversible error. This contention is without merit. For purposes of impeachment, it is permissible to cross-examine a juvenile defendant with reference to his prior convictions or adjudications of guilt of prior conduct which, if committed by an adult, would have constituted a conviction of crime. *State v. Miller,* 281 N.C. 70, 187 S.E. 2d 729 (1972). Thus, the district attorney's examination of the defendant as to his past record was not more than the law allows. This assignment of error is overruled.

Defendant's remaining assignment of error is without merit.

Defendant had a fair trial, free from prejudicial error.

No error.

Chief Judge BROCK and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. CLIFTON EARL SPEIGHT AND CLAUDIE CARTER, JR., DEFENDANTS

No. 751SC584

(Filed 17 December 1975)

Crime Against Nature § 2— instructions — consent — accomplice testimony — harmless error

In this prosecution for crime against nature, error, if any, in the court's instruction that if the jury found that the prosecuting witness willingly participated in the crime, he would be an accomplice and the jury must carefully scrutinize his testimony, was not prejudicial to defendant since it tended to discredit the testimony of the prosecuting witness.

APPEAL by defendants from *Cohoon, Judge.* Judgments entered 12 February 1975 in CURRITUCK County, Superior Court. Heard in the Court of Appeals 22 October 1975.

Defendants were charged with crime against nature in violation of G.S. 14-177.

The State's evidence tended to show that James E. Strong, an inmate at Maple Prison Camp, went to his locker in his dormitory on 18 July 1974; and while returning to his bunk, he was stopped by defendants who told him they wanted to talk to him in the rear of the dormitory. The defendant, Speight, had earlier told Strong that he wanted some of his body and on this day stated, "You know what we want." Speight and Carter then took Strong to Carter's bunk where they struck him several times with a mop handle. Both Carter and Speight committed anal intercourse with Strong while fifteen or twenty people were nearby in the dormitory. Defendants had sheets draped over the bunk to conceal their activity. Carter told Strong he would kill him if he told guards of the assault. The following day Strong reported the assault to a schoolteacher at the prison unit. Later he also told the Superintendent of the assault.

Defendants offered alibi testimony of several inmates and a prison guard, and the testimony of a physician which tended to show that he had examined Strong several days after the alleged crime and found no injury. A jury found defendants guilty as charged, and from judgments imposing prison sentences defendants appealed.

Attorney General Edmisten by Special Deputy Attorney General Edwin M. Speas, Jr., for the State.

Twiford, Abbott, Seawell, Trimpi & Thompson by Russell E. Twiford for defendants.

CLARK, Judge.

The trial judge instructed the jury in substance that consent was not a defense to the crime charged; that if the jury found Strong had willingly permitted the defendant to insert his penis for sexual purposes into his anus, then Strong would be a participant and an accomplice; and that if Strong was an accomplice, then the jury must carefully scrutinize his testimony. The defendant assigns as error this portion of the charge contending that there was no evidence of consent on the part of Strong, and that it was prejudicial to defendants in that "it tended to give to Strong's testimony a greater ring of veracity."

Strong's testimony tended to show that the crime against nature was committed during daylight hours on a bunk in a sleeping dormitory with twenty inmates nearby and their homosexual activity concealed from the view of bystanders by a sheet draped over and hanging from the bunk above. Though Strong testified that he was beaten with a mop handle and then "raped," the physician who later examined Strong testified that he found no bruises or contusions about his head or body. Conceding, *arguendo,* that there was not sufficient evidence of consent to require the foregoing instruction, we are unable to see any injury to the defendants. It appears to us that the challenged instructions would tend to discredit Strong's testimony and would seem to weaken rather than strengthen his veracity. Harmless error in the giving of that instruction does not constitute ground for reversal. See generally 1 Strong, N. C. Index 2d, Appeal and Error, § 50, p. 74, (Supp. 1975).

We have carefully examined the other assignments of error and do not find them to be meritorious.

No error.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. MIKE SPOONER

No. 755SC601

(Filed 17 December 1975)

Indictment and Warrant § 10— name of accused — use of nickname — no quashal

Defendant was not entitled to quashal of the indictment against him on the ground that the indictment alleged that his name was Mike Spooner but defendant contended his proper name was Michael Charles Irwin Spooner, since it appeared from the evidence that defendant was known and commonly referred to as Mike Spooner.

APPEAL by defendant from *Fountain, Judge.* Judgment entred 11 April 1975 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 23 October 1975.

Defendant pled not guilty to charges of breaking or entering and larceny. Prior to pleading, defendant moved to quash the indictment on the grounds that his true name was Michael Charles Irwin Spooner, not Mike Spooner as the indictment stated. The motion was denied.

For the State, Marianna Hott, owner of the Little Bavarian Restaurant, testified that her place of business was broken into and that liquor, meat and cigarettes were taken. Michael Henderson testified that he and the defendant participated in the break-in and larceny.

Defendant and several of his witnesses offered alibi evidence. The jury found defendant guilty as charged. He was sentenced to "not less than five (7) [*sic*] nor more than seven (7) years in the State Prison." From this judgment, defendant appeals.

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

Charles E. Sweeny, Jr., for defendant.

CLARK, Judge.

The defendant asserts error in denial of his motion to quash the indictment on the ground that the indictment alleges that his name is Mike Spooner but that his proper name is Michael Charles Irwin Spooner. The only evidence that defendant's proper name is Michael Charles Irwin Spooner comes from the

defendant himself. The defendant's mother, brother and friends who offered alibi testimony, referred to him as Mike Spooner.

The name of the defendant in an indictment is required to be set out with some degree of accuracy and completeness for the purpose of protecting him from double jeopardy, but nomenclative exactitude is not practical. The doctrine of idem sonans applies when names sound alike. *State v. Higgs,* 270 N.C. 111, 153 S.E. 2d 781 (1967); *State v. Utley,* 223 N.C. 39, 25 S.E. 2d 195 (1943). However the doctrine of idem sonans does not apply in this case since "Mike" does not sound like "Michael." "Mike" is the nickname or the familiar form of the proper name Michael, and it appears from the evidence in this case that the defendant was known and commonly referred to as Mike Spooner. Where the indictment refers to the defendant by the name which he is commonly and generally known, rather than his proper name, the variance is immaterial. 41 Am. Jur. 2d, Indictments and Informations, §§ 128, 270, pp. 961, 1045 (1968); 42 C.J.S., Indictments and Informations, § 127(b), p. 1016 (1944); see also *State v. Buck,* 6 N.C. App. 726, 171 S.E. 2d 10 (1969).

We note that the judgment provides for a sentence of "not less than five (7) years." This is obviously a clerical error, and we direct the Clerk of Superior Court to correct the judgment and commitment by deleting the numeral (7) and substituting (5) to conform to the written "five" and to enter and issue the corrected judgment and commitment. Where there is error on the face of the record, an appeal presents the matter for review, and the judgment may be modified to conform with the legal requirement. *In re Burrus* 275 N.C. 517, 169 S.E. 2d 879 (1969). Except for the clerical error noted, we find

No error.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. FRANK ROLAND SMITH

No. 7512SC656

(Filed 17 December 1975)

Criminal Law § 114— instructions on case against another — no expression of opinion

In a prosecution for possession of heroin wherein the evidence showed that the heroin was found in a mobile home rented by a person

other than defendant, the trial court did not express an opinion on the evidence in instructing the jury that the case against the person who rented the mobile home had been continued that morning and that the jury should not speculate on the facts of some other case.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 8 May 1975 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 17 November 1975.

Defendant was charged in a bill of indictment with the felony of possession of heroin.

The State's evidence tends to show: Police officers armed with a search warrant went to a mobile home. As they approached the mobile home, one Victoria Graham looked out the front door and then ran back into the home. The officers knocked on the front door, identified themselves, and announced they had a search warrant. There were clear glass windows in the front door. The officers saw defendant as he jumped from his seat in the living room and as he ran towards the rear of the trailer. After defendant ran out of the living room, the commode in the bathroom was flushed. One of the officers disconnected the line leading from the commode to the septic tank and recovered seven tinfoil packets of heroin as it flushed down the line. Defendant was seen standing directly in front of the commode as it was flushing. Mail addressed to the defendant at the address of the mobile home was found on a table in the bedroom.

Defendant's evidence tended to show that he did not live at the mobile home and that the mobile home was rented to Victoria Graham.

The jury returned a verdict of guilty as charged, and judgment of imprisonment was entered.

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

Downing, David, Vallery and Maxwell, by Edward J. David, for the defendant.

BROCK, Chief Judge.

The foregoing statement of facts reveals evidence which required submitting the case to the jury. Defendant's motions for nonsuit were properly overruled, and his first assignment of error is likewise overruled.

During the trial there was testimony that the mobile home in question was rented to Victoria Graham. She looked out of the front door, saw the officers approaching, and ran towards the rear of the trailer. She was seen peering out of the bathroom window as the commode started to flush. She was later observed coming out of the bedroom.

After instructing the jury upon its duty to recall and deliberate upon all of the evidence, its duty to determine the credibility of the evidence, and its duty to determine the weight to be accorded to the evidence, his honor instructed as follows:

> "Now, Ladies and Gentlemen, we are trying the case entitled State versus Frank Roland Smith. It is not for you to speculate on facts of some other case, such as the case of State versus Victoria Graham. The fact of the matter is, the case against Victoria Graham was on the calendar for trial and was continued this morning. You will not speculate on the evidence in some other case; you will be guided by the evidence in this case."

By his second assignment of error defendant argues that the above quoted instruction was error prejudicial to him. He argues that the instruction constituted an expression of opinion by the trial judge that defendant was the possessor of the heroin and that is the reason Victoria Graham was not being tried.

Although it is not clear from the record before us, it seems reasonable to surmise that the instruction was prompted by argument of defense counsel to the jury. While we fail to see the necessity for the instruction, we conclude that it does not constitute an expression of opinion upon the evidence in the case or an expression of opinion that defendant is guilty. Considered as a whole, the charge of the court was fair to the defendant in all respects. This assignment of error is overruled.

No error.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. JIMI WADE SHAW

No. 754SC504

(Filed 17 December 1975)

1. **Narcotics § 4.5— multiple offenses of possession for sale — instructions proper**

In a trial of defendant for felonious possession of LSD with the intent to sell and deliver, felonious sale and delivery of LSD, felonious possession of LSD, and felonious possession of marijuana, the trial court did not err in instructing the jury that their verdict in one case in no way depended on their verdict in any other case.

2. **Narcotics § 4— possession and sale of LSD — possession of marijuana — sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for possession of LSD with intent to sell, sale of LSD, and possession of marijuana where such evidence tended to show that defendant sold 10 microdots of LSD to an undercover narcotics agent and a search of defendant's trailer made under a warrant and in defendant's presence yielded LSD and marijuana in a jacket in a bedroom.

APPEAL by defendant from *Tillery, Judge.* Judgment entered 20 March 1975. Heard in the Court of Appeals 26 September 1975.

Defendant was indicted for (1) the 30 January 1975 felonious possession of LSD with the intent to sell and deliver; (2) the 30 January 1975 felonious sale and delivery of LSD; (3) the 31 January 1975 felonious possession of LSD; and (4) the 31 January 1975 felonious possession of marijuana.

According to the State's evidence, Mr. Kenneth L. Jones, while working for the Onslow County Sheriff's Department in an "undercover" capacity, went to defendant's trailer home on 30 January 1975 with a man named "Howard." "Howard asked the defendant if he had any smoke, meaning marijuana. The defendant told him he didn't but he had some microdot." Defendant asked Jones if he wanted any of the microdot and when Jones replied "Yes" the defendant ". . . told his wife to go get four and she went back in the trailer towards the bedrooms" and brought back, after two trips and further negotiations, a total of "10 microdots" of LSD. The agent paid for the drugs and left the trailer. His purchases were turned over to a chemist for the SBI, and the defendant stipulated that there was no objection to the chain of custody and that if the chemist were present he would testify that the purchases were LSD.

The next day, agents from the sheriff's department, armed with a search warrant, went to defendant's residence and searched defendant's trailer with defendant present. The police testified at trial that in the back bedroom they found in the pockets of a jacket, lying on the bed, "9 hits" of LSD and a small amount of marijuana. Though unclear from the record, it appears that at least part of the LSD was found in a small film cannister. Again defendant stipulated that the chemist would testify that the materials found were LSD and marijuana.

Defendant denied selling or possessing the drugs and specifically denied ownership of the jacket. He claimed that the jacket possibly belonged to some friends who previously had visited the defendant. Defendant's wife essentially corroborated defendant's testimony.

From pleas of not guilty, the jury returned verdicts of guilty on all four counts. From judgments sentencing him to various terms of imprisonment on the four verdicts, defendant appealed.

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

Edward G. Bailey for defendant appellant.

MORRIS, Judge.

[1] Defendant first contends that the trial court erred in its instruction to the jury that their verdict in one case in no way depended on their verdict in any other case. We disagree. In several recent decisions our Supreme Court has held that possession of controlled substances with the intent to distribute and the actual distribution of the controlled substances constitute separate and distinct offenses. *State v. Aiken,* 286 N.C. 202, 209 S.E. 2d 763 (1974); *State v. Cameron,* 283 N.C. 191, 195 S.E. 2d 481 (1973); also see *State v. Rush,* 19 N.C. App. 109, 197 S.E. 2d 891 (1973).

As Justice Lake noted in *State v. Aiken, supra,* at 206:

> ". . . neither the offense of unauthorized possession nor the offense of unauthorized sale of a controlled substance is included within the other offense and one placed in jeopardy as to the one offense is not thereby placed in

jeopardy as to the other. Thus, one charged with both offenses may be convicted of both and sentenced to imprisonment for each."

Thus, the court's instruction properly reflects the present state of the law in North Carolina.

Defendant's brief also notes an alleged inconsistency between the aforesaid charge and a later aspect of the same charge. Notwithstanding defendant's failure to take proper exception, on the merits we cannot perceive any prejudice to defendant in this charge and find no inconsistency.

Defendant next contends that the trial court erred in charging the jury as to the elements of constructive possession. We find no merit in these contentions. A reading of the instructions contextually reveals that the court carefully distinguished the various elements of the charges against defendant, adequately defined the various elements and specifically covered the aspects of constructive possession.

[2] Finally, defendant contends that the court erred in overruling his motion for nonsuit. Again, we disagree. The evidence was plenary to submit the question of defendant's guilt or innocence to the jury and to support their verdicts.

No error.

Judges HEDRICK and ARNOLD concur.

SCOVILL MANUFACTURING COMPANY (HAMILTON BEACH DIVISION) v. COUNTY OF GUILFORD AND WALTER R. JAMES, TREASURER OF GUILFORD COUNTY

SCOVILL MANUFACTURING COMPANY (HAMILTON BEACH DIVISION) v. CITY OF GREENSBORO AND C. M. CONWAY, TREASURER OF THE CITY OF GREENSBORO

No. 7518SC516

(Filed 17 December 1975)

Taxation § 25— ad valorem tax — goods in public warehouse — destination on bill of lading determinative

The trial court properly determined that goods stored in a public warehouse for transshipment "to an out-of-state or within-the-state

destination" were not goods designated to an out-of-state destination within the meaning of G.S. 105-275(4) and were therefore subject to ad valorem taxation, notwithstanding the fact that 98% were eventually shipped to points outside the state, as contended by plaintiff, since the tax status of the goods was determined by the original bill of lading at the time they were stored in the public warehouse.

APPEAL by plaintiff from *Crissman, Judge.* Judgment entered 26 March 1975 in Superior Court, GUILFORD County. Heard in the Court of Appeals 14 October 1975.

Plaintiff instituted this action for a refund of ad valorem taxes paid defendants on personal property stored in a public warehouse in Greensboro, North Carolina, during the taxable years 1970 and 1971. Plaintiff contended that such personal property was exempt from taxation by the provisions of G.S. 105-275.

Plaintiff has manufacturing plants in two North Carolina cities where they manufacture small electrical appliances for Sears Roebuck & Company. These appliances were shipped to a public warehouse in Greensboro for the purpose of transshipment to various Sears stores. Every bill of lading for shipment of this merchandise contained the following:

> "These goods shipped to public warehouse for transshipment to an out-of-state or within-the-state destination in original packages."

Defendants assessed a tax on the merchandise and plaintiff paid the tax under protest, claiming that the merchandise was exempt under the statute. Plaintiff claims that 98% of this merchandise was ultimately shipped out of North Carolina and therefore applies for a refund of 98% of the taxes paid.

The trial judge found that there was no genuine issue as to any material fact and that defendants were entitled to judgment as a matter of law. Defendant's motion for summary judgment was granted.

Broughton, Broughton, McConnell & Boxley, P.A., by Robert B. Broughton and Gregory B. Crampton, for plaintiff appellant.

James W. Miles, Jr., and William L. Daisy, for defendant appellees.

VAUGHN, Judge.

The following property is exempt from taxation under G.S. 105-275(4) as it was written when pertinent to this litigation.

> "Personal property of residents of the State in its original package and fungible goods in bulk, belonging to a resident of the State, placed in a public warehouse for the purpose of transshipment to an out-of-state destination, and so designated on the original bill of lading, so long as such personal property remains in its original package or, if fungible, in bulk, and in such a public warehouse. No portion of a premises owned or leased by a consignor or consignee, or subsidiary of a consignor or consignee, shall be deemed to be a public warehouse within the meaning of this subdivision despite any licensing as such. (The purpose of this classification is to encourage the development of the State of North Carolina as a distribution center.)"

We hold that the trial judge reached the proper conclusion. Assuming that the goods are otherwise qualified for exemption, they must also (1) be placed in a public warehouse for transshipment to an out-of-state destination and (2) be so designated on the original bill of lading. Goods designated for transshipment "to an out-of-state *or* within the state destination" are not goods designated to an out-of-state destination within the meaning of the statute. Obviously all goods stored in a public warehouse are destined for eventual shipment to some point either without or within the state, as are other goods held by a manufacturer or distributor in his own warehouse. Plaintiff's evidence that most of the goods were eventually shipped to points without the state is immaterial. The tax status of the goods must be determined by the original bill of lading at the time they are stored in the public warehouse.

Another section of the statute, G.S. 105-275(3), does allow an exemption when the goods are stored in a public warehouse for transshipment to "an out-of-state or within the state destination" and are so designated on the original bill of lading. This exemption applies only when, among other things, the goods move into this state from some place without the state.

The judgment is affirmed.

Affirmed.

Judges BRITT and ARNOLD concur.

STATE OF NORTH CAROLINA v. GERSON LEWIS

No. 7510SC612

(Filed 17 December 1975)

1. **Criminal Law § 66— in-court identification of robber — observation at crime scene as basis**

The trial court properly allowed an armed robbery victim to make an in-court identification of defendant as one of the robbers where the victim testified that she observed the defendant at the scene of the crime for about one minute, the office where the robbery took place was well lighted, and defendant wore no mask during the robbery.

2. **Criminal Law § 26; Robbery § 2— robbery of six individuals — separate offenses**

Where defendant robbed six different people of their personal property and threatened and endangered each individual's life with a firearm, the armed robbery of each person was a separate and distinct offense.

APPEAL by defendant from *Brewer, Judge.* Judgments entered 10 April 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 24 October 1975.

Defendant was tried on indictments charging six counts of armed robbery. The evidence at trial tended to establish that the defendant and two companions entered the Harris Wholesale Company warehouse, armed with guns, threatened the company's receptionist, Pat Moccia, and robbed the building's occupants. Pat Moccia was able to identify the defendant as one of the men participating in the robbery.

Defendant offered evidence of alibi tending to establish that he was in Alexandria, Virginia, at the time of the robbery. The jury returned a verdict of guilty to each count of armed robbery charged. From judgments imposing prison sentences, defendant appealed to this Court.

Attorney General Edmisten, by Assistant Attorney General Claude W. Harris and Associate Attorney Wilton E. Ragland, for the State.

Thomas L. Barringer for defendant appellant.

ARNOLD, Judge.

[1] We see no merit in defendant's argument that the trial court erred in finding that the in-court identification of defend-

ant by the witness was based on her observation of defendant at the scene of the crime and that the identification was untainted by out-of-court photographic identification.

The witness, Pat Moccia, testified on voir dire that she was able to observe the defendant during the robbery for about a minute and that he did not wear a mask. She stated that the lighting of the office provided as much illumination as the fluorescent lights provided for the courtroom. The defendant offered no evidence during the voir dire hearing. At the conclusion of the hearing the court made findings of fact substantially consistent with the State's evidence and defendant's motion to suppress the evidence was overruled. This was proper procedure. *State v. Burns,* 287 N.C. 102, 214 S.E. 2d 56 (1975). The trial court's findings of fact on the voir dire, supported as they are by ample evidence, are conclusive on appeal. *State v. Burns, supra; State v. Cross,* 284 N.C. 174, 200 S.E. 2d 27 (1973).

[2] Defendant also contends that the trial court erred in denying his motion for arrest of judgment. His argument that an armed robbery occurring at a single location at a single time, even though more than one person happens to be present and property is taken from more than one person, should be considered as a single offense is unsound.

This is not a situation, as in *State v. Potter,* 285 N.C. 238, 204 S.E. 2d 649 (1974), where the lives of all employees in a store are threatened and endangered by the use or threatened use of a firearm incident to the theft of their employer's money or property. Six different people were robbed in the instant case. The defendant robbed each individual of his personal property and threatened and endangered each individual's life with a firearm. The armed robbery of each person was a separate and distinct offense. *State v. Johnson,* 23 N.C. App. 52, 208 S.E. 2d 206 (1974).

We have reviewed defendant's remaining assignments of error and they too are without merit.

No error.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. CARL THOMAS FAMBROUGH, ALSO KNOWN AS CARL THOMAS McDANIELS

No. 7525SC565

(Filed 17 December 1975)

Criminal Law § 26— double jeopardy — one robbery — two kinds of property taken — two convictions

Defendant was placed in double jeopardy by his conviction of two separate charges of armed robbery where the evidence showed only one robbery in which two kinds of property, money and a pistol, were taken, and the conviction on one charge must be set aside.

APPEAL by defendant from *Ferrell, Judge.* Judgment entered 3 April 1975, in Superior Court, CATAWBA County. Heard in the Court of Appeals 20 October 1975.

Defendant was charged in separate bills of indictment with the armed robbery of Martin Violette. One bill charged the robbery of money; the other charged robbery of a pistol.

The State's evidence tended to show that on or about 10 August 1974, Martin Violette was employed at the Hickory Motor Lodge; that on 10 August he was sitting in the lobby of the motel when two black men came in through the west door with knives and one of them said, "We want your money." Violette testified that the defendant did all the talking and walked Violette to the counter with a knife at his throat. Violette identified Fambrough as the man who put the knife to his throat on that day and took $79 along with a pistol. There was also testimony received from the lady who sold the pistol to Violette and from a man who bought the pistol from defendant.

The defendant testified in his own behalf. A jury found defendant guilty on both charges and from concurrent prison sentences, defendant appeals.

Attorney General Edmisten by Special Deputy Attorney General Myron C. Banks for the State.

Butner, Rudisill & Brackett by J. Steven Brackett for the defendant.

CLARK, Judge.

In reviewing the record as requested by defendant, we find that only one robbery occurred, in which two kinds of

property were taken, money and a pistol. The two indictments charged separate offenses. Clearly both indictments and the evidence relate to what occurred on the same occasion. The same evidence would support a conviction on each charge. Under the "same evidence test," this amounts to double jeopardy, *State v. Ballard,* 280 N.C. 479, 186 S.E. 2d 372 (1972).

Though the trial court imposed identical concurrent sentences to imprisonment on each charge, this does not cure the constitutional guarantee against double jeopardy. *State v. Summrell,* 282 N.C. 157, 192 S.E. 2d 569 (1972).

For the reasons stated.

In Case No. 75CR692 judgment is arrested.

In Case No. 75CR691 no error.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. JOHN RICKY BARRINGTON

No. 7515SC697

(Filed 17 December 1975)

Larceny § 7— breaking into coin operated machines — sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for breaking into coin operated machines at a self-service laundry where such evidence tended to show that defendant and three females went to the laundromat planning to break into the machines and two of the females kept a lookout while defendant broke open the machines with a screwdriver and stole money; also, discrepancy concerning the time the machines were broken into did not require nonsuit since time was not of the essence of the offense charged in this case.

APPEAL by defendant from *Alvis, Judge.* Judgment entered 15 May 1975 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 21 November 1975.

From a judgment in district court defendant appealed to superior court where he was tried and found guilty of breaking into coin operated machines at a self-service laundry. The su-

perior court judgment imposed an active prison sentence and defendant appealed to this Court.

Attorney General Edmisten, by Associate Attorney Cynthia Jean Zeliff, for the State.

Harris & McEntire, by Mitchell M. McEntire, for defendant appellant.

ARNOLD, Judge.

Defendant first assigns as error the denial of his motion for judgment as of nonsuit at the close of the State's evidence. Defendant offered no evidence.

There was no error in refusing defendant's motion. A motion to nonsuit requires that the evidence be considered in the light most favorable to the State, be taken as true, and that the State be given the benefit of every reasonable inference to be drawn therefrom. *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469 (1968).

In the light most favorable to the State the evidence clearly showed that defendant and three females, who testified for the State, went to the laundromat planning to break into the machines. Two of the females "looked out for people in cars" while defendant, with the use of a screwdriver, broke open the machines, and stole money in the amount of ninety dollars.

We also reject defendant's contention that nonsuit should have been allowed because of a discrepancy in the evidence concerning the time when the machines were broken into. Time is not of the essence of the offense charged in this case. *State v. Lemmond,* 12 N.C. App. 128, 182 S.E. 2d 636 (1971). The only contradictory evidence concerned the date of the occurrence, and there was plenary evidence to support the allegations in the indictment.

Finally defendant argues that the court erred in refusing to charge the jury as to the potential bias of Officer Fox because Officer Fox was both the owner of the machines that were broken into, and the officer who investigated the alleged crime. We see no merit in this argument.

Officer Fox testified that he owned the machines, and that in addition to the damage the amount of money taken was estimated at ninety dollars.

We find that defendant's trial was free of prejudicial error.

No error.

Judges PARKER and HEDRICK concur.

FRED W. HALL v. MARY ALEXANDER HALL

No. 7525DC427

(Filed 17 December 1975)

Appeal and Error § 6; Rules of Civil Procedure § 54— order not adjudicating all claims — premature appeal

Appeal is dismissed as premature where the order appealed from adjudicates fewer than all claims and is not a final judgment as to that claim because the judge did not find there is no just reason for delay. G.S. 1A-1, Rule 54(b).

APPEAL by defendant from *Beach, Judge.* Order entered 3 March 1975 in District Court, BURKE County. Heard in the Court of Appeals 17 September 1975.

Plaintiff instituted this action for absolute divorce on the grounds of separation for one year. Defendant filed answer denying the material allegations of the complaint and additionally filed a counterclaim for alimony without divorce on the grounds of abandonment. A hearing was conducted before Judge Beach on 16 December 1974 upon defendant's application for alimony *pendente lite* and counsel fees. By order dated 16 December 1974 defendant was denied alimony *pendente lite* and counsel fees. Plaintiff thereafter filed a motion to dismiss defendant's counterclaim for failure to state a claim upon which relief can be granted. Plaintiff's motion to dismiss was allowed by order entered 3 March 1975, and defendant appealed. The primary action has not yet been tried.

Simpson, Martin, Baker & Aycock, by Wayne W. Martin, for the plaintiff.

Turner, Rollins & Rollins, by Elizabeth O. Rollins, for the defendant.

BROCK, Chief Judge.

The order from which defendant has appealed adjudicates fewer than all claims and is not a final judgment as to that claim because the judge did not find there is no just reason for delay. The order is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties, and therefore is not subject to review by appeal. G.S. 1A-1, Rule 54(b).

Appeal dismissed.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. CHARLES JENKINS MASON

No. 756SC593

(Filed 17 December 1975)

Narcotics § 4.5— knowledge of possession — instructions

The trial court sufficiently instructed the jury on the question of defendant's knowledge of possessing marijuana.

APPEAL by defendant from *Tillery, Judge.* Judgment entered 13 March 1975 in Superior Court, HERTFORD County. Heard in the Court of Appeals 23 October 1975.

Defendant was indicted for the 23 October 1974 possession with the intent to sell marijuana and was found guilty of possession of marijuana. Judgment was entered sentencing defendant as a youthful offender.

According to the State's evidence, ABC Officer Calvin Pearce observed defendant receive from someone in a van a clear plastic bag containing a green substance. Pearce recalled that defendant ". . . was sitting and talking to a girl outside of the window of the truck at this time. He was flipping the bag back and . . . [forth and] flipping it in his fingers and hands and then passed it back to Dean, who was the driver." The parties stipulated that the bag contained five grams of marijuana. In the van, authorities found 19 ounces of marijuana, individually packaged in one ounce sandwich bags and two pipes used for smoking marijuana.

Defendant claimed that he neither handled nor saw any of the marijuana. Marcia Jones essentially corroborated defendant's testimony.

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

Revelle, Burleson & Lee, by L. Frank Burleson, Jr., for defendant appellant.

MORRIS, Judge.

Defendant candidly concedes that except for his seventh assignment of error he can find no prejudicial error. By his remaining assignment of error defendant contends that the trial court failed to instruct the jury on the question of defendant's "knowledge" of possessing marijuana.

We have examined the charge contextually and find that the trial court's instructions sufficiently addresses the contention raised by the defendant herein.

We also have reviewed the record as a whole and find no error prejudicial to defendant.

No error.

Judges PARKER and MARTIN concur.

STATE OF NORTH CAROLINA v. DAVID LAFAYETTE MILLS

No. 7526SC540

(Filed 17 December 1975)

Criminal Law § 159— inadequate record on appeal — appeal treated as exception to judgment

An appeal was treated as an exception to the judgment, presenting the record proper for review, where the record on appeal was not docketed in apt time, the record did not present documents or events in chronological order, the record contained no exceptions, and the assignments of error referred to no exception.

APPEAL by defendant from *Kirby, Judge.* Judgment entered 13 March 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 15 October 1975.

Defendant was charged with the 13 July 1973 murder of one Billy Frances Brinkley. From a plea of not guilty the jury returned a verdict of guilty of the offense of voluntary manslaughter. From judgment sentencing him to a term of imprisonment, defendant appealed.

Other facts necessary to decision are cited in the opinion below.

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

Plumides, Plumides and Shuster, by John G. Plumides, for defendant appellant.

MORRIS, Judge.

Defendant's record on appeal was docketed on the 109th day after entry of judgment, and the 28 April 1975 order extending time does not validly extend the time for docketing. The record fails to present documents or events in chronological order. The record contains no exceptions, nor does either of the two assignments of error refer to an exception. The appeal, therefore, can present only the face of the record for review. Because of defendant's indigency, rather than dismiss the appeal, 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 defendant received a fair trial free from prejudicial error.

No error.

Judges PARKER and MARTIN concur.

STATE OF NORTH CAROLINA v. RANDOLPH WARDLOW, J. C. WARDLOW

No. 7515SC571

(Filed 17 December 1975)

Assault and Battery § 15— self-defense — confusing instructions

In a prosecution for felonious assault, the trial court's instructions on self-defense, including an instruction that if the jury did not find defendant had an intent to kill, the assault would be excused as being in self-defense, were confusing and constituted prejudicial error.

State v. Wardlow

APPEAL by defendants from *Winner, Judge.* Judgment entered 13 February 1975 in Superior Court, ORANGE County. Heard in the Court of Appeals 21 October 1975.

Defendants were charged with assault with a deadly weapon with the intent to kill inflicting serious injury. From pleas of not guilty, the jury returned verdicts of guilty. From judgment sentencing them to terms of imprisonment, defendants appeal.

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

Dunn and Eifort, by Joseph D. Eifort, for defendant appellants.

MORRIS, Judge.

During the course of the trial, defendants presented evidence tending to show that the assault was committed in self-defense. After retiring for deliberation, the jury returned to the courtroom and asked to be instructed again on the applicable law of self-defense. As the record appears before us, the court apparently advised the jury that:

> "Now, if you find from the evidence beyond a reasonable doubt that the defendant assaulted the prosecuting witness but do not find that he had an intent to kill, that assault would be excused as being in self-defense of the circumstances at the time that he acted and as would create in the mind of a person of ordinary firmness a reasonable belief that such action was necessary to protect himself from bodily injury or offensive physical contact, and that the circumstances did create such a belief in the defendant's mind."

This instruction tends to confuse the various critical elements of the law of self-defense and could possibly engender some misunderstanding in the minds of the jurors as to the nature of the applicable law. Therefore, a new trial must be had for both defendants.

New trial.

Judges PARKER and MARTIN concur.

STATE OF NORTH CAROLINA v. HAROLD R. HANEY, JR.

No. 7512SC554

(Filed 17 December 1975)

Larceny § 6— larceny of motorcycle — value of motorcycle — incompetent evidence — no objection — consideration on question of nonsuit

In a prosecution for felonious larceny of a motorcycle, testimony by the owner that he would not sell his cycle for less than $2000 was incompetent on the issue of value of the motorcycle; however, incompetent evidence, if not objected to, may be considered by the court on the question of nonsuit and can be sufficient to take the case to the jury.

APPEAL by defendant from *Smith, Judge.* Judgment entered 6 March 1975 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 16 October 1975.

Defendant was tried on a bill of indictment charging him with the felonious larceny of a 1971 Harley-Davidson Sportster motorcycle having a value of $1,445.00. He was found guilty as charged. Judgment imposing a prison sentence, suspended on certain conditions was entered.

Attorney General Edmisten, by Assistant Attorney General Conrad O. Pearson and Associate Attorney T. Lawrence Pollard, for the State.

Smith & Geimer, P.A., by William S. Geimer, for defendant appellant.

VAUGHN, Judge.

Defendant urges that his motion for nonsuit should have been granted because he contends there was no evidence of the value of the stolen motorcycle. The following is how the evidence of value was developed:

"Q. Do you have an opinion satisfactory to yourself as to the fair market value of the Harley Davidson Sportster motorcycle you owned on the 23rd of August on that day?

A. Do I have one?

Q. Yes.

A. I would not sell it for no less than $2000."

Appellant correctly argues that the word "value" as used in the statute does not mean the price at which the owner would sell, but means ". . . fair market value." *State v. Cook,* 263 N.C. 730, 140 S.E. 2d 305. Nevertheless, the statement of the witness in response to the question of value was allowed to stand without exception or motion to strike. Incompetent evidence, if not objected to, may be considered by the court on the question of nonsuit and can be sufficient to take the case to the jury. The motion for nonsuit was properly overruled.

There was no evidence that the value of the stolen motorcycle was less than $200.00 and it was therefore, not prejudicial error to fail to instruct the jury on misdemeanor larceny.

We find no error in defendant's trial.

No error.

Judges BRITT and ARNOLD concur.

STATE OF NORTH CAROLINA v. DONALD R. KAERNER

No. 754SC687

(Filed 17 December 1975)

Larceny § 3— felonious larceny — unlawful taking of vehicle — no lesser included offense

At the time the offense charged was committed, the unlawful taking of a motor vehicle under former G.S. 20-105 was not a lesser included offense of felonious larceny; therefore, the trial court in this felonious larceny prosecution erred in submitting to the jury as a possible verdict defendant's guilt of the unlawful taking of a vehicle.

ON *certiorari* to review trial before *Martin, (Perry), Judge.* Judgment entered 9 January 1975 in Superior Court, ONSLOW County. Heard in the Court of Appeals 20 November 1975.

Defendant was charged in a bill of indictment with felonious breaking and entering and felonious larceny. The breaking and entering charge was nonsuited at the close of the State's evidence. The jury found the defendant guilty of "the unlawful taking" of a motor vehicle.

From the finding of guilt and the imposition of a prison sentence, defendant appealed.

Attorney General Edmisten, by Associate Attorneys Daniel C. Oakley and Jo Anne Sanford Routh, for the State.

Grady Mercer, Jr., for defendant appellant.

VAUGHN, Judge.

Defendant contends and the State concedes that at the time of this offense, the unlawful taking of a motor vehicle under former G.S. 20-105 was not a lesser included offense of felonious larceny. We agree.

Since the offense was committed before 1 January 1975, an indictment for larceny will not support a conviction for the unlawful taking of a motor vehicle in violation of G.S. 20-105 [repeal effective 1 January 1975]. *State v. Stinnett,* 203 N.C. 829, 167 S.E. 63; *State v. McCrary,* 263 N.C. 490, 139 S.E. 2d 739; *State v. Campbell,* 14 N.C. App. 633, 188 S.E. 2d 754.

The court instructed the jury:

> " . . . if you return a verdict of not guilty of felonious larceny, you would consider whether or not the defendant is guilty of *the unlawful taking of a vehicle* which *is a lesser included offense within the charge of larceny* which I referred to." (Emphasis added.)

The instruction is erroneous.

On 1 January 1975, G.S. 14-72.2 entitled "Unauthorized use of a conveyance" became effective. Subsection (d) expressly provides that an offense under G.S. 14-72.2 may be treated as a "lesser-included offense of the offense of larceny of a conveyance." Defendant in this case was charged with an offense that was alleged to have occurred in October, 1974.

The judgment is vacated and the case is remanded.

Vacated and remanded.

Judges MARTIN and CLARK concur.

IVORY M. WHITE AND HUSBAND, DAVID WHITE, JR. v. EARL RAY ASKEW AND WIFE, CATHERINE ASKEW; EMMA ASKEW TAYLOR AND HUSBAND, JAMES TAYLOR; FRANCES ASKEW HOGGARD AND HUSBAND, FRANK HOGGARD; NEAL ASKEW AND WIFE, BARBARA ASKEW; CLARENCE TAYLOR AND WIFE, HATTIE L. TAYLOR; KELLY SAUNDERS AND WIFE, OLA MAE SAUNDERS; CARLTON MITCHELL; GLORIA BAXTER AND HUSBAND, JESSIE BAXTER; GRACE ASKEW; AUDREY ASKEW; JANICE RAE ASKEW; SHIRLEY RUTH ASKEW; MILTON DAVIS ASKEW; WRIGHT ASKEW, JR. AND WIFE, MARY ANN ASKEW; AND FLETCHER MAE ASKEW

No. 756SC492

(Filed 17 December 1975)

Partition § 8— sale for partition — determination of ownership

In an action to sell land for partition, the trial court properly determined that petitioners had no interest in one of the tracts.

APPEAL by petitioners from *Winner, Judge.* Judgment entered 20 March 1975 in Superior Court, BERTIE County. Heard in the Court of Appeals 24 September 1975.

Petitioners started a special proceeding to sell certain land for division among the several tenants in common. Respondents denied that petitioners had any interest in one of the tracts. The case was then transferred to the civil issue docket where it was tried by the judge without a jury. The judge made findings of fact and entered judgment consistent with respondents' contention that petitioners had no interest in the disputed tract.

Leroy, Wells, Shaw, Hornthal, Riley & Shearin, P.A., by J. Fred Riley, for petitioner appellants.

Gillam & Gillam, by M. B. Gillam, Jr., for defendant appellees.

VAUGHN, Judge.

Neither the bench nor the bar could benefit from a recital of the history of the title to the land in question. Petitioners entered no exceptions to the court's findings of fact. The findings of fact supported the conclusion of law. Moreover, the undisputed facts would have required the judge to reach the identical conclusion of law.

The judgment is affirmed.

Affirmed.

Chief Judge BROCK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. MILTON HARLEE

No. 755SC645

(Filed 17 December 1975)

APPEAL by defendant from *Cowper, Judge.* Judgment entered 5 March 1975 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 10 November 1975.

Defendant was charged with the 7 January 1975 felonious breaking or entering of a building. Defendant entered a plea of not guilty, and the jury returned a verdict of guilty. From judgment sentencing him to a term of imprisonment, defendant appealed.

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

Jay D. Hockenbury for defendant appellant.

MORRIS, Judge.

Defendant candidly concedes that he can find no error prejudicial to defendant, but presents the face of the record for review.

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

No error.

Judges PARKER and MARTIN concur.

STATE OF NORTH CAROLINA v. MANUEL RUSH

No. 7520SC406

(Filed 17 December 1975)

APPEAL by defendant from *McConnell, Judge.* Judgment entered 24 January 1975 in Superior Court, UNION County. Heard in the Court of Appeals 4 September 1975.

Defendant was convicted of the felonious sale of marijuana to a 12-year-old child.

Attorney General Edmisten, by Assistant Attorney General Isham B. Hudson, Jr., for the State.

Robert L. Huffman, for defendant appellant.

BROCK, Chief Judge, VAUGHN and MARTIN, Judges.

There has been no order extending the time for docketing the record on appeal in this case. The record was not docketed within the time permitted by our rules and is subject to dismissal. We have, nevertheless, carefully considered the merits of the assignments of error brought forward and find no error that would require a new trial.

No error.

STATE OF NORTH CAROLINA v. JIMMY WAYNE CAGLE

No. 7512SC667

(Filed 17 December 1975)

APPEAL by defendant from *Hobgood, Judge.* Judgment entered 30 April 1975 in Superior Court, HOKE County. Heard in the Court of Appeals 18 November 1975.

VAUGHN, MARTIN and CLARK, Judges.

No error.

ELLIE LEE DICKENS v. ROBERT DeBREW AND WIFE, SUSIE DeBREW, ORA STATON, J. J. PITTMAN, LOUISE G. JOHNSON, AND ALL UNKNOWN PERSONS, FIRMS AND CORPORATIONS OWNING OR CLAIMING, THROUGH ARTHUR STATON, AN INTEREST IN THE REAL ESTATE WHICH IS THE SUBJECT OF THIS ACTION

No. 756SC600

(Filed 17 December 1975)

APPEAL by defendant, Ora Staton, from *Tillery, Judge.* Judgment entered 12 February 1975 in Superior Court, HALIFAX County. Heard in the Court of Appeals 22 October 1975.

Charles J. Vaughan and C. Kitchin Josey, for plaintiff appellee.

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

BRITT, VAUGHN and ARNOLD, Judges.

No error.

In re Estate of Adamee

IN THE MATTER OF THE ESTATE OF PAUL CHESTER ADAMEE, DECEASED

No. 7515SC439

(Filed 7 January 1976)

1. **Husband and Wife § 12— separation agreement — revocation by reconciliation**

Where a husband and wife enter into a separation agreement and thereafter become reconciled and renew their marital relations, the agreement is rescinded for every purpose insofar as it remains executory.

2. **Clerks of Court § 3; Courts § 5— probate matters — concurrent jurisdiction of clerk and superior court judge**

The effect of G.S. 7A-240, G.S. 7A-241, and G.S. 7A-251 is to take from the clerk exclusive original jurisdiction of probate matters, to vest in the clerk and the superior court concurrent jurisdiction of probate matters, and to provide for appeals from the clerk directly to the judges of superior court, bypassing the district court, on all such matters heard originally before the clerks.

3. **Clerks of Court § 3; Courts § 5— probate matters — concurrent jurisdiction**

The word "jurisdiction" in G.S. 28A-2-1 is used in the sense of assigning original authority to the clerk and was not intended to change the vesting of concurrent jurisdiction in the clerk and the superior court under G.S. 7A-241.

4. **Executors and Administrators § 5— attack on appointment of administratrix — appeal to superior court — absence of exceptions to findings — hearing de novo — submission of issue to jury**

Upon appeal from an order of the clerk of superior court determining that respondent was entitled to qualify as administratrix of her deceased husband's estate and to share in the estate, petitioners were entitled to a *de novo* hearing by the judge of superior court on both the right of respondent to qualify as administratrix and her right to share in the estate, notwithstanding petitioners made no exceptions to specific findings of fact of the clerk; and the judge of superior court in the exercise of his inherent powers had the right to submit to the jury the issue of whether respondent and deceased had resumed their marital relations after having executed a separation agreement—an issue that would resolve both the right to qualify as administratrix, a probate matter, and the right to share in the estate, which is not a probate matter.

APPEAL by respondent, Raye T. Adamee, from *Braswell, Judge.* Order entered 16 April 1975, in Superior Court, ALAMANCE County. Heard in the Court of Appeals 17 September 1975.

Paul Chester Adamee died 20 August 1974, leaving a wife, Raye, and no children or lineal descendants. The petitioners are a brother and three sisters of Paul Adamee.

A judgment of the Superior Court of Alamance found that a purported paper writing offered for probate was not the Last Will and Testament of Paul Adamee, and that he died intestate. Raye Adamee, wife of deceased, thereafter filed application for appointment as administratrix.

Petitioners, brothers and sisters of the deceased, filed an "Objection and Complaint" with the Clerk of Superior Court, attaching a copy of a deed of separation and Consent Judgment dated 20 December 1973, in which they contested Raye Adamee's appointment as administratrix and her right as widow to share in the estate. They alleged that Raye and Paul Adamee became separated and never reconciled subsequent to the legal separation manifested by the separation agreement and Consent Judgment of December 1973.

Raye Adamee filed a "Response and Answer," alleging that the separation agreement and Consent Judgment were revoked and terminated by their reconciliation and resumption of marital relations.

In the hearing before the Clerk on 2 December 1974, the parties offered evidence, none of which appears in the record on appeal. The Clerk entered an order finding as a fact that after the separation agreement of 20 December 1973, "Paul Chester Adamee and Raye T. Adamee were reconciled and resumed their marital relations and were living together as husband and wife immediately prior to and at the time of the death of Paul Chester Adamee." The order concluded that the separation agreement and Consent Judgment were rescinded and void, and that respondent was entitled to qualify as administratrix and to share in the estate.

Following the Clerk's signature to the foregoing order this entry appears:

> "In open Court the petitioners give notice of appeal to the General Court of Justice, Superior Court Division, and request a Jury trial on all issues of fact. All further notice waived.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this matter be and is hereby transferred to the Civil Issue Docket for hearing.

This the 2nd day of December, 1974.

/s/ LOUISE B. WILSON
Clerk of Superior Court"

On 29 January 1975, petitioners filed a motion for summary judgment alleging that "even if all the allegations contained in the response and answer of Raye T. Adamee were true, that such allegations do not revoke, cancel or terminate" the separation agreement and consent judgment.

On 30 January 1975, respondent filed an affidavit and response to the motion for summary judgment in which she alleged a reconciliation which revoked the separation agreement and consent judgment.

On 3 February 1975, the petitioners filed exceptions to specific findings of fact and conclusions of law made by the Clerk in the order of 2 December 1974.

The matter came on for hearing before Judge Braswell at the April 14, 1975, Session of the Superior Court, and he advised counsel that he would hear the motion for summary judgment "and all rolled into one." The petitioners thereupon submitted several affidavits which tended to show that though respondent moved back to the home of Paul Chester Adamee in the summer of 1974, she did so solely as a matter of economic convenience, and that marital relations were not resumed. Respondent submitted several affidavits of others tending to show that she and Mr. Adamee reconciled and apparently lived together as man and wife in the summer of 1974 until his death on 10 August 1974. Respondent was then called to testify, but Judge Braswell conferred with counsel, heard argument, and then entered an order, filed 16 April 1975, in which he found facts and ordered: (1) that the exceptions filed on 3 February 1975 by petitioners to the Clerk's order of 2 December 1974, came too late and were dismissed; (2) that motion for summary judgment was denied; and (3) that there shall be a jury trial upon one issue: "Did the late Paul Chester Adamee and wife, Raye T. Adamee, become reconciled and renew their marital relations after December 20, 1973?" From this order respondent Raye T. Adamee appealed.

Latham, Wood and Cooper by Thomas D. Cooper, Jr.; and Spencer B. Ennis for petitioner appellees.

Long, Ridge & Long by Paul H. Ridge and Daniel H. Monroe, Jr., for respondent appellant, Raye T. Adamee.

CLARK, Judge.

The questions raised by this appeal involve, first, the right of the respondent to qualify for appointment as administratrix of the estate of her deceased husband, and, second, her right to share in his estate.

All parties admit the execution of the deed of separation by respondent and her husband and the entry of Consent Judgment, both dated 20 December 1973. Under the terms of the deed of separation respondent renounced (1) her right to share in the estate of her husband under G.S. 29-13 and G.S. 29-14; and (2) her right to administer upon his estate under G.S. 28A-4-1(6). The parties do not question the validity or the construction of the deed of separation. See *Lane v. Scarborough,* 284 N.C. 407, 200 S.E. 2d 622 (1973).

[1] But it is established in North Carolina that where a husband and wife enter into a separation agreement and thereafter become reconciled and renew their marital relations, the agreement is rescinded for every purpose insofar as it remains executory. *Tilley v. Tilley,* 268 N.C. 630, 151 S.E. 2d 592 (1966); *Jones v. Lewis,* 243 N.C. 259, 90 S.E. 2d 547 (1955); *Bass v. Mooresville Mills,* 11 N.C. App. 631, 182 S.E. 2d 246 (1971).

The evidence offered by respondent on one hand and petitioners on the other is conflicting. The Clerk found that there was a reconciliation and resumption of marital relations. On appeal Judge Braswell found that the conflicting evidence raised issues of fact, and ordered that an issue be submitted for jury determination as follows: "Did the late Paul Chester Adamee and his wife Raye T. Adamee become reconciled and renew their marital relations after December 20, 1973?" It is clear that the determination of this issue would determine both the right of the Clerk to appoint respondent to administer the estate and her right to share in the estate.

The respondent contends that the petitioners' appeal, without exceptions to specific findings of fact, from the order of the Clerk of Superior Court presented for determination to the

Superior Court only whether the findings of the Clerk supported his order and that the Superior Court was without authority to order a jury trial upon the issue of reconciliation and resumption of marital relations. Respondent relies on *In re Estate of Lowther,* 271 N.C. 345, 156 S.E. 2d 693 (1967), which involved an appeal to Superior Court, without exceptions to specific findings of fact, from an order from the Clerk removing an administratrix upon the finding that she was not the widow of the deceased. The Superior Court found that an issue of fact arose from the pleadings, vacated the Clerk's order, and transferred the proceeding to the civil issue docket for trial. The Supreme Court, in reversing the Superior Court, held that where the appellant does not challenge any of the Clerk's findings of fact, the superior court judge reviews the record to determine whether there are errors of law, and the appeal carries to the judge the question of whether the Clerk's findings of fact sustain his order. *In re Moore,* 25 N.C. App. 36, 212 S.E. 2d 184 (1975).

Both the case before us and the *Lowther* case involved probate matters on appeal from the Clerk to the Superior Court, and it is obvious that *Lowther* controls the case before us unless there is some compelling reason for finding that the *Lowther* decision is no longer authority for the proposition that on appeal from the Clerk to the Judge of Superior Court the hearing is not *de novo.*

In the *Lowther* decision Justice (now Chief Justice) Sharp traced the jurisdiction of probate matters from the ecclesiastical courts in England, through our Constitution of 1868 and repeal by the Constitutional Convention of 1875. "Since then the jurisdiction of the clerks of the Superior Courts with reference to the administration of estates of deceased persons has been altogether statutory. . . . Section 102 of N. C. Code of 1883—now G.S. 2-1—abolished the office of probate judge and transferred the duties which the clerks had previously performed as judges of probate to them as clerks of the Superior Court." 271 N.C. at 348. *Lowther* relied on *In re Simmons,* 266 N.C. 702, 147 S.E. 2d 231 (1966), which stated that "the appellate jurisdiction . . . is derivative and appeals present for review only errors of law committed by the clerk." 266 N.C. at 707.

G.S. 2-1 was specifically repealed on 1 October 1971 by Session Laws of 1971, c. 363, s. 11. Many of the jurisdictional statutes included in Chapter 1 and Chapter 2 of the General

Statutes were repealed, or were replaced, by Chapter 310, Session Laws of 1965, and other statutes enacted subsequently, to implement the "Court Improvement Amendment" (adopted in 1961 as proposed by the Session Laws of 1961, c. 313). The amendment is now a part of the new Constitution of North Carolina, Article IV, effective 1 July 1971. These statutes are now included in Chapter 7A of the General Statutes.

G.S. 7A-240, after providing for the vesting in the superior court division and the district court division original jurisdiction of all justiciable matters of a civil nature, concludes with this sentence: "Except in respect of proceedings in probate and the administration of decedents' estates, the original civil jurisdiction so vested in the trial divisions is vested concurrently in each division." G.S. 7A-241 provides: "Exclusive original jurisdiction for the probate of wills and the administration of decedents' estates is vested in the superior court division, and is exercised by the superior courts and by the clerks of superior court as ex officio judges of probate according to the practice and procedure provided by law." G.S. 7A-251 provides: "In all matters properly cognizable in the superior court division which are heard originally before the clerk of superior court, appeals lie to the judge of superior court having jurisdiction from all orders and judgments of the clerk for review in all matters of law or legal inference, in accordance with the procedure provided in chapter 1 of the General Statutes."

[2] The effect of these statutes is to take from the Clerk exclusive original jurisdiction of probate matters, to vest in the Clerk and the Superior Court concurrent jurisdiction of probate matters, and to provide for appeals from the Clerk directly to the judges of superior court, bypassing the district courts, on all such matters heard originally before the Clerks. And G.S. 28-1, (as well as Articles 1 thru 7 of Chapter 28, General Statutes) vesting probate jurisdiction, including the granting of letters of administration, in the Clerk was repealed by the Session Laws of 1973, c. 1329, effective 1 October 1975. G.S. 28A-2-1, replacing G.S. 28-1, provides:

> "The clerk of superior court of each county, ex officio judge of probate, shall have jurisdiction of the administration, settlement, and distribution of estates of decedents including, but not limited to, the following:
>
> (1) Probate of wills;

(2) Granting of letters testamentary and of administration, or other proper letters of authority for the administration of estates."

[3] G.S. 28A-2-1 in substance vests in the Clerk "jurisdiction" of the named probate matters without vesting concurrent jurisdiction in the superior court. But we find that the jurisdiction statutes in Chapter 7A are controlling. The word "jurisdiction" in G.S. 28A-2-1 is used in the sense of assigning original authority to the Clerk, and was not intended to change the vesting of concurrent jurisdiction in the Clerk and the Superior Court under G.S. 7A-241.

The reference in G.S. 7A-251 to "the procedure provided in chapter 1" is to Article 27, Chapter 1 of the General Statutes, entitled "Appeal." G.S. 1-272 provides in part: "Appeals lie to the judge of the superior court having jurisdiction, either in session or vacation, from judgments of the clerk of the superior court in all matters of law or legal inference." G.S. 1-273 provides: "If issues of law and fact, or of fact only, are raised before the clerk, he shall transfer the case to the civil issue docket for trial of the issues at the next ensuing session of the superior court." G.S. 1-276, which confers jurisdiction upon the judge of superior court on appeal in civil actions and special proceedings begun before the clerk "to hear and determine all matters in controversy," has no application to probate matters.

Under a strict construction of G.S. 1-272 and G.S. 1-273, in probate matters originally heard by the clerk, an appeal would lie directly to the judge of superior court in matters of law and legal inference; but in the hearing before the clerk if issues of fact, or both law and fact, were raised, the appeal would lie directly to the superior court for jury trial on the issues of fact. But in our opinion this strict construction would ignore the "according to the practice and procedure provided by law" mandate of G.S. 7A-241. In the *Lowther* decision Justice Sharp (now Chief Justice), in tracing the history of probate jurisdiction, quoted 31 Am. Jur., Jury, § 30 (1958): " 'Probate courts, having always proceeded without the intervention of a jury, are not within the application of the constitutional provisions relating to the right of jury trial. . . ' . " , 271 N.C. at 347, and concluded that in probate matters if issues of fact did arise "they were nevertheless decided by the clerk, or by the judge on appeal." 271 N.C. at 351.

[4] The clerk is a part of the superior court. Since G.S. 7A-241 vests concurrent jurisdiction over probate matter in the clerk and the superior court, the clerk does not exercise original and exclusive jurisdiction; upon appeal from the clerk the superior court's jurisdiction is not derivative, and the judge of superior court has the right to hear and determine all matters in controversy as if the case was originally before him. See *Redevelopment Comm. v. Grimes,* 277 N.C. 634, 178 S.E. 2d 345 (1971). We conclude, therefore, that upon appeal from the order of the clerk of superior court the petitioners were entitled to a *de novo* hearing by the judge of superior court on both the right of respondent to qualify as administratrix and her right to share in the estate of her deceased husband. And the judge of superior court in the exercise of his inherent powers had the right to submit to the jury the one issue that would resolve both the right to qualify as administratrix, a probate matter, and the right to share in the decedent's estate, which is not a probate matter. See *In re Estate of Ives,* 248 N.C. 176, 102 S.E. 2d 807 (1958), for proceeding involving right of intestate succession.

If, in this case, the Superior Court finds error in the order of the Clerk relative to the granting of letters of administration, it will not appoint a personal representative but must remand the cause to the Clerk for this purpose consistent with the decision of the Superior Court; the assignment of original authority of probate matters to the Clerk in G.S. 28A-2-1 is supported by, and not contravened by, G.S. 7A-241.

The Court of Appeals has recognized, and does now recognize, that it does not have the authority to overrule the decisions of the Supreme Court. *Mabry v. Bowen,* 14 N.C. App. 646, 188 S.E. 2d 651 (1972). However, where the decision of the Supreme Court, wholly or in part, is based on statutes which have since been repealed or amended so as to remove the statutory support, the Court of Appeals has the authority and the duty to recognize the statutory change and its effect upon the decision. The Supreme Court under G.S. 7A-31 has the right on its own motion to certify this cause for review. Since the decision in 1967, *In re Lowther, supra,* has been followed, or cited with approval, in the following cases: *In re Spinks,* 7 N.C.App. 417, 173 S.E. 2d 1 (1970); *In re Green,* 9 N.C. App. 326, 176 S.E. 2d 19 (1970); *In re Moore,* 25 N.C. App. 36, 212 S.E. 2d 184 (1975).

The judgment of the Superior Court appealed from is

Affirmed.

Judges BRITT and PARKER concur.

NORTH CAROLINA NATIONAL BANK v. H. L. GILLESPIE, t/a H. L. GILLESPIE'S USED CARS

No. 7517DC632

(Filed 7 January 1976)

1. **Bills and Notes § 20— action on notes — oral agreement inconsistent with terms of notes — summary judgment**

Summary judgment was properly entered for plaintiff bank in its action to collect demand notes executed by defendant where defendant testified that the notes were executed as security for a floor plan agreement for defendant's used car business, and that he had an oral agreement with the bank's former president that the bank would apply the fair market values of cars floor planned before calling upon defendant for payment, but the evidence showed that the bank's former president retired in 1966, the notes were executed in 1973 and 1975, no such agreement was made when the notes in question were executed, and the oral agreement was inconsistent with the terms of the notes.

2. **Judges § 5— refusal of judge to disqualify himself**

A district court judge did not err in refusing to disqualify himself in a bank's action to collect notes executed by defendant on grounds that the judge is a depositor with the bank and enjoys friendly relationships with its officers and employees, that a relationship of attorney and client between the judge and defendant's family had been terminated prior to the judge's election to the district court, and that the judge had prosecuted defendant when he was the solicitor of recorder's court, where the judge found as a fact that he had no prejudice or bias which would prevent him from acting impartially.

APPEAL by defendant from *Clark, Judge.* Judgment entered 19 May 1975, in District Court, SURRY County. Heard in the Court of Appeals 13 November 1975.

By this action plaintiff seeks to recover of defendant the principal sum of $15,113.09, payment for five demand notes executed by defendant to plaintiff as payee. Defendant, in his answer, denied that he had executed the notes. He counterclaimed

for the "sum of fifteen to twenty thousand dollars or such amounts as the evidence reveals that he is entitled to on his counterclaim" based upon his allegations that as a used car dealer he had "floor planned" automobiles to plaintiff and that as a part of the floor planning agreement plaintiff had promised to make certain rebate payments to him and that plaintiff had failed to make the payments as agreed.

Plaintiff moved for summary judgment and filed an affidavit of the senior vice-president of plaintiff who stated that he had been employed by the bank and its predecessor for 40 years and knew the signature of defendant, having handled many transactions for him. He further stated that he had examined the signature of defendant on the pleadings filed herein and compared it with the signature on the notes in question and was of the opinion that the signature on the notes in question was that of defendant. He further stated that he knew of his own knowledge that plaintiff had never entered into any agreement to pay any dealer rebates to defendant on any floor planning arrangement or on any note discounting arrangement.

In opposition to the motion defendant submitted the depositions of present or former officials of the bank and his own affidavit. D. C. Rector's testimony was that he had retired from the bank as of 1 January 1966, and had not had any active part in the business of the bank since his retirement, but that he had prior to that time done business with defendant. In his own affidavit defendant stated that he had been in the used car business for some 30 years in Mount Airy and for 12 to 15 of those years he had floor planned his automobiles with plaintiff and its predecessor, First National Bank of Mount Airy. He signed the notes which are the subject of this lawsuit, and they are secured by certain automobiles owned by defendant in his used car business. He stated that he had entered into a verbal agreement with plaintiff through its then president, Mr. Rector. With respect to the agreement, defendant stated:

> "That for the past thirty (30) years I have been in the used car and auto repair business, and that, more particularly for the last 12 to 15 years, I have co-endorsed notes and installment loan contracts with the First National Bank of Mount Airy when I sold the automobiles to my customers. That I had an agreement with Mr. D. C. Rector that he would floor-plan any used cars that I had at my lot, and that I would sign notes or any other security agree-

ments, including chattel mortgages and floor-plan agreements, if required by the bank, to be given to the bank to secure the automobiles floor-planned by me in my business.

I further had an agreement that I would receive one (1%) percent add-on dealer reserve after all contracts which I had floor-planned and customer sales of which I had endorsed to the First National Bank of Mount Airy were paid out. That this business relationship has continued, and that I still have outstanding contracts which have not been paid out by my customers in the First National Bank of Mount Airy, which has recently been purchased by the North Carolina National Bank. That it has been the business practice of myself and the First National Bank of Mount Airy that I endorse notes in the name of H. L. Gillespie's Used Cars, and that all of these notes have been demand notes. And that the consideration for the notes has been the money advanced for the purpose of floor-planning used cars on my lot. In addition to the notes, I have signed other floor-plan agreements in favor of the First National Bank of Mount Airy, and I am informed and believe that these security agreements contain therein other notes for the same amounts of money as set forth in the plaintiff's complaint. This is true for Note #8142, showing execution date of August 29, 1975, Note #8139, executed August 29, 1973, Note #8141, executed September 10, 1973, Note #8140, executed September 10, 1973, and Note #8138, executed September 15, 1973. That no consideration has ever been given to me by the First National Bank of Mount Airy for Notes #8138, #8139, #8140, #8141, and #8142, except to floor-plan automobiles to H. L. Gillespie's Used Cars. That the First National Bank of Mount Airy has made no effort to repossess any automobiles either before or after suit was filed in this action on August 8, 1974.

That I had an oral agreement with D. C. Rector, president of First National Bank of Mount Airy at the time of the execution of the notes and for 12 to 15 years prior thereto that the notes would be used only as security for the floor-plan agreement, and that D. C. Rector and I had an oral agreement as to the floor-plan and an oral agreement which added thereto and supplemented the notes signed by me. That I also had an oral agreement with D. C. Rector that

no demand for payment would be made until after the bank's remedies under the floor-plan agreement and other security instruments, which I was required to sign by the bank, had been exhausted. I further had an agreement and understanding that the cars floor-planned would stand good for the debt to the extent of their fair market value at the time any request was made by the bank for the payment of the notes. I am informed that my dealer reserve at the North Carolina National Bank would be in excess of $17,000.00, and more than enough to pay off all the notes that I had endorsed at the North Carolina National Bank. That I had an agreement with D. C. Rector that before demand would be made upon the notes without an opportunity to either pay the interest or renew the notes that the dealer reserve would be used to pay off the notes.

That I have never been paid any of the dealer reserve on the paid out contracts for the past 15 years, and that for the past approximately 12 years, I have endorsed on the average of about $65,000 to $75,000 worth of retail sales contracts to the First National Bank of Mount Airy, and that these contracts have been paid and that the bank still retains my one (1%) percent dealer reserve, plus interest, over this period of time. I never made a request for the dealer reserve since my business relationship with the First National Bank of Mount Airy was continuing in the same manner that it had been continuing for 12 to 15 years."

The court entered summary judgment for plaintiff on its motion and denied defendant's motion for summary judgment on his counterclaim retaining that portion of the litigation for trial. Defendant appealed.

Folger & Folger, by Larry Bowman, for plaintiff appellee.

Franklin Smith for defendant appellant.

MORRIS, Judge.

In the judgment entered, the court complied with the mandate of G.S. 1A-1, Rule 54(b), in providing that "this judgment is entered as a final judgment under Rule 54(b) of the North Carolina Rules of Civil Procedure in that there is no just cause for delaying the entry of this order."

[1] A party moving for summary judgment " . . . must show (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." *Caldwell v. Deese,* 288 N.C. 375, 378, 218 S.E. 2d 379 (1975). "[A]ll inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion." 6 Moore's Federal Practice (2d ed. 1971), § 56.15[3] at 2337. Nor does G.S. 1A-1, Rule 56, authorize the court to find the facts and decide an issue of fact. The court is authorized only to determine whether a genuine issue as to any material fact does exist. Here we do not think a genuine issue exists with respect to a material fact. Defendant has testified that the bank agreed to set up a reserve account, that the notes would be used only as security for the floor-plan agreement, that no demand for payment of the notes would be made until after the bank's remedies under the floor plan agreement and other security instruments had been exhausted, that the cars floor planned would stand good for the debt to the extent of their fair market value, that the dealer reserve would be used to pay off the notes before the bank would demand payment without defendant's having the opportunity either to pay the interest or renew the notes. However, if such verbal agreements were made, they were made, according to defendant's own statement, with Mr. Rector. It is undisputed that Mr. Rector retired from the bank in 1966. The notes involved here were dated in 1973 and 1975. Defendant relies on *Langston v. Brown,* 260 N.C. 518, 133 S.E. 2d 180 (1963), where the Court said, at 520:

> "If, at the time of the execution and delivery of the notes, the parties agreed that payment should be enforced only by a sale of the collateral, such an agreement would preclude personal liability on the part of the maker in an action between the parties, but this is a defense which must be interposed by answer unless it appears in the complaint itself." (Citations omitted.)

Here, of course, defendant did not raise the defense in his answer, nor is that material here. The undisputed evidence is that if an agreement was made, it was made with Mr. Rector prior to 1966. There is no evidence of any such agreement at the time the notes in question were executed and delivered. Nor does the case before us come within the ambit of *Borden, Inc. v. Brower,* 284 N.C. 54, 199 S.E. 2d 414 (1973). There the plain-

tiff brought action to recover the balance due on a note executed by defendant on 25 July 1969 bearing a specified due date of 1 December 1969. Defendant denied any indebtedness to plaintiff and by way of affirmative defense averred that the amount included certain notes of customers of plaintiff and defendant payable to plaintiff which had been run through defendant's books as a matter of convenience; that in 1963, an agent of plaintiff had sold the customers fertilizers though defendant had told the agent he could not carry an account that size; that the agent had agreed that plaintiff would be solely responsible for collecting the accounts but they would be merely carried on defendant's books as a bookkeeping entry. Defendant agreed to this, and each year in settling with plaintiff, the notes were included in defendant's account with plaintiff; that each year defendant gave plaintiff a note for the balance due after all transactions between plaintiff and defendant had been handled. The trial court allowed plaintiff's motion for summary judgment. We affirmed. In reversing this Court and remanding the case for trial, the Supreme Court noted at page 65 that:

> "The original note in this case given by defendant to plaintiff was renewed from time to time. Defendant offered evidence, which was stricken, that each renewal contained the amounts of the Parrish and Scott notes. If this is true, the renewals did not operate as a discharge of the original note. Plaintiff would be bound by the parol contemporaneous agreement made with defendant through plaintiff's agent at the time of the original note as to the mode of payment of the liability of defendant." (Citations omitted.)

The notes before us are demand notes. There is no evidence that they are renewal notes for the notes given at the time an agreement was entered into with Mr. Rector. On the contrary, defendant says they were given for the purpose of acquiring money with which to buy used cars.

The notes provide that should the bank deem the collateral insufficient, it could demand that defendant deposit additional collateral and, upon his refusal, could declare the notes due and collectible. They further provided that "upon the nonpayment of this note, or of any other of said liabilities, the said Bank, or the holder thereof, may sell the same (Collateral) at public or private sale. . . . " By the terms of the note the bank is not required to sell the automobiles before calling on the maker for payment. *Borden, supra,* states that parol evidence,

in some instances, may be admissible as to an agreement between the parties "so far as it is not inconsistent with the express terms of the note." Here the evidence of defendant that the bank *must* apply the fair market value of the cars to the note before calling upon defendant for payment is inconsistent with the terms of the note.

Defendant in his affidavit states that "I *am informed* that my dealer reserve at the North Carolina National Bank would be in excess of $17,000, and more than enough to pay off all the notes that I had *endorsed* at the North Carolina National Bank."

This statement would, of course, not be admissible in evidence. Even so, defendant relates the balance as being more than sufficient to pay customer's notes *endorsed* by him. This was the purpose of the reserve account according to all the evidence.

Affidavits filed in opposition to a motion for summary judgment "shall set forth such facts as would be admissible in evidence. . . . " G.S. 1A-1, Rule 56(e). If the matters stated in pleadings, affidavits, and depositions are not admissible in evidence, they should be stricken and not considered by the court. In this case, when this has been done, there does not remain a genuine issue of material fact. Defendant has admitted the execution of the notes. Plaintiff has established a prima facie right to payment. Defendant has not shown, by competent admissible evidence, a valid defense to the payment allegedly due. The court correctly entered summary judgment for plaintiff.

[2] Defendant, on the day of hearing, filed a motion praying that the court disqualify himself because of the court's alleged "prejudice and bias toward the defendant" resulting from an other than amicable termination of attorney-client relationship between the court and defendant's family and further because the court is a depositor with plaintiff and enjoys friendly relationships with its officers and employees. The court entered an order denying the motion. He found as facts that the relationship of attorney and client prior to his being elected district court judge ended amicably; that he did prosecute defendant when he was the duly elected solicitor of Mount Airy Recorder's Court but that it was his duty to prosecute all persons charged with violation of the criminal law and he had no personal feelings about the case at all; that he and his wife had funds on

deposit with plaintiff in a joint account and that he does enjoy the friendship of certain officers and employees of plaintiff but his impartiality in any decision to be made in the case would not be affected by either the fact of the funds on deposit or his friendship with officers and employees of the plaintiff. We fail to find prejudicial error in this facet of defendant's appeal. Obviously a judge who has formerly been a solicitor or prosecutor will have litigants before him who have previously been defendants on his criminal docket. Without more, this is not sufficient to require disqualification. Nor is the fact that the judge is a depositor in a bank which is a party to an action before him, standing alone, sufficient to require disqualification. The court found as a fact that he had no prejudice or bias which would prevent his acting impartially. We assume, of course, that the court is a person of high integrity and will act impartially in the determination of any controversy before him. Nothing in this record has convinced us otherwise. While the judgment entered might be construed to indicate a misconception of the office of summary judgment, the record does not indicate a lack of integrity or impartiality. Defendant's assignment of error as to this portion of his appeal is overruled.

The court's action in entering summary judgument for plaintiff is

Affirmed.

Judges VAUGHN and MARTIN concur.

LUTHER T. ROBINSON v. BRANCH MOVING & STORAGE COMPANY, INC.

No. 7515DC676

(Filed 7 January 1976)

Uniform Commercial Code § 15— purchase of truck — no inspection prior to sale — no implied warranty of fitness

Where the evidence tended to show that plaintiff executed a lease-purchase contract with defendant for the purchase of a truck, plaintiff insisted on completing the transaction while the truck was being repaired and before he had an opportunity to inspect it, plaintiff purchased the truck "as it was" at the time of sale, and plaintiff thereafter had to have numerous repairs made on the truck, the trial

court erred in finding an implied warranty of fitness for a particular purpose and in concluding that the defendant breached that implied warranty.

APPEAL by defendant from *Allen, Judge.* Judgment entered 9 April 1975 in District Court, ORANGE County. Heard in the Court of Appeals 19 November 1975.

On 27 April 1973, plaintiff, then a truck driver employed by defendant, executed a lease-purchase contract with defendant for the purchase of a 1971 Ford truck. In his verified complaint, plaintiff averred that "[d]ue to defects in its mechanical operation, the said truck has proven to be utterly unfit for the use for which it was sold and purchased, and said truck was given back to the defendant by the plaintiff." Plaintiff prayed, *inter alia,* that the trial court award him the $1,400 down payment paid to defendant and $3,000 for repairs and "out-of-pocket" expenses incurred incident to this transaction.

Defendant's answer, denying the material allegations raised in plaintiff's complaint, stated that plaintiff ". . . was [as] familiar with the truck . . . [and] its condition as the defendant was at the time the plaintiff offered to purchase the same from the defendant." Defendant then counterclaimed that

> "[a]fter making the down payment on said truck and taking exclusive possession of the same, the plaintiff incurred numerous charges and expenses which were the obligation of the plaintiff but which were wrongfully charged by the plaintiff against the defendant, all of which said charges amount to One Thousand Seven Hundred Sixty-two Dollars and Twenty Cents ($1,762.20)."

Plaintiff denied the allegations raised in defendant's counterclaim and also prayed for "$5,000.00 in lost wages plus 6% interest from June 1, 1973."

At trial, plaintiff testified that he executed the agreement even though defendant ". . . told [him] that it was being repaired in Alabama and that it was supposed to be getting a rebuilt engine." However, plaintiff stated that he had been told by defendant that on balance ". . . the overall condition of the truck was very good."

Plaintiff only had the truck for three days when

> ". . . the carburetor went out and I had to have it replaced. Mr. Branch paid for it but it was to be deducted

from my salary. Thereafter, on three different occasions I had further trouble with the truck. The engine blew up twice and it caught on fire and I had to have five pistons replaced over a period of three months during the period I had the truck. Also, the transmission went out on the truck.

The last time that I saw the truck was in June or July of 1973. What I mean by the engine blowing up is that the pistons catch on fire and become seized to the cylinder wall. This condition occurred and it interferred with my employment contract in that my truck was down more than it was available. Out of the three months that I owned the truck, it was never on the road more than one week at a time. I was able to complete only three jobs. I probably did not make over $1,000 on the three jobs.

I know that the engine was replaced on two occasions during the three months I had the truck. Once was at Alexander Ford in Durham where it was rebuilt.

I complained to Mr. Branch about the truck the last time it broke down. This was when the transmission went out and I had put it in the shop with Mr. Branch's authorization. The mechanic had been working on it and kept it tied up for four days and on the fifth day when I was supposed to pick it up, it was not ready and I just got fed up and left it in the shop. I just walked away from it after calling Mr. Branch. That was in Georgia.

When I called Mr. Branch, he told me to try to get it fixed and I mentioned to him that I was fed up with the job and asked that he either replace the truck or refund the money. He did not seem to really care what I did one way or the other but he did not offer to refund my money. He said it was too bad about the truck. He said it was impossible to replace the truck at that time."

However, on cross-examination, plaintiff recalled that when he

". . . came in to sign that contract, I knew the truck was under repairs in Alabama. I did not inspect the truck and had no discussions with Mr. Branch about inspecting it. I felt like I was familiar with it having driven it before. I did not feel that I needed to wait and see until repairs were successful. I assumed that the truck would be all

right. Mr. Branch knew basically the same thing about the truck at that time.

I do not remember whether there was any discussion about warranty as the truck was fairly new and therefore, it would have been under warranty, but I was buying it 'as it was' at that time, knowing that it was in Alabama being repaired but assuming that it would be all right and under warranty."

Defendant's president, William Benjamin Branch, testified that when plaintiff tendered the down payment,

"I tried to get him to hold off until the truck got back to Durham so he could inspect it and drive it and see if he was satisfied with it. It was not in town at the time he made that payment. He had driven the truck with us before and was familiar with it but we did not even sign any contract with him at the time he paid us the money. At the time the contract was signed on the 27th day of April, 1973, the truck was still in the shop in Opalika, Alabama. When he came back in to get the contract signed, after we had tried to get him to wait, I told him at that time 'why don't you wait until we get it back in Durham?' and he was a little bit disgusted because it had taken so long. I offered him his money back at that time and he said he didn't want his money back, he wanted his truck and he needed to get back to work. He felt like if he went down to Alabama he could pick up the truck and continue his operations for Mayflower from that standpoint. We made no representations to him at that time concerning the truck because I did not drive the truck. It was in good condition from what the men had told me up to the time it went into the shop. We made no promises concerning warranties on that truck at the time we sold it to him. He signed the contract and left to go on his first job."

Moreover, Mr. Branch noted that at

". . . one period when his truck was down, he did drive as a salaried employee the International truck for us for awhile. During that period I offered him his money back and he said he did not want his money back. He wanted a good truck. We then offered him number 73, the International, and he took it to try it and, unfortunately used it for one trip and he had a bad trip there. In fact,

he abandoned his truck in Virginia. He still wanted number 81—the Ford truck."

Defendant's president believed that the two offers of refund to plaintiff were made

". . . out of the goodness of my heart. I offered it to him twice. Once before he ever picked the truck up because he had not even seen it and then I offered it to him back in my office when it was down one time. I had asked him to wait before he got to see the truck and at no time was he forced or told to take this particular truck. He chose this truck and I would have done the same thing."

Mr. Branch finally explained that

". . . When we talked about the condition of the truck, Mr. Robinson told me more than I knew about the truck. I told him that the sale was 'as is' although that does not appear in the paper writing anyway."

The trial court found, *inter alia,*

". . . that there was an implied warranty of fitness for a particular use or purpose which ran with the said 1971 Ford motor vehicle from the defendant and third-party plaintiff to the plaintiff herein, and the court concludes that the truck described therein was defective as of April 27, 1973, and was at that time unable to perform, and was unfit for the particular purpose or purposes set out in the employment contract and purchase agreement signed by the parties hereto on that date."

From judgment for plaintiff awarding him $1400, plus interest and court costs, defendant appealed.

Michael D. Levine and John T. Stewart for plaintiff appellee.

Bryant, Bryant, Battle & Maxwell, P.A., by James B. Maxwell, for defendant appellant.

MORRIS, Judge.

Defendant contends that the trial court erred in finding an implied warranty of fitness for a particular purpose and ". . . in concluding that the defendant breached that implied warranty." We agree.

In this case, plaintiff buyer stated that the truck was purchased "as it was" at the time of sale and he must bear the loss. Throughout this transaction the defendant seller diligently and repeatedly advised the plaintiff of the risk he was taking by purchasing the unit without an inspection. There is, of course, some question as to whether an inspection would or could have revealed any defects in the truck, but notwithstanding that issue, we hold that where a buyer insists on closing the sale he should not later be allowed to shift the unfortunate results of his own short-sightedness onto his defendant seller. The Uniform Commercial Code is designed to structure the course of sales transactions efficiently and fairly and foster ". . . greater flexibility[,] . . . [provide] relief from unconscionable provisions and . . . [engender] some degree of protection from the hardship resulting from the failure of conditions which it had been assumed would continue to exist." 1 Anderson, Uniform Commercial Code, § 2-101:3, p. 200 (1970). The Code, however, is not a law which guarantees every buyer and every seller a "good deal."

Under the Uniform Commercial Code ". . . an implied warranty can . . . be excluded or modified by . . . [a] course of performance. . . ." G.S. 25-2-316(3)(c). Though G.S. 25-2-208 does not specifically define "course of performance," the official comment number 4 indicates that course of performance entails more than a ". . . single occasion of conduct. . . ." Moreover, the fact that this exclusion, raised by the parties' course of performance is oral does not vitiate its utility or relevance.

> "In view of the fact that a writing is not desired merely for the sake of having a writing but in order to assure that the buyer is adequately protected against surprise disclaimers, it would seem that a court if faced with the issue of whether a disclaimer had to be in writing, would readily conclude that where the oral waiver was in fact bargained for and was not a surprise term that the buyer is bound by it. In view of the fact that the prime objective of the section of the Code relating to the exclusion or modification of warranties is the prevention of unbargained-for disclaimers, it is probable that if the circumstances are such that the buyer has consciously made an oral waiver of warranties, the court will give effect to such waiver even though it is an oral, but not a written waiver." 1 Anderson, *supra,* § 2-316:21, at 691-692.

Furthermore, "[i]f there is a writing . . . and such a writing does not contain the oral clause relied on by the seller as a waiver or limitation of warranties, a question then arises under U.C.C. § 2-202 as to whether parol evidence is admissible to establish the existence of such an alleged oral term of the contract." *Id.* Under G.S. 25-2-202(a), parol evidence, in this case raised by operation of a course of performance, may be used in order to help explain and supplement this particular lease-purchase agreement. When so supplemented, it is clear that this buyer purchased this truck "as is" and cannot raise an implied warranty claim against his seller.

We need not reach the issue of whether an implied warranty of fitness runs with used goods. Suffice it to say that the defendant seller effectively disclaimed and plaintiff effectively waived whatever warranties may have otherwise existed incident to this transaction.

The trial court apparently deemed it unnecessary, in view of its disposition of the matter, to make findings of fact and conclusions of law with respect to defendant's counterclaim. Our reversal of the trial court's action makes it necessary that facts be found with respect to the counterclaim.

Reversed and remanded.

Chief Judge BROCK and Judge BRITT concur.

MICHAEL A. LANDRUM v. JOE M. ARMBRUSTER AND IMPORT MOTOR PARTS OF WAYNESVILLE, INC.

No. 7530DC605

(Filed 7 January 1976)

1. Uniform Commercial Code § 16—dishonored check — delivery under transaction of purchase — transfer of good title — good faith purchase — burden of proof

G.S. 25-2-403 allows a person who has obtained delivery of goods under a transaction of purchase to transfer a good title to a "good faith purchaser for value" even though such person obtained delivery in exchange for a check which is later dishonored or procured the delivery through criminal fraud; however, to terminate the original seller's reclamation rights, the subsequent purchaser must prove (1) that he was a purchaser, (2) that he purchased in good faith, and

(3) that he gave value, and the burden of proof rests upon the party making the later purchase.

2. **Rules of Civil Procedure § 56— summary judgment — party having burden of proof — credibility of defendant as witness**

Because summary judgment was granted in favor of the defendant on an issue as to which he had the burden of proof and because in so doing the court depended entirely upon defendant's credibility as a witness in his own behalf, summary judgment was improperly entered.

APPEAL by plaintiff from *Leatherwood, Judge.* Judgment entered 21 April 1975 in District Court, HAYWOOD County. Heard in the Court of Appeals 23 October 1975.

This is a civil action to recover possession of a Titan Mark Six B Formula Ford Racing Vehicle. Plaintiff alleged that he is owner of the vehicle, that it was stolen from him on 25 May 1974, and that it is being wrongfully detained by defendants. Defendants filed answer in which the corporate defendant denied any interest in the vehicle and the individual defendant alleged that he purchased the vehicle in good faith on 10 June 1974 from one Stephen Johnson.

Defendants served written interrogatories upon the plaintiff, and plaintiff's answers thereto show the following: Plaintiff, a resident of Illinois, owned the vehicle on and prior to 25 May 1974. In April 1974 he advertised it for sale in *Autoweek,* a national publication. In late April a person identifying himself as Dave Ross from Clifton, New Jersey, telephoned plaintiff in response to the advertisement and inquired about the origin, history, general condition, and price of the vehicle. Thereafter Ross telephoned plaintiff on several occasions, continuing to express an interest in the vehicle. On 25 May 1974 Ross came to Illinois, examined the vehicle and its trailer, and after some discussion agreed to purchase the vehicle and trailer for $5000.00. Ross gave plaintiff what purported to be a "certified draft" for $5000.00 issued by a bank in Indiana. Ross then drove away with the vehicle and its trailer. The Indiana bank refused to honor the "certified draft" when it was presented for payment. On inquiry at the bank, plaintiff learned that a man matching the description of "Ross" had opened a small checking account by depositing $50.00 in cash at the bank, for that purpose using the name "Steven (or Stephen) Johnson" and furnishing the bank false identification information. When the account was opened, the bank gave "Johnson" eight tempo-

rary checks imprinted with an account number. After routine verification of "Johnson's" identification information failed to check out, and after receiving two checks totalling $8000.00 drawn on the account, the bank closed the account. Plaintiff also learned that on the same date on which Ross obtained plaintiff's vehicle, he also obtained two other racing vehicles from other persons in the Chicago area under similar circumstances, one of these vehicles being a Caldwell D-9 Formula Ford Racing car. Plaintiff has been unable to locate Ross since he drove away with plaintiff's vehicle and trailer on 25 May 1974.

Plaintiff also served written interrogatories upon the defendant, and the individual defendant's answers thereto show the following: In April 1974 a man who identified himself as Steven Johnson phoned defendant, supposedly from Indiana, and told defendant that Johnson's brother had died in Florida and that the attorney handling his brother's estate had informed him there were two Formula Ford racing cars as part of the estate. Johnson asked if defendant might be interested in buying these cars. Defendant told Johnson that he might, but Johnson at that time did not know the model of the cars and told defendant he would call back after he obtained more information. Sometime in May, Johnson called defendant back and described the cars as to model and year. After further telephone conversations, on 10 June 1974 Johnson arrived at defendant's plant in Waynesville, N. C., with the trailer and two racing cars, one being the vehicle which is the subject of this action and the other being a Caldwell D-9 Formula Ford. The cars were in terrible condition, especially the Titan. After some bickering, defendant offered Johnson $3,500.00 for the pair, which Johnson accepted.

Defendant moved for summary judgment dismissing plaintiff's action, supporting his motion by the answers to the interrogatories and by affidavits. In his own affidavit the individual defendant stated that he bought the Titan Mark 6 B Formula Ford from Johnson for $2,450.00, that he had no way of knowing that it might be a stolen vehicle as there is no certificate of title for a racing vehicle, and that $2,450.00 is a fair and reasonable wholesale price for a vehicle of this type. The affidavit of one Gordon stated that the affiant had bought and sold racing vehicles, had knowledge and experience with Titan Mark 6 B Formula Ford racing vehicles, had examined the

car here in question, and that in affiant's opinion $2,450.00 is a fair and reasonable wholesale price to pay for said vehicle.

In opposition to defendants motion for summary judgment, plaintiff filed his affidavit in which he stated that on 25 May 1974 the vehicle here in question was in an excellent state of repair and on that date the fair and reasonable market value of the vehicle was between $5000.00 and $5,500.00.

The court allowed defendant's motion for summary judgment and dismissed the action. Plaintiff appealed.

Brown, Ward & Haynes, P.A., by Woodrow H. Griffin for plaintiff appellant.

Uzzell and DuMont by Larry Leake for defendant appellees.

PARKER, Judge.

The right of the parties will be determined by application of pertinent provisions of the Uniform Commercial Code. Plaintiff's answers to defendants' interrogatories establish that plaintiff delivered his racing vehicle in Illinois under a transaction of purchase, the consequences of which are governed by G.S. 25-2-403. Insofar as here pertinent, G.S. 25-2-403 provides as follows:

> *"Power to transfer; good faith purchase of goods; 'entrusting.'*—(1) A purchaser of goods acquires all title which his transferor had or had power to transfer. . . . A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though
>
> * * *
>
> (b) the delivery was in exchange for a check which is later dishonered, or
>
> * * *
>
> (d) the delivery was procured through fraud punishable as larcenous under the criminal law."

[1] Contrary to the law of this State as it may have been prior to enactment of G.S. 25-2-403, that statute now allows a person who has obtained delivery of goods under a transaction of purchase to transfer a good title to a "good faith purchaser for

value" even though such person obtained delivery in exchange for a check which is later dishonered or procured the delivery through criminal fraud. *Lane v. Honeycutt,* 14 N.C. App. 436, 188 S.E. 2d 604 (1972). Clearly, however, not every subsequent purchaser from such a person is in a position to terminate the original seller's reclamation rights. "To prevail the subsequent purchaser must prove (1) that he was a purchaser, (2) that he purchased in good faith, and (3) that he gave value." Nordstram, Sales, § 170, p. 515. The burden of proof rests upon the party making the later purchase.

[2] The question presented by this appeal is the narrow one of whether the court was correct in making the crucial determination as to defendant Armbruster's status as a "good faith purchaser for value" by way of a summary judgment. We hold that it was not. As above noted, defendant Armbruster had the burden to prove his status as a "good faith purchaser for value." By statutory definition "good faith" in this context means "honesty in fact" in the transaction involved. G.S. 25-1-201(19). All of the facts and circumstances under which defendant acquired possession of plaintiff's vehicle from Ross Johnson are shown, at this state of this proceeding, solely by defendant's own answers to interrogatories and by his own affidavit. This court has held, applying the principles of *Cutts v. Casey,* 278 N.C. 390, 180 S.E. 2d 297 (1971), that summary judgment may not be granted in favor of the party having the burden of proof when his right to prevail depends upon the credibility of his witnesses. *Shearin v. Indemnity Co.,* 27 N.C. App. 88, 218 S.E. 2d 207 (1975). Because summary judgment was granted here in favor of the defendant on an issue as to which he had the burden of proof and because in so doing the court depended entirely upon defendant's credibility as a witness in his own behalf, we hold that summary judgment was not here proper. Plaintiff is entitled to have the issue determined by the trier of the facts after a trial in which credibility of all witnesses can be properly determined. Accordingly, the summary judgment for defendant is reversed and this case is remanded for trial.

Reversed and remanded.

Judges MORRIS and MARTIN concur.

STATE OF NORTH CAROLINA v. TERRY BERNARD BLACKMON

No. 7526SC679

(Filed 7 January 1976)

1. **Robbery § 5— armed robbery — failure to submit assault issues**

The trial court in a prosecution for attempted armed robbery did not err in failing to submit to the jury issues of defendant's guilt of the lesser included offenses of assault with a deadly weapon and simple assault where all the State's evidence tended to show that defendant, while brandishing an opened pocket knife, demanded that the victim give him money, and all of defendant's evidence tended to show that he committed no crime.

2. **Robbery § 3— competency of testimony**

Testimony by the victim of an attempted armed robbery concerning a confrontation with defendant and others in a school hallway shortly before the attempted robbery, a statement concerning his actions immediately after the crime, and his identification of other youths who were with defendant were relevant and material in a trial of defendant for the attempted robbery.

3. **Criminal Law § 88— limitation on cross-examination**

The trial court in a robbery case did not unduly limit defendant's cross-examination of the victim when it sustained objections to certain questions asked the victim.

4. **Criminal Law § 126— polling jury — juror's comment on evidence — acceptance of verdict**

The trial court did not err in the denial of defendant's motion for mistrial when one juror commented on certain aspects of the evidence when she was polled since the juror replied in the affirmative each time the judge asked her if her verdict was guilty of attempted common law robbery.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 13 March 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 19 November 1975.

Defendant was tried on his plea of not guilty to an indictment charging attempted armed robbery. The State's evidence tended to show: On 25 September 1974 Michael Chesser, a student at West Charlotte High School, was approached by defendant in the hall of the school as Chesser was opening his locker. Defendant was not a student at the school at the time. Defendant said, "Give me a dime, man." Chesser replied that he did not have a dime, whereupon defendant pulled out a knife, opened it, and repeated his demand, "Give me a dime."

As defendant said this, he was holding the knife and moving his hand up and down. Chesser testified:

> "He (referring to defendant) asked me why I didn't have one, and since he had a knife on me, I told him, I decided, you know, that I had to do something or I might get cut; so I told him that I didn't stay at school all day, that I left school early and that is why I didn't have any money, because I didn't stay there long enough to eat lunch, and there was nothing else to spend money on.
>
> So he walked on off in the same direction he had been coming. . . ."

Defendant testified that he was never at West Charlotte High School on 25 September 1974 but was at other places in Charlotte during the entire day. He offered evidence tending to support his alibi.

The court instructed the jury it might return one of three verdicts, either (1) finding defendant guilty of attempt to commit robbery with a dangerous weapon, or (2) finding defendant guilty of an attempt to commit common law robbery, or (3) not guilty.

The jury found defendant guilty of attempted common law robbery. From judgment imposing a prison sentence, defendant appealed.

Attorney General Edmisten by Assistant Attorney General Charles J. Murray for the State.

Chambers, Stein, Ferguson & Becton by Karl Adkins for defendant appellant.

PARKER, Judge.

[1] Defendant contends the court erred in failing to submit to the jury issues of defendant's guilt of the lesser included offenses of assault with a deadly weapon or simple 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." *State v. Hicks*, 241 N.C. 156, 159, 84 S.E. 2d 545, 547 (1954). Here, all of the evidence for the State tended to show that defendant, while brandishing an opened pocket knife, demanded that Chesser

give him money. All of defendant's evidence tended to show that he committed no crime. There was no evidence to support a verdict of guilty of an assault with a deadly weapon, a lesser included offense of the crime of attempted armed robbery, or of simple assault, a lesser included offense of attempted common law robbery. See, *State v. Allison,* 280 N.C. 175, 184 S.E. 2d 857 (1971); *State v. Bailey,* 4 N.C. App. 407, 167 S.E. 2d 24 (1969). The court did not err in failing to submit issues not supported by the evidence.

[2] Defendant objects to the allowance of certain testimony into evidence as being irrelevant, inflammatory, and prejudicial. The testimony objected to comprises Chesser's statement concerning a confrontation with defendant and others in the school hallway shortly before the attempted robbery, a statement concerning his actions immediately after the attempted robbery, and his identification of other youths who were with defendant. We find all of this testimony to be relevant and material, and thus properly admitted.

[3] Defendant assigns as error that the trial court unduly limited his right to cross examine the State's witness, Chesser. This assignment of error is based on Exceptions 7 and 8. As to these, the record shows the following:

"Q. Did he say, "If you don't give me a dime I am going to cut you?" Did he say that?

A. I don't recall.

Q. Well, do you recall your testimony at the preliminary hearing when you said he didn't say that?

A. Not specifically.

Q. Are you saying now that he said—

MR. SAUNDERS: I OBJECT. He just testified to the question.

COURT: Sustained. EXCEPTION NO. 7.

Q. Do you recall if he said anything?

A. No, sir. I don't recall him saying anything to the effect that, "If you don't give me money, I am going to cut you." I do not recall him saying anything to any other effect about the knife.

Q. All right. Isn't it a fact that all he said to you was, "Give me a dime," and you said, "I don't have one."?

A. No, sir.

Q. That is not a fact? Did you not testify at the preliminary hearing that he asked you for a quarter?

A. I don't recall. It is possible that I testified to that. I do recall that I testified at the preliminary hearing that, after he asked me for the quarter and after he pulled out the knife, he walked off. I do not recall testifying he didn't threaten me with the knife. It is possible that I testified that way.

* * * * *

"When I saw this group of people, I pointed to the group and said 'Mr. Coggins, there, that is them,' and then I said, "And the one in the brown jacket is the one that had the knife pulled on me." This person was in the middle, toward the back sort of, of the group. I did not say anything to the group after I told Mr. Coggins that. I did not help search the group. I stood on the opposite side of the hall. When they were told to stop, they did stop. They did not try to run, except as they were coming down the hall, before Mr. Coggins stopped them, the one who had pulled the knife on me did hesitate and start to turn around and then turned back around.

Q. What do you mean he looked around over his shoulder. Is that what you say?

MR. SAUNDERS: OBJECTION. HE STATED WHAT HE MEANT.

COURT: SUSTAINED. EXCEPTION NO. 8.

Q. When you say 'hesitated', what do you mean? I don't quite understand this. Clarify it for me, if you would.

A. They were coming down the hall, and the one who pulled the knife on me I am going to refer to him as Terry. Terry is coming down the hall and when he sees me point out the group and point in his direction, he went like this and then he turned back around and came on. I was from here maybe to the back of the courtroom when I pointed at this group. This was when the person hestitated."

Although it is axiomatic that a wide latitude is allowed in cross-examination, and this is particularly true as to cross-examination of the State's witnesses in a criminal case, it is also "the well recognized rule that the latitude of cross-examination rests largely in the trial court's discretion." *State v. Robinson,* 280 N.C. 718, 720, 187 S.E. 2d 20, 21 (1972). From examination of the above quoted portion of the record, it is readily apparent that defendant's right to cross-examine the witness against him was not unduly limited and that the court did not abuse its discretion.

[4] Finally, defendant contends the trial court committed error by denying his motion for mistrial after the polling of the jury. After the verdict was returned, defendant exercised his right by timely motion to have the jury polled to determine whether the verdict was unanimous. Although one juror did comment on certain aspects of the evidence when she was polled, she replied in the affirmative in every instance when asked by the judge if her verdict was guilty of attempted common law robbery. We find no error. See, *Sheppard v. Andrews,* 7 N.C. App. 517, 173 S.E. 2d 67 (1970).

No error.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. RAYMOND EDWARD BARBOUR

No. 7515SC479

(Filed 7 January 1976)

1. Homicide § 21— death by shooting — first degree murder — sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for first degree murder where such evidence tended to show that defendant, his victim and a companion were together in an automobile, the victim left the automobile whereupon defendant threatened the companion's life with a gun, the victim returned to the car and carried on a conversation with defendant, the victim left the car again, defendant got out of the car and told the victim to stop, the victim continued walking away, defendant shot the victim in his back, and the victim died a few minutes later.

2. **Criminal Law § 128— bloody shirt shown to jury — mistrial motion denied**

The trial court in a first degree murder prosecution did not err in failing to grant defendant's motion for a mistrial when the prosecuting attorney, in close proximity to the jury, removed from a plastic bag a foul smelling bloody shirt allegedly worn by the victim at the time he was shot.

3. **Arrest and Bail § 1— arrest by private citizen — felony in citizen's presence required**

The trial court in a prosecution for first degree murder did not err in failing to instruct the jury on the law with respect to citizen's arrest, former G.S. 15-40, since, in order to have the protection of the statute, defendant had to show that his victim *actually* committed a felony in his presence, not merely that defendant had reasonable ground to believe his victim was committing a felony, and this defendant failed to show.

4. **Arrest and Bail § 2— defendant acting as law enforcement officer — reasonable belief**

The trial court in a first degree murder prosecution did not err in failing to instruct the jury on the law arising from defendant's evidence that he believed he was acting as a law enforcement officer, since even if a letter from the Chief of Police of the Town of Graham provided defendant with reason to believe he had authority to act as a police officer in that town, he had no reason to believe that his authority would extend to the City of Burlington where the shooting occurred.

5. **Homicide § 24— intentional use of deadly weapon — presumptions — instructions proper**

The trial court in a first degree murder prosecution properly instructed the jury as to the presumption of malice arising from a showing of intentional use of a deadly weapon and death resulting therefrom.

APPEAL by defendant from *Tillery, Judge.* Judgment entered 12 January 1975 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 24 September 1975.

In a bill of indictment proper in form, defendant was charged with the murder of William Samuel Abner (Abner) on 13 June 1974. He was placed on trial for murder in the first degree and pled not guilty.

Evidence presented by the State is summarized in pertinent part as follows:

Defendant and Abner were friends and business associates. On the night in question, Abner and J. B. McDonald went to defendant's home. After a brief stay, the three of them, in a

car driven by Abner, went to a steak house, located some nine or ten miles from defendant's home. Finding the steak house closed, they drove to Burlington to get something to eat and parked the car on the street near Zack's Restaurant. During the time they had been together, the three had consumed various quantities of intoxicants. Abner got out of the car and went into the restaurant, leaving defendant and McDonald in the car. Defendant produced a .38 caliber pistol, placed the barrel to McDonald's head, and stated, "I am going to kill you." After a brief conversation, defendant instructed McDonald to lie down in the backseat of the car, which he did. Abner returned to the car and, while he and defendant were engaged in a conversation, McDonald slipped out of the car and went into the restaurant. Abner left the car again and started walking back toward the restaurant. Defendant got out of the car, told Abner to stop, and asked if he was coming back. Abner continued walking toward the restaurant, whereupon defendant took aim with his pistol and shot Abner in his back. Abner staggered on into the restaurant where he died a few minutes later from gunshot wounds.

Evidence presented by defendant is summarized in pertinent part as follows:

Although defendant and Abner had been friends for several years, defendant began to suspect that Abner was involved in the drug traffic. Defendant had been given a letter from the Chief of Police of Graham, N. C., authorizing him to carry a weapon and to act as an undercover police officer. Prior to seeing Abner that night, defendant had attempted to arrange a drug transaction with Abner with the view of consummating the transaction and arresting Abner. When they went to the restaurant in Burlington, defendant thought Abner had drugs in his possession. After Abner first went into the restaurant and returned to the car, he displayed a quantity of pills to defendant. Defendant tried to grab the pills but Abner jerked the bottle away and invited defendant to accompany him into the restaurant to get a hot dog. At that point, defendant told Abner that he was under arrest. Abner laughed, turned, and started walking toward the restaurant. Defendant told Abner to stop but he continued to walk on toward the restaurant. Whereupon, defendant took his pistol from his pocket, cocked it, and prepared to fire a warning shot into the air. As defendant moved to avoid firing into an overhanging awning, he

slipped, his hands struck the open door of the automobile, and the gun accidentally discharged.

The jury found defendant guilty of murder in the second degree and from judgment imposing prison sentence of not less than 35 nor more than 40 years, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Thomas B. Wood, for the State.

Fred Darlington III, Felix B. Clayton and Thomas B. Anderson, Jr., for defendant appellant.

BRITT, Judge.

[1] Defendant assigns as error the denial of his timely made motions to dismiss all charges, particularly his motion to dismiss as to first-degree murder. The assignments have no merit.

Murder in the first degree is the unlawful killing of a human being with malice, premeditation and deliberation. *State v. Moore,* 275 N.C. 198, 166 S.E. 2d 652 (1969). When the State satisfies the jury beyond a reasonable doubt that the defendant intentionally shot the deceased with a pistol, thereby proximately causing his death, there arise the presumptions that the killing was (1) unlawful and (2) with malice, constituting the offense of murder in the second degree. *State v. Propst,* 274 N.C. 62, 161 S.E. 2d 560 (1968). While the State must prove premeditation and deliberation, ordinarily it is not possible to prove these elements directly. Among the circumstances to be considered in determining whether a killing was with premeditation and deliberation are want of provocation on the part of the deceased, the conduct of defendant before and after the killing, and the use of grossly excessive force. *State v. Britt,* 285 N.C. 256, 204 S.E. 2d 817 (1974). No fixed length of time is required for the mental processes of premeditation and deliberation constituting an element of first-degree murder. *State v. Perry,* 276 N.C. 339, 172 S.E. 2d 541 (1970).

Clearly, the evidence presented by the State was sufficient to show defendant intentionally shot Abner with a pistol, and that within minutes Abner died from wounds inflicted by the bullet, thereby raising the presumptions that the killing was unlawful and with malice. We think the showing of want of provocation on the part of Abner, the conduct of defendant before the shooting and particularly his threat to kill McDonald

and his taking careful aim at Abner, together with the use of grossly excessive force, warranted the trial court in submitting the case on first-degree murder.

[2] Defendant assigns as error the failure of the court to grant his motion for a mistrial when the prosecuting attorney, in close proximity to the jury, removed from a plastic bag a foul smelling bloody shirt allegedly worn by Abner at the time he was shot. This assignment has no merit. To allow the motion was within the sound discretion of the trial judge. We perceive no abuse of this discretion. 3 Strong, N. C. Index 2d, Criminal Law § 128.

Defendant assigns as error the failure of the court to instruct the jury as requested by him on the law with respect to citizen's arrest and on the law arising from defendant's evidence that he believed he was acting as a law enforcement officer. These assignments have no merit.

[3] At the time of the alleged offense, the following statute, former G.S. 15-40, which has been repealed, was in effect: "Every person in whose presence a felony has been committed may arrest the person whom he knows or has reasonable ground to believe to be guilty of such offense . . . . " Defendant argues that the statute gave him the right as a citizen to arrest Abner whom he had reasonable ground to believe was committing a felony—possessing narcotic drugs—and that it was a question for the jury whether defendant acted reasonably. We reject this argument.

In *State v. Mobley,* 240 N.C. 476, 481, 83 S.E. 2d 100, 103 (1954), we find:

> "G.S. 15-40 (Subchapter 1, Section 6 of the Act of 1869) authorizes private persons to make arrests in certain felony cases. By the terms of this statute, when a felony actually has been committed in the presence of a private person, he may forthwith arrest without warrant (1) the person he knows to be guilty, or (2) the person he has reasonable ground to believe to be guilty. It is noted that this statute confers on a private citizen the right of arrest only when a felony is actually committed in his presence. Thus, if it turns out that the supposed offense is not a felony, then the arresting private citizen may not under the terms of the statute justify taking the suspect into custody. . . . "

For defendant to have had the protection of the above quoted statute, he had to show that Abner *actually* committed a felony in his presence, not merely that he had reasonable ground to believe Abner was committing a felony. This defendant failed to show.

[4] Defendant's contention that he believed he was acting as a police officer is not persuasive. Assuming, *arguendo,* that the letter from the Chief of Police of the Town of Graham provided defendant with reason to believe he had authority to act as a police officer in that town, he had no reason to believe that his authority would extend to the City of Burlington. *See Martin v. Houck,* 141 N.C. 317, 54 S.E. 291 (1906); *State v. Campbell,* 107 N.C. 948, 12 S.E. 441 (1890).

[5] Defendant assigns as errors portions of the jury charge relating to presumptions of malice arising from a showing of intentional use of a deadly weapon and death resulting therefrom. By Exception 139, he excepts to instructions shifting the burden to defendant to show no malice after the State had shown intentional shooting with a pistol and death resulting therefrom. We find no merit in these assignments unless the instructions challenged by Exception 139 are invalid under *Mullaney v. Wilbur,* 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975).

In *State v. Williams,* 288 N.C. 680, 220 S.E. 2d 558 (1975), our State Supreme Court held that the ruling in *Mullaney* does not apply to the presumption of malice that arises when the State proves beyond a reasonable doubt that the accused intentionally inflicted a wound with a deadly weapon proximately causing death. *See also, State v. Hankerson,* 288 N.C. 632, 220 S.E. 2d 575, (1975), holding that *Mullaney* will not be given retroactive effect in North Carolina and will apply only to trials conducted on or after 9 June 1975.

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

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

No error.

Judges PARKER and CLARK concur.

STATE OF NORTH CAROLINA v. RUDOLPH JOHNSON

No. 7514SC613

(Filed 7 January 1976)

1. **Criminal Law § 75— in-custody statements — admissibility**

The trial court properly allowed into evidence statements made by defendant while in custody where the court concluded on *voir dire* that two documents advising defendant of his rights were read to him, defendant stated that he understood his rights and would answer questions without an attorney, although defendant was under the influence of intoxicants at the time of questioning he had sufficient control of his mental faculties to understand his circumstances and his rights, the circumstances surrounding defendant's detention at the time he was questioned and prior to his arrest were neither oppressive nor coercive, and the statements made by defendant to police were freely, understandingly, and voluntarily made.

2. **Homicide § 24— use of deadly weapon — presumptions — instructions proper**

The trial court did not err in instructing the jury that if the evidence proved beyond a reasonable doubt that defendant intentionally inflicted a wound on his victim with a deadly weapon that proximately caused his death, the law raises presumptions that the killing was unlawful and was done with malice.

3. **Homicide § 24— instructions on burden of proof — validity of instructions — date of trial determinative**

The trial court's instructions to the jury which had the effect of placing on defendant the burden of showing (1) absence of malice or heat of passion on sudden provocation that would reduce the offense to manslaughter, or (2) that would entitle him to a verdict of not guilty on the ground of self-defense were not invalidated by *Mullaney v. Wilbur*, 421 U.S. 684, since that decision applies only to trials conducted on or after 9 June 1975, and defendant's trial was in March of 1975.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 13 March 1975 in Superior Court, DURHAM County. Heard in the Court of Appeals 24 October 1975.

By indictment complying with G.S. 15-144, defendant was charged with the murder of William Nesbitt. When the case was called for trial, the district attorney announced that the State would seek no verdict greater than second-degree murder. Defendant pled not guilty and the State presented evidence summarized in pertinent part as follows:

On 8 November 1974, at about 12:15 a.m., Listia Langley, with whom Nesbitt was living, went to Lewis Ruffin's apart-

ment where she found Ruffin, Nesbitt, defendant, and others drinking. Defendant lived in the apartment. Langley criticized Nesbitt for striking her child earlier that night with a horseshoe and left to return later. At the time she left, defendant was arguing with Nesbitt about hitting the child. Thereafter, defendant went into another room, returned with a pistol, and shot Nesbitt in his neck; the bullet severed an artery, causing death a short while later. Previously, defendant had dated Langley while Nesbitt was in prison and Nesbitt had threatened to kill defendant and Langley. (A .22 caliber pistol was found under defendant's mattress but the court refused to admit it into evidence on the ground that the search of the premises was illegal.) Later that morning, following his arrest about 3:15 a.m. and interrogation, defendant told police that he shot Nesbitt but that Nesbitt was advancing on him with a knife at the time.

Defendant did not testify but presented evidence tending to show: While he was in jail between 8 and 14 November 1974, and on other occasions, he suffered from, and was treated for, delirium tremens and did not know what he said or did on the morning of 8 November. On the afternoon or evening before Nesbitt was shot, and on a previous occasion, Nesbitt had threatened to kill both defendant and Langley.

The court instructed the jury that they might return a verdict of guilty of second-degree murder, guilty of voluntary manslaughter, or not guilty. They found defendant guilty of second-degree murder, and from judgment imposing prison sentence of not less than 12 nor more than 15 years, with credit for time spent in custody awaiting trial, defendant appealed.

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

Paul, Keenan, Rowan & Galloway, by James V. Rowan, for defendant appellant.

BRITT, Judge.

[1] By his first assignment of error, defendant contends the trial court erred in admitting into evidence statements made by defendant while in custody. We find no merit in the assignment.

Defendant argues that the evidence was inadmissible for the reasons that he was not properly advised of his right to

counsel prior to being questioned, his statements were triggered by the use of illegally obtained evidence, and he was intoxicated at the time he allegedly made the statements.

Before admitting the evidence, the court conducted a voir dire in the absence of the jury. The detective who questioned defendant testified that before asking defendant any questions he advised him of his *Miranda* rights by reading from two cards or documents. From one of the documents, defendant was informed, among other things, that the police had no way of providing him with a lawyer, but if he wanted a lawyer, one would be appointed if and when he went to court. From the other document, he was informed that if he could not afford to employ a lawyer and wanted one, one would be appointed to represent him before questioning. The detective testified that after each document was read to defendant, he stated that he understood his rights and would answer questions without an attorney. Testimony was also presented with respect to defendant's state of intoxication and that he was informed that a pistol had been found under his mattress. Defendant did not testify on voir dire.

Following the voir dire, the court found, among other things, that after each document was read to defendant, he stated he understood his rights and was willing to answer questions without a lawyer being present; that although defendant was under the influence of intoxicants at the time he was questioned, he was not drunk. The court concluded, among other things, that the circumstances surrounding defendant's detention at the time he was questioned and prior to his arrest were neither oppressive nor coercive; that although defendant at the time of questioning was under the influence of intoxicants, had he sufficient control of his mental faculties to understand his circumstances and his rights "to silence and to representation by counsel"; that the statements made by defendant to police were freely, understandingly, and voluntarily made, therefore, were admissible in evidence.

On the question of defendant's having been properly advised of his rights, defendant relies on *State v. Robbins*, 4 N.C. App. 463, 167 S.E. 2d 16 (1969). The State relies on *State v. Wright*, 274 N.C. 84, 161 S.E. 2d 581 (1968). *See also, Wright v. North Carolina*, 483 F. 2d 405 (4th Cir. 1973). If there is a conflict between *Robbins* and *Wright*, obviously *Wright* is the controlling authority. However, we think the instant case is

distinguishable from *Robbins*. In this case, not only did the detective read to defendant the statement of rights which we said in *Robbins*, was inadequate, he also read the statement which has been approved in many previous decisions. The evidence discloses, and the court found as a fact, that after each statement was read to defendant, he said he understood his rights and was willing to answer questions without a lawyer being present.

We find unconvincing defendant's argument that his incriminating statements were inadmissible for the reason that they were triggered by police telling him that a pistol had been found under his mattress. As to the extent of defendant's intoxication at the time he made the statements, this presented a question for the trial judge to determine and his findings and conclusions are supported by competent testimony.

The findings of fact by the trial judge following a voir dire as to the voluntariness of a confession or admission are conclusive if the findings are supported by competent evidence in the record, and the reviewing court may not set aside or modify the findings if they are supported by competent evidence. *State v. Gray*, 268 N.C. 69, 150 S.E. 2d 1 (1966), *cert. denied*, 386 U.S. 911, 17 L.Ed. 2d 784, 87 S.Ct. 860 (1967).

[2] Defendant assigns as error the court's instructions to the jury that if the evidence proved beyond a reasonable doubt that defendant intentionally inflicted a wound on Nesbitt with a deadly weapon that proximately caused his death, the law raises presumptions that the killing was unlawful and was done with malice. Defendant argues that while the instructions were consistent with well settled case law in this State, they were invalidated by *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975).

The assignment has no merit. Our State Supreme Court in *State v. Williams*, 288 N.C. 680, 220 S.E. 2d 558 (1975), held that *Mullaney* does not apply to the presumption of malice created when the State proves beyond a reasonable doubt that the accused intentionally inflicted a wound with a deadly weapon proximately causing death.

[3] Defendant assigns as error the court's instructions to the jury which had the effect of placing on defendant the burden of showing (1) absence of malice or heat of passion on sudden provocation that would reduce the offense to manslaugh-

ter, or (2) that would entitle him to a verdict of not guilty on the ground of self-defense. Defendant argues that while these instructions were consistent with North Carolina case law, they were invalidated by *Mullaney, supra.* The question raised by this assignment was answered by our State Supreme Court in *State v. Hankerson,* 288 N.C. 632, 220 S.E. 2d 575, (1975). The court held that while the instructions are invalidated, *Mullaney* will not be given retroactive effect in North Carolina and will apply only to trials conducted on or after 9 June 1975. The case at bar was tried in March of 1975.

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

No error.

Judges VAUGHN and ARNOLD concur.

STATE OF NORTH CAROLINA v. WALTER (NMN) WEDDINGTON

No. 7526SC701

(Filed 7 January 1976)

1. **Constitutional Law § 30— speedy trial — 137 days between arrest and trial**

   Defendant was not denied his right to a speedy trial by a delay of 137 days between his arrest and trial where defendant did not contend the delay was purposeful and defendant conceded he was not prejudiced by the delay.

2. **Arrest and Bail § 3; Searches and Seizures § 1— lawfulness of arrest, search**

   An officer had reasonable grounds to arrest defendant without a warrant for a felony where the officer had received information from his dispatcher that the car defendant was driving had been stolen, and the officer's subsequent warrantless search of defendant's person was therefore lawful.

3. **Criminal Law § 75— confession not fruit of illegal arrest**

   Defendant's confession was not the fruit of an illegal arrest and thus inadmissible in evidence since defendant's arrest was lawful.

APPEAL by defendant from *Baley, Judge.* Judgments entered 2 April 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 21 November 1975.

Defendant was indicted upon charges of felonious breaking and entering the residence of Roy Kiser and felonious larceny therefrom of a television set. He pled not guilty.

State's witness, Roy Kiser, testified that he lived on Highway 160 in Steele Creek Community in Mecklenburg County. He and his wife left home on the morning of 15 November 1974 at 7:00 a.m. Police contacted him and told him that his house had been broken into. When he returned home at approximately 1:30 p.m., he found the back door glass was broken and his TV, serial no. 4380354, was missing.

I. N. Dennis, a Mecklenburg County policeman, testified that shortly after noon on 15 November 1974 he saw a Ford automobile parked on the shoulder of Highway 160 in the Steele Creek Community directly across the highway from Mr. Kiser's house. Diane Murphy was alone in the car, sitting on the passenger side. There were no other cars in the area at the time. Officer Dennis asked if he could be of assistance, and Diane Murphy told him that the car was overheated and her husband had gone to get water. Dennis looked into the car and there wasn't anything in the back seat at that time. He noted the license number of the car, drove on, and called his dispatcher, who informed him the car was reported stolen. Driving back toward the site, the car passed him on the highway. He stopped the car at a point less than a quarter of a mile from the place he had originally seen it parked on the side of the highway and at a time approximately five minutes after he had seen it so parked. Defendant was the driver of the car. Officer Dennis arrested defendant, searched him, and found a loaded pistol and a pair of gloves in his right jacket pocket. On looking into the car, Officer Dennis found a pair of pliers and a prying tool on the floor by the driver's seat and a TV in the back seat, serial number 4380354.

L. M. Cochran, Jr., a Mecklenburg County policeman, testified that he talked with defendant on 15 November 1974, advised him of his constitutional rights, and defendant signed a waiver. Defendant confessed that he had broken into Roy Kiser's house and stolen a TV set.

Defendant testified that he did not steal the car which he was found driving and that he was stopped along the side of the road because the car had "cut off." He testified that he found the TV set in a vacant house, brought it out of the house,

and placed it in his car. He denied making a statement that he broke into Kiser's house and took a TV set.

The jury found defendant guilty of both offenses charged in the indictment. Judgments were entered imposing prison sentences on each count, the court directing that defendant be given credit on the sentence imposed on the first count for time spent in jail awaing trial. Defendant appealed.

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

Thomas D. Windsor for defendant appellant.

PARKER, Judge.

[1] Defendant contends the Court erred in not granting his motion to dismiss for failure to provide a speedy trial. The record shows the following. Defendant was arrested on 15 November 1974; counsel was appointed on 20 November 1974; preliminary hearing scheduled for 12 December 1974 was postponed because police officers were not available, another preliminary hearing scheduled for 9 January 1975 was postponed because the District Attorney was not ready; defendant then waived a preliminary hearing on 9 January 1975; defendant moved for speedy trial on 31 January 1975; case was tried on 1 April 1975; defendant spent a total of 137 days in jail awaiting trial. After a voir dire hearing, the court made findings of fact, concluded defendant had not been denied a speedy trial, and denied defendant's motion. In this we find no error. Defendant makes no contention that the delay in his trial was purposeful and we find the period of the delay was not in itself excessive. See, *State v. Brown,* 282 N.C. 117, 191 S.E. 2d 659 (1972). Furthermore, defendant concedes that he was not prejudiced as a result of the delay.

[2] Defendant contends the court erred by overruling his objections and allowing into evidence the pistol and gloves found in his pocket as a result of the search of his person made at the time of his arrest. He contends the arrest was unlawful and therefore the warrantless search of his person was illegal. This contention is without merit. The statute in effect when defendant was arrested, G.S. 15-41(2), provided that a peace officer may without warrant arrest a person "[w]hen 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." [For cognate statute in effect and applicable to criminal proceedings begun on and after 1 September 1975, see G.S. 15A-401(b)(2).] Here, the arresting officer had reasonable ground to believe that the automobile which defendant was driving had been stolen; only moments before, his dispatcher had so reported to him by radio. Defendant was driving and in control of the vehicle, and if not immediately taken into custody could easily have evaded arrest. These circumstances were amply sufficient to furnish the officer reasonable ground to believe defendant had committed a felony in stealing the automobile and that he would evade arrest if not immediately taken into custody. Indeed, the officer would have been derelict in his duty had he not arrested defendant forthwith. It follows that the search of defendant's person was incident to a lawful arrest and the fruits of the search were properly admitted in evidence.

[3] Defendant assigns error to the admission in evidence over his objection of testimony of Officer Cochran concerning defendant's confession that he had broken into the Kiser house and stolen a TV set. Before this testimony was admitted, the court conducted a voir dire hearing at which both Officer Cochran and defendant testified. At the conclusion of the hearing the court made findings that before Officer Cochran questioned defendant concerning the offenses for which he was tried, Cochran advised defendant of his constitutional rights, and defendant freely, knowingly, and voluntarily waived those rights. These findings were fully supported by competent evidence. Defendant does not now contend that the requirements of *Miranda* were not fully met. His contention is that his receipt of the *Miranda* warnings did not, per se, make his confession admissible, and, still contending his arrest was illegal and relying on *Brown v. Illinois,* 422 U.S. 590, 45 L.Ed. 2d 416, 95 S.Ct. 2254 (1975), he contends that any statement he made was the fruit of an illegal arrest. Holding as we do that defendant's arrest was legal, we find the cited case inapposite and find no error in admitting the evidence concerning defendant's confession.

We have examined all of defendant's remaining assignments of error and find no error in defendant's trial or in the judgments from which appeal was taken.

No error.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. ROBERT LOUIS GATEN

No. 7526SC542

(Filed 7 January 1976)

1. **Criminal Law § 126— initial uncertainty of juror — acceptance of verdict as unanimous — no error**

The trial court did not err in accepting the verdict of guilty in each of two cases as unanimous, though one juror initially indicated some uncertainty, since that juror clearly and unequivocally stated that the verdict of guilty as charged as returned in each case was his verdict and that he still assented to it.

2. **Criminal Law § 60— fingerprint on moon pie — impressing at time of crime — admissibility of evidence**

In a prosecution for armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury, the trial court did not err in allowing testimony of a fingerprint expert that a latent print found on a moon pie which was on the counter in the store whose employee was robbed was identical with defendant's known left thumbprint, since there was substantial evidence of circumstances from which the jury could find that defendant's thumbprint found at the scene of the crime was impressed at the time the crimes were committed.

APPEAL by defendant from *Thornburg, Judge.* Judgments entered 17 February 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 15 October 1975.

Defendant was indicted for (1) armed robbery and (2) assault with a deadly weapon with intent to kill inflicting serious injury. He pled not guilty.

The State presented evidence to show that at about 5:55 in the afternoon of 16 June 1974 defendant entered a Little General Store in Charlotte, brought a small 10¢ cake to the counter, said "wait a minute," went back to the cake rack, got another cake, returned to the counter, and as the attendant was ringing up the purchase on the cash register, pointed a revolver at the attendant and demanded he "open the box." When the attendant opened the cash register, defendant grabbed the cash box and took approximately $100.00 from it. Defendant asked, "Where's the rest of it?" When the attendant told him that was all, defendant demanded he open the safe. The attendant replied that he didn't have a key to the safe and couldn't open it. Defendant then started out the door, turned around, and shot the attendant in the stomach, inflicting a

wound which required that the attendant be operated upon and that he remain in the hospital for eleven days. The attendant made a positive in-court identification of the defendant as the person who came into the store, robbed him, and shot him. A latent fingerprint found on a moon pie, which was on a counter in the store, was developed and was identified as defendant's left thumbprint.

Defendant did not present evidence. The jury returned verdicts finding defendant guilty as charged in both cases. From judgments imposing prison sentences, defendant appealed.

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

DeLaney, Millette & DeArmon by Ernest S. DeLaney III for defendant appellant.

PARKER, Judge.

[1] The defendant first contends that the court erred by accepting a verdict which was not unanimous. In this connection the record shows that while the jury was being polled the following exchange took place between the court and one of the jurors, a Mr. Polk:

> "THE COURT: Mr. Polk, in the cases of *State v. Robert Louis Gaten,* your foreman has returned as your verdicts in these cases that you find the defendant guilty as charged of robbery with a firearm and guilty as charged of assault with a deadly weapon with intent to kill inflicting serious injuries. Were these your verdicts?
>
> MR. POLK: Yes, sir, if he's the man, that's my verdict, but . . .
>
> THE COURT: Are these your verdicts?
>
> MR. POLK: Well, to tell the truth, I just went along with the rest of them.
>
> THE COURT: Well, you haven't answered my question, so I'll ask that all jurors return to the jury room and continue your deliberations.
>
> MR. POLK: Well, I tell you, it won't my decision until I see he's proved guilty, I mean, guilty, I feel it was proved guilty. That's my decision but . . .

THE COURT: Is that your decision now?

MR. POLK: Yes sir.

THE COURT: Was it your decision back there?

MR. POLK: Yes, sir.

THE COURT: Do you still agree to that decision?

MR. POLK: I did.

THE COURT: Well, do you still agree to it?

MR. POLK: Yes, sir.

THE COURT: All right. Let me ask you one more time. In the cases of *State v. Robert Louis Gaten,* your foreman has returned as your verdicts in these cases that you find the defendant guilty, Robert Louis Gaten, guilty as charged of robbery with a firearm and guilty as charged of assault with a deadly weapon with intent to kill inflicting serious injuries. Now, I ask you again, were these your verdicts?

MR. POLK: Yes, sir.

THE COURT: Are they now your verdicts?

MR. POLK: Yes, sir.

THE COURT: And do you still agree to those verdicts?

MR. POLK: Yes, sir.

THE COURT: All right. You may have a seat."

After the polling of individual jurors was completed, the court once again put the questions, addressing all members of the jury collectively, as to whether their verdict was that they found defendant guilty as charged in the armed robbery case and in the case in which defendant was charged with felonious assault with a deadly weapon with intent to kill inflicting serious injury. In each case the jury answered affirmatively.

The court did not err in accepting the verdict in each case as unanimous. The juror Polk, after indicating some initial uncertainty, clearly and unequivocally stated that the verdict of guilty as charged as returned in each case was his verdict and that he still assented to it. A similar situation was before the North Carolina Supreme Court in *State v. Godwin,* 27 N.C. 401 (1845). In that case, a juror upon being polled first stated

"that when the jury first went out he was not for finding the prisoner guilty, but that a majority of the jury was against him, and that he then agreed to the verdict as delivered in by the foreman," and when asked " 'What is your verdict now?' ", he replied " 'I find the prisoner guilty.' " *State v. Godwin, supra,* at p. 401. The court found the verdict to be unanimous, despite the initial hesitation of the juror. In *State v. Sheets,* 89 N.C. 543 (1883), the Court held that when a juror upon being polled initially answered " 'Well, I suppose I must go with the rest,' " but upon further questioning answered " 'guilty,' " there were no grounds for refusing to receive the verdict, as the "last answer of the juror was an assent to the verdict of guilty." Id. at pp. 547, 550. *See also, Sheppard v. Andrews,* 7 N.C. App. 517, 173 S.E. 2d 67 (1970); *Nolan v. Boulware,* 21 N.C. App. 347, 204 S.E. 2d 701 (1974). Nothing in this present record indicates that the verdict rendered in each case was not a unanimous one.

[2] The only other assignment of error brought forward on this appeal relates to the admission in evidence over defendant's objections of testimony of the finger print expert that a latent print found on a moon pie which was on the counter in the store was identical with defendant's known left thumbprint. In this connection defendant contends that, since the store was a public place, the mere fact that his print was found somewhere in the store would have no probative value; and that there was insufficient evidence to show that defendant, on the occasion when the crimes were committed, touched or handled the item on which the latent print was found. The record does not support defendant's contention. The store attendant, the victim of the robbery and assault, testified that "[t]he first time the man [referring to the defendant, whom he had previously identified as the robber] came to the counter he had a 10¢ cake in his hand. He had it in his left hand. He went back and got another cake and came to the counter again. He had it in his left hand again, holding it the same way (indicating between his thumb and his forefinger)." This same witness, while testifying concerning a photograph of the counter in the store taken by the police shortly after the robbery, testified that it showed "cakes or moon pies on the counter." The investigating officer who made the photograph testified he found "a couple of moon pies" on the counter, and that it was on one of these that he found the thumbprint which was later identified as defendant's. Thus, the record shows there was substantial evi-

dence of circumstances from which the jury could find that defendant's thumbprint found at the scene of the crime was impressed at the time the crimes were committed. Under all of the circumstances disclosed in this record, therefore, evidence concerning the thumbprint was clearly relevant to show defendant's presence at the time the offenses for which he was tried were committed. There was no error in admitting the challenged testimony.

In defendant's trial and in the judgments appealed from we find

No error.

Judges MORRIS and MARTIN concur.

JOSEPH S. GRISSOM v. NORTH CAROLINA DEPARTMENT OF REVENUE

No. 7510SC683

(Filed 7 January 1976)

Administrative Law § 5— dismissal of State employee — reinstatement sought — appeal to State Personnel Board unnecessary

Petitioner whose employment with the Department of Revenue was allegedly terminated because of his political views was not required to appeal to the State Personnel Board before he could seek judicial review, since the Board could only render an advisory recommendation and could not grant the reinstatement sought by petitioner.

APPEAL by petitioner from *Brewer, Judge.* Judgment entered 9 May 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 19 November 1975.

Petitioner instituted this action on December 31, 1974 seeking an order pursuant to G.S. 143-312 to stay the decision of the Department of Revenue terminating the employment of petitioner pending the outcome of this cause, to review the Department decision by trial de novo in accordance with G.S. 143-314, and to reverse the decision of the Department. Petitioner asked that his petitions be treated as an appeal, or in the alternative, as a petition for writ of certiorari to review the agency's decision dismissing petitions.

Petitioner made the following allegations: He had been continuously employed by the State of North Carolina from 1954 to November, 1974. From March, 1958, until his employment was terminated in November 1974, he held the position of Personnel Officer with the Department of Revenue. On 7 November 1974 J. Howard Coble, Secretary of the Department of Revenue, ordered the petitioner to resign from his job because of an alleged informal comment by petitioner to fellow employees that he intended to vote a straight ticket in the November election. Secretary Coble labeled petitioner's action as "disloyal" and ordered petitioner to resign. Petitioner submitted his resignation under duress. He subsequently attempted to withdraw his resignation, but Secretary Coble refused to accept the withdrawal. Petitioner alleged that he had a statutory and constitutional right to continued employment by the State.

By affidavit petitioner further alleged that his attorney met with Secretary Coble on 22 November 1974. Mr. Coble informed the petitioner that he would not be reinstated to his former position and stated that his denial of reinstatement "was the final administrative decision and that Mr. Coble would give the matter no further consideration." Petitioner was officially dismissed from his employment on 27 November 1974.

Respondent, the Department of Revenue, filed a motion to dismiss pursuant to Rule 12(b) (6) and Rule 12(b) (1) of the North Carolina Rules of Civil Procedure, and for the reason that the matters complained of were not properly subject to review under Article 33 of Chapter 143 of the General Statutes because petitioner had failed to comply with statutory provisions.

At the hearing on the motion in Superior Court, the court concluded that petitioner was not entitled to judicial review upon the question of whether his position as a State employee was wrongfully terminated, or whether his resignation was coerced. The court further held that petitioner was not entitled to judicial review upon the question of whether he should be reemployed and dismissed the petition without prejudice to petitioner's right to pursue any administrative remedies now available to him. From that order petitioner appealed to this Court.

Blanchard, Tucker, Twiggs and Denson, by Howard F. Twiggs, for petitioner appellant.

Tharrington, Smith and Hargrove, by J. Harold Tharrington and Roger W. Smith, for respondent appellee.

ARNOLD, Judge.

This case concerns an employee of the Department of Revenue (the Department) whose employment allegedly was terminated because of his political views. The question presented by this appeal is whether the employee is required to appeal to the State Personnel Board before he may seek judicial relief.

Article 1 of Chapter 126 of the General Statutes creates the State Personnel Board (the Board). Among the powers and duties conferred by the General Assembly the Board is to hear ". . . appeals of applicants, employees, and former employees and . . ." to issue ". . . advisory recommendations in all appeal cases."

By authority of G.S. 126-4(9) the Board has adopted a rule permitting an employee who has been suspended or dismissed to make a final appeal to the State Personnel Board, provided that the appeal shall be in writing and within thirty days after the effective date of the suspension or dismissal.

Also applicable to this case is G.S. Chapter 143, Article 33, authorizing judicial review of certain administrative agencies. This provision was repealed by the General Assembly effective 1 February 1976, and judicial review of administrative agencies is now embodied in Article 4 of Chapter 150A.

G.S. 143-307 provides for judicial review of a final administrative decision only after all administrative remedies have been exhausted.

An "administrative decision" is "any decision, order or determination rendered by an administrative agency in a proceeding in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an opportunity for agency hearing. G.S. 143-306(2).

An "administrative agency" means "any State officer, committee, authority, board, bureau, commission, or department authorized by law to make administrative decisions, except those agencies in the legislative or judicial branches of government, and except those whose procedures are governed by Chapter 150 of the General Statutes, or whose administrative decisions are made subject to judicial review under some other statute or statutes containing adequate procedural provisions therefor." G.S. 143-306(1).

The Department of Revenue is an "administrative agency," and the termination of petitioner, if as alleged, would be an "administrative decision" within the statutory definitions already set forth.

The petitioner contends that the trial court erred in dismissing his action because he had not exhausted all administrative remedies by failing to appeal to the Board within thirty days.

It is argued by the Department that G.S. 126-4(9) required an appeal to the Board, and that petitioner's failure to appeal his grievance to the Board bars him from obtaining judicial review pursuant to G.S. 143-307 because he has not exhausted his administrative remedies. It is emphasized by the Department that the rule that statutory requirements for appeal from decisions of administrative agencies are mandatory and not directory. *In re Employment Security Com.,* 234 N.C. 651, 68 S.E. 2d 311 (1951).

The Department further argues that since this is an action against the State it is barred by the doctrine of sovereign immunity for failure to strictly follow the statutory provision permitting the action against the State.

The General Assembly is presumed to have acted in accord with reason and common sense and not to have intended an unjust or absurd result. *State v. Humphries,* 210 N.C. 406, 186 S.E. 473 (1936). It does not accord with reason to require petitioner to waste money, time, and effort in appealing to the Board in order to fully exhaust his administrative remedies. The Board is authorized only to render advisory recommendations which are not binding on administration officials or the courts, and it is without power to grant petitioner any relief.

It is petitioner's position that exhaustion of administrative remedies does not require him to appeal to a purely advisory body. This position is supported by *United States Alkali Exp. Asso. v. United States,* 325 U.S. 196, 65 S.Ct. 1120, 89 L.E. 1554 (1945), where the defendant, in an anti-trust action, asserted that the government had failed to present its case to the Federal Trade Commission. The Supreme Court of the United States held that such an administrative remedy was inadequate, and that the government was not required to pursue that remedy in order to exhaust administrative remedies, because the

F.T.C. could not grant any relief, only investigate, recommend and report.

Similarly, the Personnel Board has no power but to recommend, and to require an appeal to the Board in order to exhaust administrative remedies is an inadequate remedy. Moreover, our Supreme Court has stated that G.S. Chapter 143, Article 33, is to be liberally construed, and that its primary purpose is to confer the right of review. *In re Appeal of Harris,* 273 N.C. 20, 159 S.E. 2d 539 (1968).

We hold that petitioner is entitled to judicial review, and that he was not compelled to appeal to a purely advisory board in order to exhaust all administrative remedies, and that his action is not barred by sovereign immunity.

The order of the trial court is reversed and the cause remanded to Superior Court for judicial review.

Reversed and remanded.

Judges PARKER and HEDRICK concur.

LOIS G. LEA AND FRANK D. CUMMINGS v. GARLAND (GARFIELD) WALTER DUDLEY AND WIFE LOYCE GEORGIA DUDLEY, J. LEON DUDLEY AND WIFE MARGARET WATERFIELD DUDLEY, O. A. DUDLEY AND WIFE DOWE DUDLEY

No. 751SC663

(Filed 7 January 1976)

1. **Adverse Possession § 25— sufficiency of evidence**

The evidence was sufficient for submission of an issue of title by adverse possession to the jury where the evidence was conflicting as to whether defendants' predecessor took possession as an agent or employee of a corporation and his possession was thus permissive.

2. **Adverse Possession § 25.1— instructions — possession with owner's permission**

The trial court properly charged the jury that if defendants' predecessor entered into possession of land with permission of the owner, his possession would not be adverse until he disclaimed such arrangement in such manner as to put the owner on notice that he was no longer using the land by permission but was claiming it as absolute owner.

3. Adverse Possession § 24— certificate of tax sale to possessor

Notice of a sheriff's levy and a certificate of tax sale of land to defendants' predecessor was relevant to show the hostile interest with which defendants' predecessor possessed the land and the notoriety of that possession.

4. Adverse Possession § 24— declarations of ownership by possessor

Evidence of declarations by defendants' predecessor that he had bought the land in question and that it "belonged to him" was competent to show that defendants' predecessor claimed to possess the land as the real owner.

5. Adverse Possession § 24— grant of easement by possessor

The court did not err in permitting a witness to testify that defendants' predecessor "signed an easement" across the property in question.

APPEAL by plaintiffs from *Rouse, Judge.* Judgment entered 7 March 1975 in Superior Court, CURRITUCK County. Heard in the Court of Appeals 18 November 1975.

This is an action by plaintiffs to remove a cloud from plaintiffs' alleged title to particularly described lands in northeastern Currituck County.

Defendants answered and alleged that they were the sole owners of the property and that they and their predecessors in title had possessed the lands under known and visable lines and boundaries, adversely to all other persons for more than 20 years next preceding the commencement of the action.

Plaintiffs introduced a 1914 deed conveying the property to Deals Island Ducking Club, Inc., a Virginia corporation. It was stipulated that upon recordation of that deed, the corporation had title to the property by a connected chain of title back to the State. The club stopped filing annual corporate reports in 1919. Fees were paid until 1929. The corporate charter was revoked in 1931 for failure to pay corporate franchise taxes. Plaintiffs acquired all of the stock in the corporation. On 20 July 1970 a court appointed receiver for the corporation conveyed the property to plaintiffs. *(See Lea v. Dudley,* 20 N.C. App. 702, 202 S.E. 2d 799.)

Plaintiffs introduced two deeds to the property that were executed in 1964. One was from defendants to W. L. Cogswell and the other was a deed from Cogswell to defendants. Plaintiffs contend that these deeds were a cloud on their title.

Defendants' evidence tends to show the following:

The property in question is mostly marsh land. Defendants' father, L. L. Dudley, the alleged predecessor in title owned land north of the property in question where he lived and operated a hunting and fishing lodge or clubhouse. In 1914, he had helped a former owner in the sale of the land to the corporation. In the early twenties stockholders of the corporation and their guests would stay in L. L. Dudley's clubhouse during the hunting season. L. L. Dudley furnished their room and board on a daily or weekly basis. There were no buildings on the property in dispute. In about 1925, some of the stockholders in the corporation attempted to move an old Coast Guard station onto the property but soon abandoned that project. L. L. Dudley erected duck blinds on the property and these were used by some of the stockholders or guests. The stockholders and guests of the corporation did not visit or make other use of the property after 1929. In 1930, L. L. Dudley erected a two-story house on the property from material salvaged from the old Coast Guard station. The house was used by guides and other employees of Dudley. He also rented the house to others. The last tenant was W. L. Cogswell who lived there about 15 years until his death in 1968. Dudley built roads over the property and barred access to those he did not want on the property. Dudley erected a number of concrete duck blinds and placed posted signs on the property. The duck blinds were licensed in his name. He fenced part of the property and raised cattle, goats and sheep. He used all of the land commercially. During hunting season he employed guides to take hunting parties out on the property. He advertised his hunting facilities in a magazine and distributed advertising folders. He dynamited a ditch about 200 yards long across part of the property. After the hunting seasons he trapped muskrats and other animals for commercial purposes. Each year he burned over the marshy areas of the property to make it more desirable for hunting. Hunting on the land was allowed only by permission from L. L. Dudley. Dudley used the land for about the only purpose that the nature of the property would permit.

On 1 July 1929, Dudley purchased the tax lien on the property at a tax sale in 1929. Dudley and his successors paid the taxes on the property up to the time this action was started. The property was listed on the tax records as "Deals Island Club, L. L. Dudley, Agent" until 1965 when it was changed to

"Dudley, Garland Walters, et al." L. L. Dudley's son testified, "My father was never an employee of anyone . . . he was never an employee or agent of anyone. He was not a caretaker for anyone. . . ."

On 23 April 1952, L. L. Dudley as "owner" conveyed a right-of-way easement across the land to Virginia Electric and Power Company.

After L. L. Dudley died in 1958 his sons stayed in possession of the property and continued essentially the same use of the property. The sons subsequently leased the land to others.

The deed from defendants to Cogswell and from Cogswell back to defendants was executed upon the advice of a Virginia attorney "who has been disbarred" so that it could be entered in the record.

To show the notoriety of L. L. Dudley's possession, defendants produced several witnesses who testified that it was generally reputed that L. L. Dudley owned the land. Around 1930, Dudley told his friends that he owned the land and had bought it at a tax sale.

Plaintiffs then offered evidence in rebuttal tending to show that from the time the corporation bought the property until about 1919, L. L. Dudley was employed by the corporation as a salaried caretaker of the property. Thereafter, Dudley was still employed as a caretaker. Instead of receiving a cash salary, however, he was allowed to use the property in return for taking care of it and paying the taxes.

J. Kenyon Wilson, Jr., for plaintiff appellants.

Leroy, Wells, Shaw, Hornthal, Riley & Shearin, P.A., by Dewey W. Wells and Norman W. Shearin, Jr., for defendant appellees.

VAUGHN, Judge.

[1, 2] Plaintiffs contend that the evidence, as a matter of law, was insufficient to allow the jury to consider defendants' claim of title by adverse possession and urges, therefore, that it was error to deny their motions for directed verdict and judgment notwithstanding the verdict. The thrust of plaintiffs' argument appears to be that there was no evidence that defendants' possession was hostile so as to rebut the presumption that it was

subordinate to owner's legal title. We disagree. The evidence was conflicting. Plaintiffs offered evidence tending to show that L. L. Dudley took possession as an agent or employee of the corporation and that his possession was permissive. Defendants' evidence was to the contrary. Conflicts in the evidence and in the inferences arising thereon were for the jury under appropriate instructions from the court. *Chambers v. Chambers,* 235 N.C. 749, 71 S.E. 2d 57. We have reviewed the judge's charge and find that he fully and accurately declared and explained the law arising on the evidence given in the case. Among other things, the court correctly charged the jury that if defendants' predecessor entered into possession with the permission of the owner that possession would not be adverse until he disclaimed such arrangement in such manner as to put the owner on notice that he was no longer using the land by permission, but was claiming it as absolute owner. *Board of Education v. Lamm,* 276 N.C. 487, 173 S.E. 2d 281.

[3] Plaintiffs contend that it was error to admit the notice of sheriff's levy and certificate of tax sale. We cannot sustain the contention. The parties stipulated that the documents were genuine and, if relevant and material, could be received without further identification or proof. The documents were relevant to show the hostile interest with which L. L. Dudley possessed the land and the notoriety of that possession.

[4] Plaintiffs also contend that it was error to admit evidence of declarations of L. L. Dudley to the effect that he had bought the land and that it "belonged to him." At the time Dudley is reported to have made the declarations he was in possession of the land and they were, therefore, admissible to show that he claimed to possess as the real owner.

[5] One of the witnesses for defendants testified that L. L. Dudley "signed an easement" across the property and this is the subject of another of plaintiffs' exceptions. We see no error prejudicial to plaintiffs. It was stipulated that the document was genuine and it was introduced into evidence.

We have carefully considered all of the assignments of error brought forward by plaintiffs. The case was well tried by able counsel before a fair and impartial judge. We find no

error that would justify this Court in disturbing the solemn verdict of the jury.

No error.

Judges MARTIN and CLARK concur.

THE TRAVELERS INSURANCE COMPANY v. PAUL FRANKLIN CURRY; NELLIE B. McRAE, ADMINISTRATRIX OF THE ESTATE OF HARVEY DAVIS, DECEASED; LEO HAILEY AND JAMES ELBERT ALSTON

No. 7518SC675

(Filed 7 January 1976)

1. **Declaratory Judgment Act § 1— inapplicability to workmen's compensation claims — applicability to construction of insurance contracts**

Although the Declaratory Judgment Act, G.S. 1-253 et seq., is not applicable to claims under the Workmen's Compensation Act, it is applicable to construction of insurance contracts and in determining the extent of coverage.

2. **Master and Servant § 62— workmen's compensation — injury on way to or from work**

Generally, injuries sustained in accidents occurring while an employee is going or coming from work are not covered by the Workmen's Compensation Act; however, where the employer provides transportation for his employees pursuant to the contract of employment, then he may be subject to liability for purposes of workmen's compensation.

3. **Insurance § 91; Master and Servant § 62— transportation provided employees — gratuity — no workmen's compensation coverage**

Evidence was sufficient to support the trial court's findings of fact and conclusions of law that the automobile accident in question was not within the scope and course of two of defendant's employees' employment and thus not excluded from coverage by a policy of insurance issued to defendant where such evidence tended to show that transportation furnished the employees by defendant to and from their place of work at defendant's saw milling business was gratuitous and was not given them pursuant to an express or implied term of a contract of employment.

APPEAL by plaintiff from *Kivett, Judge*. Judgment entered 19 May 1975 in Superior Court, GUILFORD County. Heard in the Court of Appeals 19 November 1975.

Plaintiff brought this action under the Declaratory Judgment Act G.S. 1-253 et seq. and G.S. 1A-1, Rule 57, seeking to determine its obligations under a policy of automobile liability insurance issued to defendant Curry. It alleged, and offered evidence at the non-jury trial which tended to show, in pertinent part, the following:

Prior to the summer of 1972, Curry operated a saw milling and logging business near Greensboro. In June 1972, he moved the operation from Greensboro to Lexington. Defendants Alston and Hailey, and the decedent Davis, were all employed by Curry as common laborers. When operations were moved to Lexington, the three desired to continue working for Curry, whereupon Curry let Davis use a 1967 International Harvester Travelall to transport Davis, Alston and Hailey to and from work. This was a part of Davis' job for which he was compensated. At approximately 7:00 a.m. on 1 May 1973, while Davis was driving on Highway 64 from Greensboro to Lexington, with Alston and Hailey as passengers, he collided with a truck owned by VonCannon Trucking Company. Davis was killed and Alston and Hailey sustained severe personal injuries. They instituted actions for damages against Curry and the estate of Davis which actions are now pending. At the time of the accident plaintiff had in force a policy of liability insurance covering the Travelall.

Curry was called as a witness by defendants Hailey and Alston and testified contrary to his earlier statements in answer to plaintiff's interrogatories. He stated that neither Alston, Davis nor Hailey was paid for any of their time on the road. The day for which they were paid began when they arrived and went to work and ceased when they went home in the evening. Curry let Davis have the Travelall as a mere gratuity and did not provide him with transportation as a part of his job. He had previously stated that Davis was not his special or general agent and that he was under no duty to provide transportation for any of the employees party to this action.

In the final pretrial order the parties stipulated that plaintiff's policy of insurance provided in pertinent part:

> "This policy does not apply: . . . (d) under coverage A, to bodily injury to or sickness, disease or death of any employee of the insured arising out of and in the course of (1) domestic employment by the insured, if benefits

therefor are in whole or in part either payable or required to be provided under any workmen's compensation law, or (2) other employment by the insured; (3) under coverage A, to any obligation for which the insured or any carrier as his insurer may be held liable under any workmen's compensation, unemployment compensation, or disability benefits law, or under any similar law. . . ."

It was further stipulated that although defendant Curry employed in excess of ten employees, he had failed to secure workmen's compensation insurance or to qualify as a self-insurer, and that neither Curry nor his employees had filed or given notice of nonacceptance of the provisions of the Workmen's Compensation Act.

The trial judge made detailed findings of fact which included the following (summarized): On 1 May 1973, and prior thereto, Hailey and Alston were not performing any duty or labor for Curry, their employer, while traveling to and from work in the vehicle furnished by Curry; the actual beginning of their daily employment with Curry occurred when they arrived at the place of their employment in Lexington and terminated when they departed said place of employment; they were not, pursuant to an express or implied term of a contract of employment, entitled to the transportation furnished by Curry, nor were they required by Curry to use such transportation in traveling to and from work; the transportation to and from work furnished them by Curry was gratuitous and merely an accommodation; and, on said date, they were not within the course and scope of their employment by Curry while traveling to their work in Lexington in the vehicle furnished by Curry.

The court concluded that plaintiff's policy of insurance was applicable to the accident in question and that plaintiff is obligated to defend defendants Curry and Davis' administratrix in the trial of the pending actions. Plaintiff appealed.

Deal, Hutchins and Minor, by William K. Davis, for plaintiff appellant.

O'Connor and Speckhard, by Donald S. Speckhard, for Leo Hailey and James Elbert Alston, defendant appellees.

Booth, Fish, Simpson and Harrison, by H. Marshall Simpson, for Nellie B. McRae, Administratrix of the Estate of Harvey Davis, defendant appellee.

BRITT, Judge.

Plaintiff assigns as error the trial judge's findings of fact and conclusions of law that the accident was not within the scope and course of Hailey's and Alston's employment and thus not excluded from coverage by its policy of insurance. Plaintiff contends that the judgment is contrary to law and against the greater weight of the evidence. We find no merit in these contentions.

[1] The Declaratory Judgment Act, G.S. 1-253 et seq., may be utilized to alleviate uncertainty and clarify litigation. Although it is not applicable to claims under the Workmen's Compensation Act, it is applicable to construction of insurance contracts and in determining the extent of coverage. *Cox v. Transportation Co.,* 259 N.C. 38, 129 S.E. 2d 589 (1963); *Iowa Mutual Ins. Co. v. Simmons Inc.,* 258 N.C. 69, 128 S.E. 2d 19 (1962). If the claims for personal injuries asserted by defendants Alston and Hailey fall within the scope of the Workmen's Compensation Act they would be subject to the exclusion provision of plaintiff's policy of insurance.

[2] Whether an injury by accident is compensable under the Workmen's Compensation Act is a mixed question of law and fact. *Lee v. Henderson & Associates,* 17 N.C. App. 475, 195 S.E. 2d 48 (1973), *aff'd,* 284 N.C. 126, 200 S.E. 2d 32 (1973); *Bryan v. Church,* 267 N.C. 111, 147 S.E. 2d 633 (1966). Under G.S. 97-2(6) this is dependant upon whether the accident arose out of and in the course of the employment. Generally, injuries sustained in accidents occurring while an employee is going to or coming from work are not covered by the Act. *Hardy v. Small,* 246 N.C. 581, 99 S.E. 2d 862 (1957). However, where the employer provides transportation for his employees pursuant to the contract of employment, then he may be subject to liability for purposes of workmen's compensation. *Archie v. Lumber Co.,* 222 N.C. 477, 23 S.E. 2d 834 (1943).

The salient factor is whether provision for transportation is a real incident to the contract of employment. *Lassiter v. Telephone Co.,* 215 N.C. 227, 1 S.E. 2d 542 (1939). This precept is manifested as something more than mere permission; it approaches employee transportation as a matter of right. In *Jackson v. Bobbitt,* 253 N.C. 670, 676, 117 S.E. 2d 806, 810 (1961), we find:

> " 'The rule has been established in accordance with sound reason that the employer's liability in such cases depends

upon whether the conveyance has been provided by him, after the real beginning of the employment, in compliance with one of the implied or express terms of the contract of employment, for the mere use of the employees, and is one which the employees are required, or as a matter of right are permitted, to use by virtue of the contract. Pursuant to this rule, the employee is in the course of employment if he has a right to the transportation, but not if it is gratuitous, or a mere accommodation. . . . '" (Quoting from *Lassiter v. Telephone Co.*, 215 N.C. 227, 229, 1 S.E. 2d 542, 543 [1939] and authorities therein cited.)

[3] We think the foregoing is a correct statement of the law governing this appeal. Thus, as found by the trial judge, Curry would not expose himself to liability for workmen's compensation purposes by gratuitously furnishing transportation for his employees.

The record contains substantial competent evidence which fully supports the trial judge's findings of fact and conclusions of law. While we note that the record also contains evidence permitting an opposite result, where the facts found by the trial judge, sitting without a jury, are supported by substantial competent evidence they are conclusive on review by an appellate court. *Transit, Inc. v. Casualty Co.*, 285 N.C. 541, 206 S.E. 2d 155 (1974); *Insurance Co. v. Clark*, 23 N.C. App. 304, 208 S.E. 2d 861 (1974). Conflicts between Curry's answers to plaintiff's interrogatories and his testimony at trial go not to his competency but to the credibility and weight of his testimony. *Blackwell v. Butts*, 278 N.C. 615, 180 S.E. 2d 835 (1971); *Fletcher v. Fletcher*, 23 N.C. App. 207, 208 S.E. 2d 524 (1974).

For the reasons stated, the judgment is

Affirmed.

Chief Judge BROCK and Judge MORRIS concur.

VIVIAN R. TRAYWICK v. RALPH C. TRAYWICK

No. 7520DC696

(Filed 7 January 1976)

1. **Evidence § 12; Divorce and Alimony § 14— alimony without divorce — husband's relationship with other woman — wife's testimony admissible**

Testimony by a wife concerning her husband's relationship with another woman will be excluded under G.S. 50-10 when it clearly implies an act of adultery, even though the words "adultery" or "intercourse" are not used, but when there is no clear implication of intercourse, the testimony is admissible; therefore, the trial court in an action for alimony without divorce did not err in allowing plaintiff wife to testify concerning defendant husband's visits with the female next-door neighbor where plaintiff was not attempting to prove that defendant committed adultery but contended instead that defendant offered her indignities by spending more time with the neighbor than with her and making it clear that he preferred the neighbor's company to that of his own wife.

2. **Evidence § 27— tape recordings — insufficient authentication — exclusion proper**

The trial court properly excluded a tape recording of a conversation in which plaintiff admitted that she spat in defendant's face, since the recording was not authenticated in the manner required.

3. **Divorce and Alimony § 16— alimony without divorce — jury instructions improper**

In an action for alimony without divorce where plaintiff alleged cruelty and indignities, defendant is entitled to a new trial since a part of the trial court's instructions had the effect of charging what *would,* rather than what *could,* constitute cruel or barbarous treatment, and another part of the instructions indicated that the jury could find that defendant offered plaintiff such indignities as to render her condition intolerable if defendant visited the female neighbor's home in the middle of the night on even one occasion or visited there "in undue number of hours," rather than on a repeated and persistent basis.

APPEAL by defendant from *Webb, Judge.* Judgment entered 15 March 1974 in District Court, UNION County. Heard in the Court of Appeals 20 November 1975.

Plaintiff wife brought this action against defendant husband for alimony without divorce, alleging cruelty and indignities. Defendant denied that he had engaged in any misconduct toward plaintiff and, in a further defense, alleged cruelty, indignities and constructive abandonment on her part.

Plaintiff offered evidence tending to show: The parties were married in 1947 and have two adult children. In 1973, defendant began spending a great deal of time with Mrs. Carra Nelson, their next-door neighbor, whose husband had recently committed suicide. He visited her home every night and often stayed for several hours. There was no one else present at Mrs. Nelson's home except her two-year-old son. On one occasion defendant got out of bed in the middle of the night and went to visit Mrs. Nelson. After defendant began this relationship with Mrs. Nelson, on several occasions he kicked plaintiff, beat her with his fist, stepped on her feet, pulled her hair, and assaulted her in other ways. He locked her out of the house several times. On one occasion he cursed her in the presence of her daughter and her daughter's boyfriend. On 14 December 1973, he ordered plaintiff out of his bedroom, and thereafter they slept in separate rooms. After plaintiff brought this action, defendant moved into a duplex apartment next door to the family home. On one night after the separation, he called her on the telephone and cursed her and then came to her front door with a gun in his hand and threatened to "shoot a Magnum through the house."

Defendant offered evidence tending to show: He had visited Mrs. Carra Nelson only occasionally and had not had any improper relationship with her. Plaintiff's hostility to defendant began to develop some time before Mr. Nelson's suicide. Since then, she has spat in defendant's face, swung at him with her fist, struck him with a can, kicked him, screamed at him, and cursed him continually. On the night he threatened to shoot a magnum through her house, he did so because she had shot at his duplex three times.

Issues were submitted to, and answered by, the jury as follows:

1. Did the defendant by cruel and barbarous treatment endanger the life of the plaintiff as alleged in the Complaint?

ANSWER: "Yes"

2. Did the defendant offer such indignities to the plaintiff as to render her condition intolerable and her life burdensome?

ANSWER: "Yes"

3. Is the plaintiff substantially dependent upon the defendant for her support and maintenance, OR is substantially in need of maintenance and support from the defendant?

ANSWER: "Yes"

4. Is the defendant one on whom the plaintiff is actually substantially dependent or one from whom the plaintiff is actually substantially in need of maintenance and support?

ANSWER: "Yes"

5. Has the plaintiff offered such indignities to the defendant as to render his condition intolerable and his life burdensome?

ANSWER: "No"

6. Has the plaintiff, by cruel or barbarous treatment, endangered the life of the defendant?

ANSWER: "No"

From judgment entered on the verdict, awarding plaintiff alimony and other relief, defendant appealed.

Clark and Griffin, by Richard S. Clark, for plaintiff appellee.

Thomas and Harrington, by L. E. Harrington, and William H. Abernathy, for defendant appellant.

BRITT, Judge.

[1] Defendant contends the court erred in admitting testimony by plaintiff concerning his visits with Mrs. Nelson. The contention has no merit. Testimony by a wife concerning her husband's relationship with another woman will be excluded under G.S. 50-10 when it clearly implies an act of adultery, even though the words "adultery" or "intercourse" are not used. *Phillips v. Phillips,* 9 N.C. App. 438, 176 S.E. 2d 379 (1970). But when there is no clear implication of intercourse, the testimony is admissible. *Earles v. Earles,* 26 N.C. App. 559, 216 S.E. 2d 739 (1975), *cert. denied,* 288 N.C. 239, 217 S.E. 2d 679 (1975). Here, plaintiff was not attempting to prove that defendant committed adultery. She contended instead that

defendant offered her indignities by spending more time with Mrs. Nelson than with her and making it clear that he preferred Mrs. Nelson's company to that of his own wife. Her testimony was properly admitted under *Earles*.

[2] Defendant contends the court erred in excluding a tape recording of a conversation in which plaintiff admitted that she had spat in his face. We hold that the tape was properly excluded for the reason that it was not authenticated in the manner required. *See State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561 (1971).

[3] Defendant contends the court erred in giving the following instructions to the jury:

> "The Court instructs you, if you find from the evidence and by its greater weight that the defendant did on various times assault his wife *or* threaten his wife *or* display a firearm in her presence with a menacing attitude or threatening attitude, then it would be your duty to answer the (first) issue yes if you are satisfied from the evidence and by its greater weight. If you are not so satisfied, then you should answer it no." (Emphasis added.)
>
> * * * *
>
> "The Court instructs you if you find that to be a fact by the evidence and by its greater weight, that Mr. Traywick was visiting in the home of this lady in the middle of the night *or* in undue number of hours *or* that for no good cause he threw her out of their bedroom, that he cursed her, if you find that to be a fact from the evidence and by its greater weight, then the Court instructs you, you should answer that second issue yes. If you are not so satisfied you would answer it no." (Emphasis added.)

This contention has merit.

In 1 Lee, N.C. Family Law § 81, pp. 306-307, we find: "There is no arbitrary rule or well-defined test for determining whether particular acts or conduct constitute cruelty; each case must be determined by its own facts and the surrounding circumstances. The status of the parties and their sensibilities, including their social position, refinement, and intelligence, as well as the character and nature of the acts or violence alleged, are among the factors considered. In 1955, the Supreme Court of North Carolina said: 'It would be impossible, and also unwise, to attempt to define with accuracy, so as to fit all cases,

what is cruel treatment by a husband that compels his wife to leave him. There is a species of cruelty, which cuts deeper than a blow. . . . '" Citing *Bailey v. Bailey,* 243 N.C. 412, 415, 90 S.E. 2d 696, 699 (1956).

The first instruction challenged above had the effect of charging what *would,* rather than what *could,* constitute cruel or barbarous treatment. While a finding that defendant on various times assaulted plaintiff might *permit* an affirmative answer on the first issue, such a finding would not *compel* an affirmative answer. With respect to threats, there are degrees ranging from mild to violent threats. Certainly, a wife is not *always* entitled to alimony when her husband "threatens" her, however mildly, on several occasions.

The second challenged instruction related to plaintiff's contentions of indignities. In Lee, *supra,* § 82, p. 311, we find: " . . . The fundamental characteristic of indignities is that it must consist of a *course* of conduct or *continued* treatment which renders the condition of the injured party intolerable and life burdensome. The indignities must be *repeated and persisted in* over a period of time." (Emphasis added.) The quoted instruction called for an affirmative answer to the second issue if the jury found that even on one occasion defendant visited in Mrs. Nelson's home in the middle of the night or "in undue number of hours."

We hold that the challenged instructions were erroneous and that defendant was prejudiced by them, entitling him to a new trial.

New trial.

Chief Judge BROCK and Judge MORRIS concur.

IN THE MATTER OF THURMAN P. THOMAS, GUARDIAN OF MARY AUGUSTA LANCASTER, INCOMPETENT

No. 759SC617

(Filed 7 January 1976)

Appeal and Error § 7— standing to appeal — person dismissed as party

Attempted appeal from an order confirming the sale of an incompetent's property by a person who had been dismissed as a party

to the proceeding, did not appeal his dismissal, and had no interest in the subject matter is dismissed.

APPEAL by Mary Augusta Lancaster, Incompetent, from *Hobgood, Judge.* Order entered 25 April 1975, Superior Court, FRANKLIN County. Heard in the Court of Appeals 12 November 1975.

On 28 November 1973, Thurman P. Thomas, Guardian of Mary Augusta Lancaster, Incompetent, filed a petition asking the court to direct the sale of the incompetent's lands for the purpose of paying debts and creating a fun for the incompetent's maintenance and upkeep at Wake Forest Rest Home or similar institution and other necessary expenses of the ward. On 29 November 1973, the clerk entered an order directing that the lands be sold and appointing William Jolly commissioner to make the sale and report to the court. On 19 December 1973, John F. Matthews filed an application in which he stated that he had, for more than 30 years, been general attorney for Mary Lancaster and "as her friend and attorney" was under a continuing right and duty to protect her interests. He further stated that the petition did not state facts sufficient to support an order of sale, that it did not set out the true facts, that a sale was not necessary, and asked for the appointment of a guardian ad litem.

Thereupon the clerk entered an order appointing Ruby Eaves Underwood, sister of the incompetent, as guardian ad litem for the incompetent. On 31 December 1973, John F. Matthews filed a motion asking for the discharge of Mrs. Underwood as guardian ad litem and the appointment of a guardian ad litem who would act in the best interests of the incompetent and not be likely to be influenced by the guardian or commissioner.

On 10 January 1974, Mrs. Underwood answered the petition. She admitted most of the allegations, and further averred that she, being the sister of the incompetent, was familiar with her sister's circumstances, well acquainted with her sister's real estate holdings, owned farm land adjoining, and knew that her sister's land was in a deteriorating condition. She averred that she had had a lifetime of experience in farming operations, had personal knowledge of her sister's sources of income and of her debts, and agreed that her sister's best interests would be served by a sale of the lands. She further averred that in her

opinion, some of the debts might be without valid consideration and further that collection of some might be barred by the statute of limitations. In her third and further answer she suggested that the court require an accounting by the persons, firms, or corporations handling the incompetent's business affairs under a power of attorney prior to the appointment of a guardian. By her fourth and further answer she averred that she was aware that certain paper writings had been filed in this cause by John F. Matthews, attorney at law and private citizen of Louisburg, N. C., and that he did not represent her sister, the incompetent, in any capacity, had no interest in the subject matter of the action, and she suggested to the court that he had no standing in fact or in law to intervene.

John F. Matthews filed a reply to the answer of the guardian ad litem in which he again took the position that a sale would be adverse to the interests of the incompetent, that the lands could produce income sufficient for the incompetent's needs, that the incompetent was not being fairly represented by the present guardian ad litem. He further stated that he, as attorney for the incompetent, held certain papers, which, at her death, might be declared to be her last will and testament and that a sale of the lands would defeat her testamentary intention. He prayed that Mrs. Underwood be relieved as guardian ad litem and another person appointed or that he be recognized as a friend of the court to assist in determining whether the land should be sold; that any sale be postponed pending a determination of the incompetent's debts; and that pending such determination, the lands be rented.

On 30 July 1974, the guardian ad litem moved for a hearing upon the pleadings and for the entry of such orders or directives as would be in the best interests of the incompetent.

On 21 August 1974, the guardian filed a supplemental petition requesting authority to borrow $2600 to pay outstanding bills, for maintenance and support of the incompetent pending determination of the matters before the court. The court entered an order on 12 October 1974, finding facts and granting the request.

On 31 October 1974, the court held a hearing on John F. Matthews's petition for the removal of Mrs. Underwood. Mr. Matthews stated to the court, in response to questioning by the court, that he did not represent Gary C. Carter or the Car-

ter family nor had he been employed by Gary C. Carter. Mr. Matthews was then allowed by the court to state his contentions with respect to the subject matters of the proceedings. Gary C. Carter was subpoenaed and testified that he had retained John F. Matthews as his attorney in this proceedings for the purpose of stopping the sale of any of the property of Mary Augusta Lancaster; that immediately upon learning of the sale through a legal advertisement in the newspaper, he went to Mr. Matthews's office and hired him to prevent the sale; that he had not paid Mr. Matthews anything but that he had entered into a contract under which Carter "guaranteed that a fee of $1000.00 will be paid to the said attorney, in the settlement of the estate of Mary A. Lancaster, if not otherwise compensated by the allowance by the court and paid to the said attorney . . . " . Carter further testified that he had in his possession a copy of the will of Mary Augusta Lancaster by which she devised all her real estate to Thomas Carter, father of Gary Carter, with the provision that if Thomas Carter predeceased Mary Lancaster, the property would go to Gary Carter; that Mr. Matthews had the original of the will and had discussed the will with him; that he did not want the property sold and employed Mr. Matthews to prevent the sale.

Counsel for the guardian ad litem moved that all pleadings filed by Matthews except the application for appointment of guardian ad litem be stricken and expunged from the record. The clerk found facts, among them that "John F. Matthews is employed to represent the interest of Gary C. Carter in this cause and is not in fact 'a friend of the court' . . . has a serious conflict of interest . . .". The court concluded that neither Matthews nor Carter had any legal standing, that neither was a proper party, and all pleadings filed subsequent to the application should be stricken. The clerk thereupon ordered that all pleadings filed by Matthews subsequent to 19 December 1973 be stricken and of no force and effect, ordered the dismissal of Carter and Matthews as parties, and ordered the commissioner to proceed with the sale.

Carter and Matthews attempted to appeal. On 20 December 1974, Judge Hobgood entered an order in which he made full findings of fact, and concluded that neither Carter nor Matthews was a necessary or proper party to the proceedings and that their appeals should be dismissed. He therefore dismissed them as parties, dismissed their appeals, and ordered the sale

stayed "until such time as either said appeals are dismissed or ruled upon by the North Carolina Court of Appeals." Matthews did not appeal. On motion filed 31 January 1975, by the guardian, joined in by the guardian ad litem, to dismiss Carter's appeal from the 20 December 1974 order, Judge Hobgood dismissed Carter's appeal and ordered the commissioner to proceed with the sale. Carter subsequently notified the court that he did not intend to pursue his appeal.

The sale was had, and after a resale, the clerk entered a confirmatory decree which was confirmed and approved by Judge Hobgood. From this decree and order confirming, John Matthews attempts to bring an appeal to this Court.

John F. Matthews, attorney.

Yarborough, Jolly & Williamson, by E. F. Yarborough, for Thurman P. Thomas, Guardian of the Estate of Mary Augusta Lancaster, Incompetent.

David, Sturges & Tomlinson, by Conrad B. Sturges, Jr., for Ruby Eaves Underwood, Guardian Ad Litem of Mary Augusta Lancaster, Incompetent.

MORRIS, Judge.

No notice of appeal, exceptions, or assignments of error appear in the record filed in this purported appeal. Mr. Matthews asserts that he, on 1 May 1975, handed to the clerk a notice of appeal but the clerk refused to file it. He then petitioned this Court for a writ of mandamus which was denied on 22 July 1975.

Mr. Matthews was, by order of court, dismissed as a party to this action. He took no appeal from that order. The court found that he had no standing in this litigation and no interest in the subject matter. From the evidence before us, those facts are abundantly clear.

The general guardian and the guardian ad litem have moved to dismiss the purported appeal. The motion is well taken

Appeal dismissed.

Judges PARKER and MARTIN concur.

STATE OF NORTH CAROLINA v. JACK BRUCE BAYSINGER

No. 7522SC616

(Filed 7 January 1976)

Constitutional Law § 30— speedy trial on escape charge — delay of year between recapture and trial

Defendant was not denied his right to a speedy trial on a felonious escape charge by the delay of a year between his recapture and trial where defendant was serving prison sentences for other crimes while awaiting trial for escape, defendant did not contend the delay resulted in impaired memories or loss of witnesses, and defendant failed to show that the delay was wilful or the result of negligence by the State or that he was prejudiced by the delay.

APPEAL by defendant from *Seay, Judge.* Judgment entered 21 April 1975 in Superior Court, DAVIE County. Heard in the Court of Appeals 12 November 1975.

While serving prison sentences for various felony convictions, defendant obtained a special one-day leave for 16 April 1972 in order to visit his brother in Mocksville, North Carolina. Defendant failed to return to his unit at the stipulated time, and on 19 April 1972, was indicted for felonious escape.

Recaptured almost two years later, defendant was sent to the Central Prison in Raleigh on 16 April 1974. There, on or about 28 June 1974, defendant purportedly wrote the Clerk of Court, seeking a speedy trial provided " . . . they had a warrant pending against me." Defendant was served with a warrant on 19 July 1974, and on the same date, moved for a speedy trial.

On 27 August 1974, probable cause was found after a preliminary hearing and defendant was bound over to the Superior Court. On 28 October 1974, the grand jury returned another felonious escape indictment against defendant, but the case was not heard during that term of court. Though no formal entry has been located by the prosecution, the case ostensibly had been continued.

During the next term defendant again was brought to court, but on 21 January 1975, the State obtained a continuance because

> " . . . there was an intimation either by the defendant Baysinger or by his attorney that the State's bill of indictment was not sufficient and he would have moved to quash the

bill at the time the defendant was arraigned because it did not allege temporary relief escape. I think we brought it to the court's attention, and that is one reason we moved for continuance the last session, to prepare a new bill which I did and sent to the grand jury. It was returned a true bill."

Defendant's attorney acknowledged that he neither consented to nor objected to the continuance granted on 21 January 1975.

The State obtained another bill of indictment on 21 April 1975, and the case was called for trial on that same day. Prior to arraignment on this 21 April 1975 charge, defendant moved to quash the indictment on two grounds: (1) denial of a speedy trial, and (2) presentation of defendant in the courtroom while dressed in prison clothes. Defendant explained that he had

" . . . appeared for trial in October 1974. I was ready for trial then. I was ready for trial the entire week court was held, in jail for eleven days. I wanted to be tried. I was not tried. I was returned to Davie County in January 1975 for trial of this case in Superior Court. I was ready for trial then. I wanted to be tried and asked to be tried. I was not tried. I am here this week for trial.

The first time I was brought into court today I was brought in court with the brown khakis I have in my hand with the white tag with Baysinger, my last name, on it, and the prison number on it; the camp number and clothes number. I was wearing these pants. It has my name, tag number, clothes number and prison camp number 3310. It is tan. This article has my name and clothes Number 3310. It is the jacket I was wearing. The tag is on the right side. It is the jacket I was wearing when brought into court. (Defendant handed a third article to counsel.) It has the number 3310 on it. It is medium close custody prison garments. The number 79 on it stands for the clothes number—3310 stands for the camp or prison unit number. My name is on it so the clothing won't be separated . . . You receive the same clothes back each time they launder them."

Defendant's attorney, further amplifying the situation, described

" . . . what transpired—the case was called, I lodged a motion orally at that session in open court; it just wasn't

> acted on. With respect to the question of the defendant's clothes, when he came into court, according to my observation while he was in court and before he was removed there was a jury in the box and other potential jurors not sitting on the case being heard were in the courtroom sitting on the other side of the courtroom, a number of jurors, I didn't count them—potential jurors in the defendant's case in the courtroom at the time."

The defendant's case, however, had neither been called for trial nor tried while defendant was in the courtroom dressed in his prison uniform; when his case actually was tried defendant wore "civilian" attire. The court denied the aforesaid motion, but defendant again moved to quash; this time averring that the bill of indictment failed " . . . to charge an offense under the statute and fail[ed] to particularize under what particular statute and particular subsection the defendant is charged with." This motion also was denied.

From a plea of not guilty, the jury returned a verdict of guilty. From judgment sentencing him to a term of imprisonment, defendant appealed.

Attorney General Edmisten, by Associate Attorney Claudette Hardaway, for the State.

John T. Brock for defendant appellant.

MORRIS, Judge.

Defendant contends that the trial court erred by denying his motion to dismiss for alleged denial of a speedy trial and for his presentation in court while dressed in his prison uniform. We disagree. There is no question that every defendant confronted by the prospect of penal sanction is entitled to an expeditious disposition of the matter. "The fundamental law of this State secures to every defendant the right to a speedy trial." *State v. Hollars,* 266 N.C. 45, 50, 145 S.E. 2d 309 (1965). Yet, the actual timetable within which the case must be tried and disposed of is not subject to any fixed standard of time. Our Supreme Court has noted that "[s]*peedy* is a word of indefinite meaning. . . . Neither the constitution nor the legislature has attempted to fix the exact time within which a trial must be had." *Id.* at 51. However, the determination of whether a speedy trial has been afforded to the defendant has not been left to wide-open discretion. Standards have been

established and can be reduced to four interrelated factors: "(1) The length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) the prejudice resulting to defendant from the delay." *State v. Hill,* 287 N.C. 207, 211, 214 S.E. 2d 67 (1975).

Slightly over one year transpired between this defendant's recapture and his trial and conviction, and this period standing by itself " . . . is not insubstantial. . . . However, we elect to view this factor merely as the 'triggering mechanism' that precipitates the speedy trial issue. Viewed as such, its significance in the balance is not great." *Id.* at 211. Here, defendant waited for trial on the felonious escape charge while serving a sentence for different unrelated charges. There is no question that waiting for resolution of the escape charge would be a troublesome cloud in the defendant's future and could arguably vitiate rehabilitation processes within the penal system. Yet, when a " ' . . . man is in prison [for another offense], a trial might be longer delayed than when the man is held in jail an unreasonable length of time to await trial because an acquittal in the case where the question is raised would not necessarily terminate the imprisonment when the man is in the penitentiary.' " (Citation omitted.) *State v. Hollars, supra,* at 51. This underlying consideration, however, does not excuse the State for delay because " . . . release from imprisonment is only one of the purposes of a speedy trial, and the danger that long delay may result in impaired memories and the loss of witnesses is as real to a convict as to any other person charged with crime. Presumably, his anxiety with reference to the pending trial is as great as, if not greater than, that of one who has been admitted to bail." *Id.* at 51. In this case, defendant never alleged that the delay would or could result in impaired memories or the loss of witnesses. The more important question, therefore, becomes the reason for the delay.

Our Supreme Court, quoting from *Barker v. Wingo,* 407 U.S. 514, 531, 33 L.Ed. 2d 101, 92 S.Ct. 2182, has stated that " '[a] deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government.' However . . . '[a] more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.' . . . In this State the burden

of showing neglect or wilful delay is on the defendant." *State v. Hill, supra* at 212. Here, defendant has failed to meet this burden.

We do not believe there is any doubt that defendant made a timely request for a speedy trial and we are left to consider the last crucial factor of prejudice to defendant resulting from the delay. Defendant contends that

> " . . . in this case his right to move the trial court for a continuance on this ground was substantially prejudiced by the fact of the long delay on the part of the state in bringing him to trial in that he was unfairly confronted with the choice of having to further delay his trial by such a motion to continue or run the risk of having his cause prejudiced in the eyes of the jury by its having observed him in prison clothing. . . ."

We find no merit in this contention. Here defendant was tried in "civilian" garb and even if some of the potential jurors may have seen him in prison clothes we can see no prejudice to defendant in light of all the particular facts of this case.

We have considered the other contentions raised by defendant and find them also to be without merit.

No error.

Judges PARKER and MARTIN concur.

STATE OF NORTH CAROLINA v. LEROY ANDRE' MAYFIELD

No. 7512SC658

(Filed 7 January 1976)

1. **Criminal Law § 57— expert firearm testimony — sufficiency of evidence of expertise**

The trial court properly allowed a detective to testify that a gun found in defendant's car would fire, since evidence that the witness was a first sergeant in the Infantry for 20 years and had examined pistols thousands of times was sufficient to support a finding of expertise.

2. **Criminal Law § 102— improper jury argument — curative instruction sufficient**

In a prosecution for the armed robbery of a convenience store employee, the solicitor's improper jury argument that there had been

many robberies of convenience stores in the county and that "we've got to do something about it to put a stop to it" was not prejudicial to defendant, since the court instructed the jury not to consider the remark and that the case was to be decided on the evidence heard by them about this particular case and not what happened at some other time.

APPEAL by defendant from *Hobgood, Judge.* Judgment entered 11 April 1975, Superior Court, CUMBERLAND County. Heard in the Court of Appeals 17 November 1975.

Defendant entered a plea of not guilty to an indictment charging him with armed robbery.

Evidence for the State tended to show the following: Mrs. Carolyn Sudbury was manager of the 7-11 Store on Hope Mills Road in Cumberland County and was working there without help on the night of 4 December 1974. About 9:25 she noticed an orange Volkswagen had been driven into the parking lot and parked next to her car at the end of the building. When the last customer had gone, the Volkswagen was backed across the lot and parked at the gasoline pumps. There were two men in the car. One came into the store and one stayed at the car. The one who came in the store was later identified as Moore and the one who stayed outside at the pumps was later identified as defendant. Moore told Mrs. Sudbury that he wanted $1.50 worth of gas and she activated the computer which controlled the amount of gas flowing from the pump, but the console clicked off before the requested amount of gas had been pumped and Mrs. Sudbury pointed this out to Moore. Moore went over to the console where she was standing and looked at it. He then pulled a small handgun from his pocket, pointed it at her, and told her to open the cash register. As she was doing this she noticed that defendant was coming across the parking lot. He came into the store and stood beside Moore, approximately three feet from Mrs. Sudbury. Moore told Mrs. Sudbury to go to the back of the store. As she was walking to the back of the store she glanced at the counter and saw defendant with one hand in the cash register drawer and the other, poised above it clutching bills. Moore locked Mrs. Sudbury in the cooler. Through a window in the cooler, she watched them leave the store. She then let herself out of the cooler and called the sheriff. While making the call, she saw them leave the parking lot in the orange Volkswagen.

Some 15 minutes later, the Volkswagen was stopped about four miles from the store. Defendant was driving and Moore was seated on the passenger's side in the front. The officers found a small, loaded .22 handgun protruding from under the seat of the car. Later, defendant consented to a search of the car, and $104 was found in a compartment under the back seat directly behind the driver's seat. This was exactly the amount taken from the store.

Defendant's evidence tended to show: He and Moore were in the 82nd Airborne Division, Infantry, stationed at Fort Bragg. They had agreed to get defendant's family together with Moore and his girl friend during the day. Moore asked defendant to drive him on an errand and after they had driven a considerable distance, defendant decided he needed gasoline. They stopped at the 7-11, and Moore went inside to tell the clerk how much gas they wanted. When the pump clicked off before it had pumped the requested amount, defendant went in the store to investigate and found Moore conducting a robbery. He denied knowing anything about Moore's plan to rob the store and said the money Mrs. Sudbury saw in his hand was the money for the gasoline. He drove the car after the robbery only because Moore directed him to. Defendant's wife testified that Mrs. Sudbury told her that she paid no attention to the second man involved.

There was clear identification evidence and the defendant does not contest the identification procedure.

The jury found defendant guilty, and he appeals from judgment entered on the verdict.

Attorney General Edmisten, by Elizabeth R. Cochrane, Associate Attorney, for the State.

Daniel T. Perry III, for defendant appellant.

MORRIS, Judge.

[1] On appeal defendant first contends that the court erred in allowing Detective Burns to testify that the gun found in the car would fire, because the witness was not an expert. "To be an expert the witness need not be a specialist or have a license from an examining board or have had experience with the exact type of subject matter under investigation, nor need he be engaged in any particular profession or other calling.

It is enough that, through study or experience, or both, he has acquired such skill that he is better qualified than the jury to form an opinion on the particular subject." 1 Stansbury, N. C. Evidence (Brandis Rev.), § 133, at 429. Here the witness testified that he was a first sergeant in the Infantry for 20 years and had examined pistols thousands of times. While the court did not expressly find the witness to be an expert, he did allow him to give his opinion. By admitting the testimony, the court presumably found him to be an expert. *State v. Jenerett,* 281 N.C. 81, 187 S.E. 2d 735 (1972). The evidence was sufficient to support a finding of expertise. This assignment of error is overruled.

[2] Toward the close of his jury argument, the solicitor stated:

> "Ladies and gentlemen, you know that we have been having a great many of these type robberies of convenience stores here in our county, and we've got to do something about it to put a stop to it."

Defendant objected, and the court sustained the objection and instructed the jury not to consider the remark, that this case was to be decided on the evidence heard by them about this particular case and not what happened at some other time. Conceding that the solicitor's remark was improper, nevertheless any error was cured by the court's prompt instruction to the jury to disregard it followed by an instruction that they were to decide this case only on the evidence in this case and not to consider what might have happened at some other time and place. The manner of conducting the argument of counsel must be left largely to the discretion of the trial judge.

> " 'It is only in extreme cases of the abuse of the privilege of counsel, and when this is not checked by the court, and the jury is not properly cautioned, this Court can intervene and grant a new trial.' " (Citation omitted.) *State v. Barefoot,* 241 N.C. 650, 657, 86 S.E. 2d 424 (1955).

The two remaining assignments of error are directed to the charge of the court to the jury. The purported exceptions do not point out the particular portions of the charge to which defendant objects, nor do the assignments of error indicate what defendant contends the court should have charged. Suffice it to

say, our examination of the court's instructions do not reveal prejudicial error.

No error.

Judges BROCK and BRITT concur.

STATE OF NORTH CAROLINA v. SAMMY McMILLIAN

No. 7512SC686

(Filed 7 January 1976)

1. **Criminal Law § 29— mental capacity to stand trial — determination by court**

The mental capacity of defendant to plead to the bill of indictment and to aid in the preparation and conduct of his defense was a preliminary question to be decided by the trial judge prior to trial and in the absence of prospective jurors, and the court's findings in this case supported its conclusion that defendant was mentally competent to stand trial.

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

The trial court's instructions as to procedures for restraint in the event of a verdict of not guilty by reason of insanity were inaccurate and could have caused the jury to find defendant guilty because they believed an insanity acquittal would free in a short time one who was dangerous to society.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 22 May 1975 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 20 November 1975.

Before pleading to charges of (1) assault with intent to rape and (2) common law robbery the defendant made a motion for a hearing to determine the mental capacity of the defendant to stand trial and for a jury determination of this question. The trial court denied determination by a jury and conducted a hearing in which the defendant and two jail inmates testified. Defendant's testimony tended to show he had been confined in Dorothea Dix Hospital three times; that he knew that he was charged with attempted rape and robbery; that he grabbed the lady and started beating up on her, took her pocketbook and ran; that since his release from Dorothea Dix Hospital a year ago he had been taking medicine prescribed at the hos-

pital; that when he did not take the medicine his thinking got messed up and he could not work or eat. One of the jail inmates testified that on occasions the defendant would suddenly yell, dance and laugh; on several occasions he had threatened suicide but that he did understand the charges against him. The other jail inmate testified that he considered the defendant normal. The trial judge made findings of fact and concluded that the defendant had the mental capacity to plead to the charges and was able to stand trial.

The defendant pled not guilty and not guilty by reason of insanity to the charges. The evidence for the State tended to show that on 29 March 1974, Mary Taylor was employed by the Salvation Army in Fayetteville and that the defendant had been working there for several days in exchange for welfare assistance; that on this morning she unlocked the building and the defendant followed her inside where he grabbed her from behind and hit her on the head, knocking her to the floor. He fell on top of her and began clawing at her clothes; he rejected her offer of money and stated that he was going to have sexual intercourse with her. After a struggle in which the defendant beat her about the face and body, she managed to escape and run from the building. Defendant took her purse and fled.

The defendant testified relative to his treatment for mental illness at Dorothea Dix; he admitted that he had attacked Mary Taylor but denied that he intended to have sexual intercourse with her. Attorney Don Grimes testified that in 1973 when he was with the Public Defender's Office, he had represented the defendant on the charge of forcible trespass and that the defendant was "clearly the least in touch with reality of all the ones that I have represented." Two fellow jail inmates testified concerning defendant's erratic behavior. The jury returned verdicts of guilty of assault with intent to commit rape and misdemeanor larceny. From a judgment imposing concurrent prison sentences, the defendant appeals.

Attorney General Edmisten by Assistant Attorney General Ann Reed for the State.

Public Defender James D. Little for defendant.

CLARK, Judge.

[1] The defendant assigns as error the ruling of the trial court that the defendant was mentally competent to stand trial and the ruling of the court that this determination be made by the trial judge rather than the jury.

A defendant's mental capacity to plead to a bill of indictment and to aid in the preparation and conduct of his defense is a preliminary question to be decided by the trial judge prior to the trial and in the absence of prospective jurors. *State v. Thompson,* 285 N.C. 181, 203 S.E. 2d 781 (1974). The test is whether the defendant has the capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner and to cooperate with his counsel to the end that any available defense may be interposed. *State v. Propst,* 274 N.C. 62, 161 S.E. 2d 560 (1968).

The facts found and the conclusions drawn from them by the trial judge are supported by the evidence. This assignment of error by the defendant is not sustained.

[2] The defendant assigns as error the following instructions given by the judge in his charge to the jury:

> ". . . Should you bring back a verdict that he was insane at the time, then there will be a further inquiry made by another jury as to whether or not he is insane at this time; that is, at the time the other jury is empaneled to determine his sanity. And depending on what that jury finds, he can be committed for up to but not to exceed ninety days, or not committed at all, if they find that he is sane."

The evidence does not reveal that either the State or the defendant requested that the jury be instructed relative to what happens to the accused if the jury found him not guilty by reason of insanity. The propriety of giving such an instruction was recently discussed by this Court in *State v. Sellers,* 26 N.C. App. 51, 214 S.E. 2d 790 (1975). In that case we pointed out that North Carolina follows the majority view that the jury is not concerned with punishment or what happens to the accused after verdict, but is only concerned with matters bearing on guilt or innocence.

While the circumstances of a particular case may justify, or require, that the trial court instruct the jury as to procedures for restraint in the event of a verdict of not guilty by reason of insanity, the instructions must be in proper form and must accurately describe the law governing these procedures for restraint. The foregoing instructions of the trial court do not accurately describe the procedures as set out in G.S. 122-84.1.

Sub judice, there was strong evidence that the defendant was not mentally competent. It appears from the record on appeal that after some deliberation, the jury returned to the courtroom and informed the court that the jury was divided on the question of whether the defendant was not guilty by reason of insanity. We conclude that in the light of the evidence in this case the instructions of the trial judge quoted above were inaccurate and could have caused the jury to find the defendant guilty for the reason that an insanity acquittal would free in a short time one who was dangerous to society.

New trial.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. SAMUEL SHERRILL

No. 7519SC634

(Filed 7 January 1976)

Homicide § 24— instructions — gunshot wounds as cause of death

The trial court in a homicide case erred in failing to instruct the jury that before it could find defendant guilty of manslaughter, it must find that the victim's death resulted proximately from the gunshot wounds inflicted by defendant.

APPEAL by defendant from *Crissman, Judge.* Judgment entered 30 April 1975 in Superior Court, CABARRUS County. Heard in the Court of Appeals 13 November 1975.

The defendant was charged in a bill of indictment, proper in form, with the second degree murder of Edward Redfern. Upon a plea of not guilty, the State offered evidence tending to show:

In the early morning of 27 April 1974, the defendant and Janie Sibby went to Edward Redfern's house at 344 Lincoln Street in Concord, North Carolina. Around 9:00 a.m., the defendant and Redfern got into an argument over Janie, who was supposed to be Redfern's girlfriend. They went outside and Redfern pulled a knife on the defendant. The defendant, then pulled out a .38 Mizzer and shot Redfern five or more times. He then went inside, told Janie he had shot Redfern, and asked Janie to drive him home, which she did. Defendant was later arrested and confessed.

After the shooting, Redfern was taken to Cabarrus Memorial Hospital. He had extensive abdominal wounds requiring three hours of surgery and treatment for shock before his condition finally stablized. He remained in the hospital until 20 May 1974 when he was released. On 27 May 1974 he returned to the hospital, with extensive internal bleeding. He was given massive transfusions of blood, but his condition worsened until he died on 7 June 1974. Subsequent examinations and an autopsy were performed. Although there was evidence of other scars and injuries, particularly eleven "hemorrhagic uclers" in the deceased's stomach, it was the opinion of the two qualified physicians that the cause of death was the damage done to the intestines and abdomen by the gunshot wounds.

The defendant admitted the shooting, but he contended that when Redfern pulled the knife, he ran until his "legs give out" and that Redfern chased him threatening him with the knife. At the time he shot Redfern, Redfern would not let him get to his car. The defendant, through cross-examination of the two physicians, also offered evidence that forty-one days had elapsed from the time of the shooting and Redfern's death, that at least some of the wounds from the gunshots had healed, and that there was evidence of other injuries on and in the deceased at the time of death.

From a verdict of guilty of voluntary manslaughter and judgment imposing a prison sentence of five to seven years, defendant appealed.

Attorney General Edmisten by Special Deputy Attorney General Edwin M. Speas, Jr., and Assistant Attorney General Richard F. Kane for the State.

Davis, Ford and Weinhold by Robert M. Davis for defendant appellant.

HEDRICK, Judge.

The principal assignments of error brought forward and argued by the defendant relate to the charge. We are unable to distinguish the instructions challenged by these assignments of error from the instructions declared by our Supreme Court in *State v. Ramey,* 273 N.C. 325, 160 S.E. 2d 56 (1968), to be erroneous and prejudicial. In *Ramey,* the defendant was charged with second degree murder and convicted of voluntary manslaughter. There the evidence tended to show that Ramey shot the deceased who expired a few hours later as a proximate result of the gunshot wounds inflicted by the defendant. In *Ramey,* the defendant contended that he acted in self-defense when he shot the deceased.

After general instructions and a review of the evidence of the State and the defendant, the court declared and explained the elements of second degree murder and manslaughter. The court explained the circumstances under which it would be the jury's duty to find the defendant guilty of second degree murder. Thereafter, the court charged the jury that if it found the defendant not guilty of second degree murder, it would be their duty to determine whether he was guilty of manslaughter.

Proximate cause is an element of second degree murder *and* manslaughter. If the jury did not find from the evidence and beyond a reasonable doubt that Redfern's death resulted proximately from the gunshot wounds inflicted by the defendant, it could not convict him of either offense. Nowhere in the charge did the judge declare and explain that before the jury could find the defendant guilty of manslaughter, it must find that Redfern's death was proximately caused by the gunshot wounds inflicted by the defendant. The charge with respect to manslaughter and self-defense presupposes that Redfern's death was caused by the gunshot wounds. If the jury followed the charge, it was bound to find the defendant guilty of manslaughter unless it found he acted in self-defense. The defendant was entitled to an explicit instruction that the burden was on the State to satisfy the jury from the evidence and beyond a reasonable doubt that the defendant intentionally shot and wounded Redfern and that his death was proximately caused by such wounds. The necessity for such an instruction was not obviated by the presence of plenary evidence to support such a finding. *State v. Ramey, supra.*

The State's contention that the charge when considered contextually as a whole is without error is untenable. The mere statement by the court that the defendant contended that Redfern's death was not proximately caused by the gunshot wounds in face of the court's failure to give an explicit instruction with respect to the element of proximate cause magnifies the error rather than curing it. No statement of the defendant's contentions regarding proximate cause could remove the prejudicial effect of the presumptions made in the charge with respect to manslaughter and self-defense that the defendant fired "the fatal shot" or "killed" Redfern in self-defense. Moreover, the recital of the defendant's contentions in this regard in the absence of an explicit instruction regarding the element of proximate cause, in our opinion, carries a clear implication that the burden was on the defendant to prove that Redfern's death was not proximately caused by the wounds inflicted by the defendant.

Since there must be a new trial, it is not necessary that we discuss defendant's other assignments of error.

For error in the charge, the defendant is entitled to a

New trial.

Chief Judge BROCK and Judge CLARK concur.

STATE OF NORTH CAROLINA v. JOHN JUNIOR SMITH

No. 7529SC669

(Filed 7 January 1976)

Assault and Battery § 15— instructions as to burden of proof — no error

In a prosecution for assault with a deadly weapon with intent to kill, inflicting serious injury, the trial court's instructions did not place upon the defendant the burden of proving that he acted in self-defense, but squarely placed upon the State the burden of proof of each element of the offense.

APPEAL by defendant from *Friday, Judge.* Judgment entered 21 May 1975 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 19 November 1975.

Defendant was charged in a bill of indictment with the felony of assault upon Charlie Williams with a deadly weapon with intent to kill, inflicting serious injury. The jury found defendant guilty of an assault upon Charlie Williams with a deadly weapon, inflicting serious injury, a felony under G.S. 14-32(b). He was sentenced to imprisonment for a term of not less than six nor more than ten years.

The State's evidence tends to show that Charlie Williams went to defendant's trailer residence and bought a drink of whiskey from defendant. Shortly thereafter defendant offered to sell Williams another drink. As Williams swallowed the second drink, it tasted bitter; it had been doped. Williams sat for a few minutes and fell out of the chair. When Williams revived, defendant was running his hands through Williams' pocket. Defendant took Williams' money, Williams kicked defendant, and defendant shot Williams through the neck. Defendant told the investigating officer that he shot Williams while Williams was lying on the floor. Defendant did not mention to the officer that Williams had a knife. Defendant had the pistol in his right front pocket when the officer arrived at the scene after the shooting.

Defendant's evidence tends to show that he and Williams were drinking bay rum in defendant's trailer and that Williams demanded that defendant give him a ride to town. An argument ensued, and Williams attacked defendant with a knife. Defendant shot Williams as Williams struck at defendant with the knife.

Attorney General Edmisten, by Associate Attorney Elisha H. Bunting, Jr., for the State.

Hamrick, Bowen & Nanney, by Louis W. Nanney, Jr., for the defendant.

BROCK, Chief Judge.

Defendant argues that the trial judge instructed the jury that defendant had the burden of proving that he acted in self-defense. Defendant cites *Mullaney v. Wilbur,* 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508 (1975). In our view the principles of *Mullaney* have no application to the instructions in the case now before us. It has long been the rule in North Carolina that a defendant, in cases not involving homicide, does not have the burden of satisfying the jury that he acted in self-defense.

The trial judge clearly and unequivocally instructed the jury at least seven times during the charge that the burden of proof was upon the State to satisfy the jury beyond a reasonable doubt of the guilt of defendant. At no point was a burden of proving anything placed upon the defendant.

After explaining defendant's right to act in self-defense, the trial judge instructed:

> "Now, if you find that the defendant properly acted in self-defense and are satisfied to (sic) this, Members of the Jury, then he would not be guilty of any offense, he would not be guilty of the first issue or any lesser included offense, Ladies and Gentlemen."

Later in the charge the trial judge instructed:

> "If you fail to so find or if you have a reasonable doubt as to one or more of the essential elements of this lesser offense, you should find the defendant not guilty and your verdict on the second issue would be not guilty, or if you believe that he acted in self-defense, as the Court has instructed you thereon, Members of the Jury, then you would find him not guilty of any offense, Ladies and Gentlemen, if you find that he properly acted in self-defense on the occasion in question."

Defendant's argument is that the foregoing instructions placed upon defendant the burden of proving that he acted in self-defense. We do not agree. The burden of proof of each element of the offense having been squarely placed upon the State, we do not envision that the foregoing instructions could have conveyed to the jury an impression that defendant was required to prove anything.

Defendant's remaining assignment of error relates to the admission of evidence. We have carefully reviewed this in the light of all the evidence and conclude that no prejudicial error has been shown.

No error.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. WILLIAM MICHAEL ORR

No. 7526SC649

(Filed 7 January 1976)

Constitutional Law § 31— informant who participated in crimes — disclosure of identity

In a prosecution for distribution and possession of heroin, the trial court erred in failing to require disclosure of the identity of an informant where the evidence tended to show that the informant was a participant and helped to set up the commission of the crime.

APPEAL by defendant from *Falls, Judge.* Judgment entered 1 May 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 14 November 1975.

Defendant was tried on bills of indictment charging him with the felonies of (1) distribution and (2) possession of heroin.

The State offered evidence which tended to show that on or about 8 August 1974, W. E. Tadlock, a Mecklenburg County police officer doing undercover drug investigation, went to the home of defendant accompanied by an informant. Upon his arrival, the officer either "blowed the horn for him to come outside or the informant went to the door and got him," Tadlock could not remember which. In any event, the defendant came outside and got in the back seat of the "undercover car." The defendant asked Tadlock if he was the one who wanted the drugs or something to that effect. When Tadlock responded in the affirmative, defendant told him that he did not have any drugs on him, that Tadlock would have to take him somewhere to get them.

The trio went to a house, known by the officer to be the residence of a "heroin dealer." Tadlock gave defendant $24.00 for two bags of heroin and when defendant returned from the house, he gave the officer two "foil bags" and put approximately four others in his pocket.

The contents of the foil bags given to Tadlock were examined by a chemist and found to be heroin.

The defendant's evidence tends to show the following:

On the date in question, he was in bed at his parents' house when the informant came into the bedroom and told him that he

was sick and needed some drugs. Defendant had seen the informant before, knew that he was a user of drugs, was aware that the informant knew of defendant's participation in a Methodone Maintenance program but defendant did not know the informant's real name. The informant said that he had been trying to buy drugs all day, unsuccessfully, and wanted defendant to make a purchase for him. Defendant was first introduced to Tadlock when he and the informant left the house and went out to Tadlock's automobile, which was parked in the driveway. Defendant directed the officer to a house where he thought he might be able to make a drug purchase. Tadlock wanted 2 bags and the informant wanted 2 bags. They gave him the money to make the purchase. Defendant paid $48.00 for the four bags of heroin, returned to the automobile and gave Tadlock two bags and the informer two bags. Defendant made no profit from the exchange. Tadlock thereafter returned the defendant to his home.

At the time these events took place, defendant was participating in a Methodone Maintenance program attempting to overcome his former addiction to heroin.

Defendant's aunt was in the Orr family home that night and answered the door when the informant asked to speak to defendant. She also observed another individual waiting in an automobile in the driveway.

Defendant's mother testified that she was at home, and her sister was visiting on the night of 8 August 1974. She heard the doorbell ring but didn't see anyone. Mrs. Orr further testified that she was familiar with her son's drug problem and that he had made some effort to overcome that problem and that he no longer uses drugs.

From a verdict of guilty as charged in each bill of indictment and the imposition of an active sentence, defendant appealed.

Attorney General Edmisten, by Special Deputy Attorney General T. Buie Costen, for the State.

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

VAUGHN, Judge.

The defendant's first assignment of error relates to the trial court's refusal to require the State to identify the informant and issues that surround that refusal.

From the early stages of the trial, defendant attempted to secure disclosure of the informant's identity. The trial court refused to require the State to reveal the informant's name or address and would not allow questions seeking information as to his background or motivation for participation in the scheme.

The defendant persuasively argues that the informant in this case was not a mere tipster, but instead, was a material witness and a major participant. Additionally, he points out that the informer was the only one who might resolve conflicts between defendant's testimony and that of the officer. Defendant contends that in this case, disclosure is necessary to his defense of entrapment, and is required by authority of *Roviaro v. U.S.*, 353 U.S. 53, 1 L.Ed. 2d 639, 77 S.Ct. 623, and *McLawhorn v. North Carolina*, 484 F. 2d 1. We agree.

The government's privilege to withhold disclosure of an informer's identity must give way, where the disclosure of his identity, or of the contents of his communication is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause. *Roviaro, supra.*

The courts have placed great emphasis on determining whether an informant may be classified as a "tipster" or a "participant." These classifications seem to be based on the nature of the informers' activities. The "tipster" is one who supplies law enforcement officers with leads and information while the "participant" is one who takes some active part in the commission of the offense.

As stated in *McLawhorn*, ". . . [t]he privilege of nondisclosure ordinarily applies where the informant is neither a participant in the offense, nor helps set up its commission, but is a mere tipster who only supplies a lead to law investigating and enforcement officers. (Citing cases.)"

In the instant case, the evidence tends to show that the informant was a participant and helped to set up the commission of the offense.

The defendant's evidence, when taken as true, would tend to show that it was at the informant's urging that defendant

had any contact with these drugs at all, that he made the initial face to face contact with defendant, that the informant arranged the sale, purchased some of the drugs with his own funds and in general, helped engineer the events leading up to the crime.

By virtue of his participation, the informer is ". . . a witness to material and relevant events." ". . . [o]ne of the factors tending to show that the prosecution is not entitled to withhold from the accused information as to the identity of an informant is the qualification of the informant to testify directly concerning the very transaction constituting the crime." *McLawhorn, supra.* Defendant was entitled to have access to the informer as a potential witness. The court's failure to require that the identity of the informer be disclosed requires a new trial.

Defendant has brought forward other assignments of error, some of which appear to have merit. We need not discuss them here, however, because they may not recur at the next trial.

New trial.

Judges BRITT and ARNOLD concur.

STATE OF NORTH CAROLINA v. LARRY WILLIAMS

No. 7520SC664

(Filed 7 January 1976)

1. Criminal Law §§ 9, 113— instructions on aiding and abetting — supporting evidence

In a prosecution for breaking and entering and larceny, the trial court's instruction that the jury might find defendant guilty as an aider and abettor was supported by evidence of defendant's in-custody statement that he accompanied his friends to the vicinity where the crimes were committed, he obtained and furnished the automobile which carried them there, he waited in the car while they broke into a school and until they returned with stolen property, he assisted them in spraying paint on the stolen machines, and he accompanied them while they attempted to pawn one of the machines.

2. Criminal Law § 9— aider and abettor — trial before conviction of perpetrators

It is not necessary that the actual perpetrator of the crime be tried and convicted, or even named in the indictment, before one who aided and abetted can be tried and convicted.

3. Criminal Law § 139— committed youthful offender — minimum and maximum terms

The imposition of a minimum and maximum sentence on a committed youthful offender is inconsistent with G.S. 148-49.8 and G.S. 148-49.4 since only a maximum term should be imposed.

APPEAL by defendant from *Long, Judge.* Judgment entered 29 April 1975 in Superior Court, MOORE County. Heard in the Court of Appeals 18 November 1975.

Defendant was indicted for (1) the felonious breaking and entering of Aberdeen Elementary School and (2) the felonious larceny therefrom of a calculator, electric typewriter, movie projector, and other personal property of the Moore County Board of Education. He pled not guilty.

The State's evidence showed: On the night of 17 January 1975 the Aberdeen Elementary School was broken into and an electric typewriter, calculator, movie projector and an autoharp having a fair market value of about $1800.00 were taken. On the following day a deputy sheriff of Cumberland County arrested defendant as he came out of a pawn shop in Fayetteville where he had just pawned the calculator. After defendant was advised of his constitutional rights, he made a statement to a Moore County deputy sheriff. Defendant told the officer that on the night of 17 January 1975 he borrowed his sister-in-law's car and drove two friends down Keyser Street in Aberdeen, parking on a dirt road near a path leading from the school; defendant remained in the car while his two friends went into the school; his friends returned with the office equipment, which they put in the trunk of the car; the next day they sprayed paint on the machines to cover up the school name; they then went to Fayetteville, where defendant was picked up at the pawn shop.

Defendant testified and denied making any statement to the officer. He testified that on 18 January 1975 he rode with his sister-in-law and with two friends to Fayetteville, but they did not tell him why they were going there; when they arrived, his friends tried to pawn the calculator in a pawn shop but were not successful; at another pawn shop, defendant followed

his two friends into the shop, where one of his friends pawned the calculator; defendant's friends left the pawn shop before he did; when he came out, his friends were gone and defendant was then arrested.

The jury found defendant guilty of both offenses. The charges were consolidated for judgment, and defendant was sentenced for the term of not less than four nor more than five years as a committed youthful offender. Defendant appealed.

Attorney General Edmisten by Assistant Attorney General Poe, Jr., for the State.

P. Wayne Robbins and Bruce T. Cunningham, Jr., for defendant appellant.

PARKER, Judge.

[1] In his brief the defendant brings forward but one question. He contends the court erred in charging the jury that the defendant could be found guilty if the jury should find either that he committed the offenses himself or that he aided and abetted others in committing the crimes with which he was charged. In support of this contention he argues, first, that there was no evidence indicating that he rendered aid or encouragement to other perpetrators of the crime, and second, that since no co-defendants were tried with him, the court should not have charged the jury that he could be found guilty of aiding and abetting other unknown persons. As to the first argument, the evidence of defendant's own statement to the officer would show that he accompanied his friends to the vicinity where the offenses were committed, that he even obtained and furnished the automobile which carried them there, that he waited in the car while they broke into the school and until they returned with the stolen property, that he assisted them in spraying paint on the stolen machines, and that he accompanied them while they attempted to pawn one of the machines. This evidence was amply sufficient to warrant the court in instructing the jury that they might find defendant guilty as an aider and abettor. "To be guilty as an aider and abettor, a defendant's actual presence is not necessary as he may be constructively present." *State v. Torain,* 20 N.C. App. 69, 70, 200 S.E. 2d 665, 666 (1973). One who, with knowledge that another intends to commit a crime, accompanies the actual

perpetrator to the vicinity of the offense and, with the knowledge of the actual perpetrator, remains in the vicinity for the purpose of aiding or abetting in the offense and sufficiently close to the scene of the offense to render aid in its commission, if needed, or to provide a means by which the actual perpetrator may get away from the scene upon the completion of the offense, is a principal in the second degree and equally liable with the actual perpetrator. *State v. Price,* 280 N.C. 154, 184 S.E. 2d 866 (1971).

[2] As to the defendant's second argument, it is not necessary that the actual perpetrators of the crime be tried and convicted, or even named in the indictment, before the one who aided and abetted can be tried and convicted. *State v. Beach,* 283 N.C. 261, 196 S.E. 2d 214 (1973).

[3] We find no error in the trial. However, we note that by judgment entered the defendant was sentenced as a committed youthful offender for the term of not less than four nor more than five years. The imposition of a minimum and maximum sentence appears inconsistent with G.S. 148-49.8, *State v. Satterfield,* 27 N.C. App. 270, 218 S.E. 2d 504 (1975) and with G.S. 148-49.4 which deals with the sentencing of a youthful offender and which provides that "[a]t 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." (Emphasis added.) Accordingly, the judgment entered is vacated and this case is remanded for imposition of a sentence consistent with Article 3A of G.S. Ch. 148.

Vacated and remanded.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. DAVID HENRY SHORES AND CHARLES DAVON HUGHES

No. 7518SC690

(Filed 7 January 1976)

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

Evidence was sufficient to be submitted to the jury in a second degree murder prosecution where such evidence tended to show that

one defendant and deceased engaged in an argument, defendant pulled a knife on deceased after which deceased pulled a knife on defendant, defendant moved over to a parked car where another defendant, who was in the car, handed him a pistol, defendant fired some shots in the direction of deceased, deceased chased defendant, defendant ran a short distance and then turned and shot deceased, and defendant then got into the car with the defendant who had given him the pistol and left the scene.

2. **Homicide § 28— abandoning fight — jury instructions proper**

The trial court's instructions in a second degree murder prosecution on abandoning the fight were sufficient.

3. **Homicide § 24— provocation and self-defense — burden of proof — jury instructions**

The trial court's charge instructing the jury that defendants had the burden of proving provocation and self-defense was not invalidated by *Mullaney v. Wilbur*, 421 U.S. 684, since that decision applies only to trials conducted on or after 9 June 1975, and the instant case was tried in March of 1975.

APPEAL by defendants from *McConnell, Judge*. Judgment entered 13 March 1975 in Superior Court, GUILFORD County. Heard in the Court of Appeals 20 November 1975.

By separate indictments, defendants were charged with the murder of Lee Martin Hammonds (Martin) and, without objection, the cases were consolidated for trial. The State elected not to seek verdicts of first-degree murder but asked for verdicts of second-degree murder or such lesser offense as might be appropriate. Both defendants pled not guilty.

The State's evidence, summarized in pertinent part, tended to show:

At approximately 9:30 p.m. on 11 November 1974, Martin, his wife, his brother Deanie, and other relatives were on the premises of the G & H Restaurant and the Amber Room, a beer joint on English Street in the City of High Point. While outside and near the Amber Room, Deanie encountered defendant Shores who began cursing Deanie and invited him to fight. Deanie returned to the Amber Room and told Martin about the encounter, after which Martin came out and he and defendant Shores began cursing each other. Martin told defendant Shores if he was going to fight anybody to fight him. Defendant Shores pulled a knife on Martin after which Martin pulled a knife and they proceeded to curse and swing their knives at each other. Defendant Shores moved on over to a parked

car where defendant Hughes, who was in the car, handed him a pistol. Defendant Shores fired the pistol three or four times in the direction of Martin and his relatives who were standing near him. That made Martin mad and he began running toward defendant Shores who ran a short distance in the opposite direction, then turned and shot Martin in the left temple, inflicting a mortal wound. Defendant Shores then got in the car with defendant Hughes and they left the scene.

Defendant Shores offered no evidence. Defendant Hughes offered evidence tending to show: On the night in question, as defendant Shores and a friend were going into the Amber Room, Martin came out of the building, falsely accused Shores of calling his brother names, and threatened to kill Shores. Martin pulled out a knife and said, "You and all your friends come on," swung the knife at Shores, and started chasing Shores toward the car. Several shots were fired (defense witnesses did not see who fired the shots or in what direction they were fired) and Martin, with the knife in his hand, continued chasing Shores. Finally Shores stopped running, turned around and shot Martin.

The court instructed the jury that they might return verdicts of second-degree murder, voluntary manslaughter, involuntary manslaughter, or not guilty. Both defendants were found guilty of second-degree murder. As to defendant Shores, the court entered judgment imposing prison sentence of not less than 12 nor more than 15 years. As to defendant Hughes, it entered judgment imposing prison sentence of not less than 5 nor more than 10 years.

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

Clara Anne Williamson for defendant appellant Charles Davon Hughes.

Assistant Public Defender Richard S. Towers for defendant appellant David Henry Shores.

BRITT, Judge.

The case against defendant Hughes was properly submitted on the principle of aiding and abetting. The court instructed the jury, in effect, that they would first determine if defendant Shores was guilty of either of the offenses submitted, and,

if so, they would then determine if defendant Hughes was guilty as an aider and abettor. That being true, both defendants argue the same basic questions.

[1] Defendants' assignment of error that the court erred in denying their motions for nonsuit as to all charges are clearly without merit and are overruled. Likewise, we find no merit in the assignment that the cases should not have been submitted on second-degree murder. Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation. 4 Strong, N. C. Index 2d, Homicide § 5. Considering the evidence in the light most favorable to the State, as we are bound to do, we hold that it was sufficient to support a verdict of murder in the second degree.

[2] Defendants' strongest assignments of error relate to the court's instructions to the jury. Among these, they contend that the court, on at least one occasion when it referred to the question of whether defendant Shores was the aggressor and whether he used excessive force, committed prejudicial error when it did not go further and instruct on the principle of abandoning the fight. We find no merit in the assignments.

While agreeing that the question of abandoning the fight or "quitting the combat" was vital to defendants in this case, when the jury charge is considered as a whole, and the challenged instruction is considered contextually, we think defendants were given a fair charge. Defendant Hughes specifically requested that the court read from the opinion in *State v. Correll,* 228 N.C. 28, 44 S.E. 2d 334 (1947). The court did so and gave other instructions on the principle of abandoning the fight. On two occasions after giving the instruction complained of—which came near the end of the charge—the court repeated defendants' contention that defendant Shores did not cause the altercation, but, if he did, he had abandoned the fight before shooting Martin. If the jury charge taken as a whole presents the law fairly and clearly, the fact that some statements, standing alone, might be considered erroneous will afford no ground for reversal. *State v. Lee,* 277 N.C. 205, 176 S.E. 2d 765 (1970).

[3] Defendants assign as error portions of the charge instructing the jury that defendants had the burden of proving provocation and self-defense, and rely on *Mullaney v. Wilbur,* 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (filed 9 June 1975). Questions raised by this assignment were answered by our

State Supreme Court in *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575, (filed 17 December 1975). While conceding that *Mullaney* invalidates instructions similar to those challenged by this assignment, the court in *Hankerson* ruled that *Mullaney* will not be given retroactive effect in North Carolina and will apply only to trials conducted on or after 9 June 1975. The instant case was tried in March of 1975.

We have considered the other assignments of error brought forward and argued in defendants' briefs but find that they too are without merit.

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

No error.

Chief Judge BROCK and Judge MORRIS concur.

BOARD OF TRANSPORTATION v. FRANCES E. HARVEY AND HUSBAND, ELMER A. HARVEY

No. 7528SC494

(Filed 7 January 1976)

Eminent Domain § 5— taking of part of tract — proper measure of damages

The trial court in a condemnation proceeding properly instructed the jury that the measure of damages was "the difference between the fair market value of the entire tract immediately prior to the taking, and the fair market value of the remainder immediately after said taking," and that " . . . when you arrive at the difference in value under this rule, it will include compensation for the part taken and compensation for injury, if any, to the remaining portion." G.S. 136-112.

APPEAL by defendants from *Grist, Judge.* Judgment entered 10 February 1975 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 24 September 1975.

Plaintiff, State Highway Commission (now Board of Transportation), condemned and appropriated a portion of defendants Harvey's land in Buncombe County pursuant to the authority vested in plaintiff under the provisions of Chapter 136 of the General Statutes and pursuant to a resolution of

said Commission duly passed. Plaintiff deposited $2570 as just compensation and brought this action in court for determination of damages.

Defendants Harvey filed an answer alleging that they have been damaged in excess of the amount of the deposit and asked that a jury determine the damages for the lands taken and to the lands remaining after the taking.

The defendant Elmer A. Harvey offered evidence to the effect that the lands taken were part of a tract that he used for the purpose of operating a cottage and mobile home rental business. The cottages and mobile homes were owned by him and his wife and all were rented to tenants. In his opinion the highest and best use of the property was as a mobile home park. Prior to the taking, defendants' property was served by two roads which formed a complete loop around their property so that access to the cottages and mobile homes could be had from two directions and traffic into and from their property could travel "both ways." Prior to the taking, mobile homes could be taken onto or removed from the property by use of the southernmost of the two roads. The northernmost of the two roads was not wide enough for passage of a mobile home. As a result of the taking, the construction, and lowering of the highway in front of the property, the southernmost road into and upon the property was cut off and that end of the loop was "dead-ended" by an embankment. Whereas there had been a complete loop around and through the property, there was only a one-lane, dead-end road into the remaining lands. Defendant Elmer A. Harvey testified that the taking had reduced the market value of his property by $17,500. Hubert Redmond, a real estate appraiser, testified for defendants that the diminution in market value had been $16,650.

Plaintiff offered testimony of three real estate appraisers who testified that the market value of defendants' property had been reduced by $3,809, $4,300, and $3,500.

The jury found that defendants were entitled to recover $8,000 for the taking of their property. After the trial, defendants moved for a new trial on the ground of newly discovered evidence and for other reasons. The court denied the motion for a new trial, and defendants appealed.

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

Morris, Golding, Blue & Phillips, by William C. Morris, Jr., for defendant appellants.

MARTIN, Judge.

Defendants contend that the court erred in failing to declare and explain the law arising on the evidence in this case as required by G.S. 1-180.

"The chief purpose of a charge is to aid the jury to understand clearly the case, and to arrive at a correct verdict. For this reason, this Court has consistently ruled that G.S. 1-180 imposes upon the Trial Judge the positive duty of declaring and explaining the law arising on the evidence as to all the substantial features of the case. A mere declaration of the law in general terms and a statement of the contentions of the parties . . . is not sufficient to meet the statutory requirement." *Glenn v. Raleigh,* 246 N.C. 469, 98 S.E. 2d 913 (1957).

In the case before us, the issue was the amount of damages the defendants were entitled to recover. The court instructed the jury that the ". . . compensation must be full and complete, and include everything which affects the value of the property taken and in relation to the entire property affected." The court further instructed the jury that the measure of damages was "the difference between the fair market value of the entire tract immediately prior to the taking, and the fair market value of the remainder immediately after said taking," and that ". . . when you arrive at the difference in value under this rule, it will include compensation for the part taken and compensation for injury, if any, to the remaining portion." The charge used by the trial court as to the measure of damages was in substantial compliance with G.S. 136-112 and with numerous decisions of our Supreme Court.

> "Where only a part of a tract is taken, the measure of damages . . . shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking, with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes." G.S. 136-112(1).

See *Highway Commission v. Black,* 239 N.C. 198, 79 S.E. 2d 778 (1954); *Proctor v. Highway Commission,* 230 N.C. 687, 55 S.E. 2d 479 (1949); *Highway Commission v. Hartley,* 218 N.C. 438, 11 S.E. 2d 314 (1940).

Thus, the court properly and sufficiently explained the law as to all substantial features of the case.

Defendants next contend that the court erred in failing to allow the defendants' motion to set aside the verdict pursuant to G.S. 1A-1, Rule 59. This assignment of error is without merit since a motion under Rule 59 is addressed to the sound discretion of the trial court, and will not be reviewed on appeal in the absence of abuse of discretion. *Glen Forest Corp. v. Bensch,* 9 N.C. App. 587, 176 S.E. 2d 851 (1970).

All of defendants' assignments of error have been considered and are hereby overruled.

No error.

Chief Judge BROCK and Judge VAUGHN concur.

NORTH CAROLINA EQUIPMENT COMPANY v. JAMES L. DeBRUHL, d/b/a LAFAYETTE TRANSPORTATION SERVICE

No. 7510SC602

(Filed 7 January 1976)

1. **Corporations § 25; Uniform Commercial Code § 29— signing note for corporation — parol evidence**

Parol evidence was admissible to show that defendant signed a note and security agreement, "LaFayette Transportation Service," with defendant's name signed thereunder, as agent for LaFayette Transportation Service, Inc., a duly organized corporation, and the evidence supported the court's determination that defendant was not individually liable on the note and security agreement. G.S. 25-3-403 (2) (b).

2. **Corporations § 1— alter ego of individual — insufficiency of evidence**

Evidence that a corporate office is the den in defendant's home, that defendant has not read the corporate by-laws, and that he is unfamiliar with the corporation's tax matters did not establish that the corporation was merely defendant's alter ego and that he was individually liable on a note which he executed for the corporation.

APPEAL by plaintiff from *Smith, Judge.* Judgment entered 16 April 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 22 October 1975.

Plaintiff brought this action to obtain a deficiency judgment after the sale of collateral securing a note, and also to collect an account. Defendant denied personal liability on the note and the account and alleged that the debtor was a corporation, LaFayette Transportation Service, Inc., of which he was president.

Plaintiff attempted to establish that it sold a dragline and front end loader to defendant and that defendant executed a note to plaintiff for $22,390.80 as payment for the equipment. The note was signed as follows:

"LaFayette Transportation Service (Seal)

"x(s) *James L. DeBruhl* (Seal)"

Also a security agreement was executed giving plaintiff a purchase money security interest in the equipment to secure payment of the note. The security agreement was signed in a similar manner, and the ledger card for the account designated the debtor as "Lafayette Transportation Service."

Upon default of the note, leaving an unpaid balance of $18,390.80, notice of public sale was given and public sale was held. The equipment was sold for $5,000.00, leaving a balance of $13,390.80. There was also owed plaintiff the sum of $620.11 on an account, giving plaintiff a claim for $14,010.91.

Defendant's evidence tended to show that he purchased the equipment as an agent on behalf of LaFayette Transportation Service, Inc., a duly oraganized corporation, with articles of incorporation, a corporate seal, four directors, and a corporate bank account.

Defendant introduced into evidence an earlier note executed to plaintiff and signed in the following manner:

"LaFayette Transportation Ser. Inc. (Seal)
By *James DeBruhl* (Seal)"

On cross-examination, defendant stated that he had never read the by-laws of LaFayette Transportation Service, Inc., and that LaFayette's corporate office was in the den of defendant's home.

The court held that defendant had made the purchases as president of LaFayette Transportation Service, Inc., and not in his individual capacity. From the judgment plaintiff appealed to this Court.

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

McCoy, Weaver, Wiggins, Cleveland and Raper, by Elmo R. Zumwalt III, for defendant appellee.

ARNOLD, Judge.

The question presented by this appeal is whether the trial court erred in its holding that defendant was not liable on the note.

G.S. 25-3-403(2) provides as follows:

> "An authorized representative who signs his own name to an instrument
>
> . . . .
>
> (b) *except as otherwise established between the immediate parties,* is personally obligated if the instrument names the person represented but does not show that the representative signed in a representative capacity, or if the instrument does not name the person represented but does show that the representative signed in a representative capacity." [Emphasis added.]

[1] This action involves the immediate parties to the transaction. The exception to the above general principle ["except as otherwise established between immediate parties"] allows the introduction of parol evidence to establish the requisite agency status to avoid personal liability.

"When the plaintiff who sues the agent personally is one who dealt directly with the agent, and the signature either names the principal or indicates the representative capacity, section 3-403(2)(b) permits the agent to introduce parol evidence of his agency status to avoid personal liability." J. J. White and Robert S. Summers, Uniform Commercial Code § 13-5, p. 406.

The defendant in the instant case introduced parol evidence of his agency status and the trial judge, as trier of fact, made findings substantially consistent with defendant's evidence. The

trial judge concluded that plaintiff "knew or should have known that James L. DeBruhl was acting for and as President of Lafayette Transportation Service, Inc." He further concluded that "James L. DeBruhl did not intend to sign and did not sign the note and Security Agreement as an individual but as President of Lafayette Transportation Service, Inc." Defendant presented ample competent evidence upon which the trial court could base its findings and conclusions.

[2] Furthermore, we do not see merit in plaintiff's contention that LaFayette Transportation Service is merely defendant's alter ego. Plaintiff's evidence establishes that defendant's den is the corporate office, that defendant has not read the corporate by-laws, and that he is not familiar with the corporation's tax matters. This is not sufficient evidence to show that the corporation was "ignored as a separate entity," and it is insufficient to apply the alter ego doctrine and hold defendant personally liable.

We find no prejudicial error, and the judgment of the trial court is

Affirmed.

Judges BRITT and VAUGHN concur.

GEORGE MOORE, ADMINISTRATOR OF THE ESTATE OF CHARLES FREDERICK WILSON, DECEASED, PLAINTIFF v. PUBLIC SERVICE GAS COMPANY OF NORTH CAROLINA, INC., DEFENDANT AND THIRD-PARTY PLAINTIFF v. LEAR-SIEGLER, INC. AND HONEYWELL, INC., THIRD-PARTY DEFENDANTS

No. 7528SC533

(Filed 7 January 1976)

Gas § 3— notice of leak — failure of company to terminate gas delivery

The trial court in a wrongful death action erred in granting defendant gas company's motion for a directed verdict where plaintiff presented evidence sufficient for the jury that defendant was negligent in failing to terminate the delivery of gas after it had been given notice of a leak.

APPEAL by plaintiff from *Snepp, Judge.* Judgment entered 20 February 1975 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 16 October 1975.

This is an action for the wrongful death of plaintiff's intestate on 14 January 1971. The intestate was born on 25 November 1968. The child's mother, Priscilla Harris Wilson Giles is the sole beneficiary. At the close of plaintiff's evidence defendant gas company's motion for a directed verdict was allowed.

When the evidence is taken as true and considered in the light most favorable to plaintiff, it tends to show the following.

In August, 1969, the mother purchased a gas heater from defendant gas company. Defendant ran a gas line to the house and installed the heater. Later in the fall, when defendant turned the gas on, the mother smelled gas. As a result of her call, defendant's employees repaired what they said was a leak. The mother made several other calls to defendant, reported that she smelled gas and was told it was her imagination. About three weeks before a fire occurred at her house on 14 January 1974, a friend was visiting with her in her home and told her that she smelled gas. As a result of her friend's statement she called the defendant. Defendant's employees came to her house and found nothing wrong. She was unable to say when any of the other calls were made to defendant except that she made one call the day before the fire occurred and told the person who answered the telephone that she smelled gas. That person told her it was her imagination.

January 14, 1971 was a warm day. The heater was on and was burning but was turned to the lowest degree on the thermostat. About 5:00 p.m. the friend who had smelled gas when visiting there three weeks earlier came in the house. She again smelled gas and told the mother it should be checked.

On that date, deceased, age 2, lived in the house with his mother and three half-sisters: Ramona, age 8; Penny, age 5; and Natalie, age 4. The ages are approximate because the mother could not remember exactly when they were born. About 7:30 p.m. the mother left the children alone in the house and went to another house about 150 feet away. About 15 minutes later, Penny, Natalie and deceased were playing in the living room where the heater was located. Penny "heard a big boom, and after the big boom, fire started getting up on the ceiling." Ramona had gone to bed and was awakened by "a big boom." Penny and Ramona ran to the window and began to call for

their mother. The mother heard their cries and ran home and saw a mass of flames in the living room. Most of the fire was around the ceiling. She could not get in the house. Ramona, Penny and Natalie jumped out of a bedroom window. About 20 minutes later firemen brought deceased out of the house. At that time he was still breathing, and was taken to the hospital. He died in his mother's arms while they were in the emergency room.

The most serious damage to the living room was the burning of the ceiling just above the heater. The heater did not appear to be materially damaged and was covered with debris. The gas piping to the heater was still connected. The heater was disconnected and removed from the premises the following day.

Riddle and Shackelford, P.A., by John E. Shackelford, for plaintiff appellant.

Uzzell and DuMont, by Harry DuMont, for defendant appellee.

VAUGHN, Judge.

Among other things, plaintiff alleged that defendant was negligent in: selling defective equipment, installation of the equipment, failing to make proper repairs, failing to provide proper safety devices, failing to provide proper ventilation to allow excess gas to escape and failing to make proper inspections. There was no evidence to support any of the foregoing allegations.

Plaintiff was allowed to amend the complaint to add an additional allegation of negligently failing to terminate the delivery of gas after notice of a leak.

Plaintiff presented at least some evidence in support of the foregoing allegation.

> "Where a gas company, which is engaged in supplying gas to a customer's building, becomes aware that such gas is escaping from the gas fixtures on the premises into the building, it becomes the duty of the gas company to shut off the gas supply until the further escape of gas from the fixtures can be prevented, even though the fixtures do not belong to the company and are not in its charge or

custody. If the gas company continues to transfer gas to the fixtures on the premises after it learns that the gas is escaping therefrom, it does so at its own risk, and becomes liable for any injury proximately resulting from its act in so doing. *Clare v. Bond County Gas Co.*, 356 Ill. 241, 190 N.E. 278." *Graham v. Gas Co.*, 231 N.C. 680, 58 S.E. 2d 757.

Whether plaintiff's evidence is plausible is for the jury and not for the court. When plaintiff's evidence is taken as true, as it must be on a motion for directed verdict, we believe it is sufficient to take the case to the jury.

Contributory negligence on the part of the mother will bar recovery to the extent that the recovery, if any, will inure to the benefit of the mother. Although plaintiff's own evidence tends to disclose facts which would permit the jury to find that the negligence of the mother was a proximate cause of the death of her child, that also is a question for the jury and not the court.

It was error to direct the verdict in favor of defendant.

Reversed.

Judges BRITT and ARNOLD concur.

STATE OF NORTH CAROLINA v. J. C. CASTOR

No. 7519SC568

(Filed 7 January 1976)

1. Homicide § 12; Indictment and Warrant §§ 7, 14— indictment for first degree murder — retrial for second degree murder — motion to quash

Where defendant was indicted for first degree murder and was awarded a new trial upon an appeal from his conviction of the lesser offense of second degree murder, defendant was properly retried for second degree murder upon the original indictment, and the trial court properly denied defendant's motion to quash the original indictment made on the ground defendant had been acquitted of the crime charged in that indictment, *i.e.*, first degree murder.

2. Homicide § 26— trial for second degree murder — reading first degree murder indictment to jury

A defendant on trial for second degree murder was not prejudiced when the indictment charging first degree murder was read to the

jury, especialy since the indictment did not contain allegations of "premeditation and deliberation."

3. Homicide § 14— presumptions of malice and unlawfulness — validity

The decision of *Mullaney v. Wilbur*, 421 U.S. 684 (1975), does not prohibit the presumptions of malice and unlawfulness created when the State proves beyond a reasonable doubt that the accused intentionally inflicted a wound with a deadly weapon proximately causing death.

APPEAL by defendant from *Rousseau, Judge*. Judgment entered 5 February 1975 in Superior Court, CABARRUS County. Heard in the Court of Appeals 21 October 1975.

The bill of indictment against defendant charges as follows:

> "THE JURORS FOR THE STATE UPON THEIR OATH DO PRESENT, That J. C. Castor, late of the County of Cabarrus, on the 24th day of June, 1971, with force and arms, at and in the said County, feloniously, willfully, and of his malice aforethought, did kill and murder Pearl Walker contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

Defendant was placed on trial for first-degree murder at the 15 November 1971 Session of Cabarrus Superior Court. He pled not guilty, a jury found him guilty of second-degree murder, and from judgment imposing prison sentence of 30 years, he appealed to the Court of Appeals. He later withdrew his appeal but thereafter petitioned for a writ of certiorari which was allowed.

In an opinion filed 6 February 1974 and reported in 20 N.C. App. 565, 202 S.E. 2d 281, this court found no error in the trial sufficiently prejudicial to warrant a new trial. Defendant appealed under G.S. 7A-30(1) to the State Supreme Court and, in an opinion reported in 285 N.C. 286, 204 S.E. 2d 848 (1974), that court, with Justice Huskins dissenting, ordered a new trial.

At the second trial, substantially the same evidence presented at the first trial was presented again. Summaries of the evidence are set forth in the opinions above referred to and no worthwhile purpose would be served in restating the evidence here. At the second trial, defendant was tried for second-degree murder and the jury was instructed to return a verdict of guilty of that offense or not guilty.

The jury found defendant guilty of second-degree murder and from judgment imposing prison sentence of 30 years, less 1325 days spent in custody pending trial, he appealed.

Attorney General Edmisten, by Associate Attorney Richard F. Kane, for the State.

Smith, Carrington, Patterson, Follin & Curtis, by J. David James, for defendant appellant.

BRITT, Judge.

[1] First, defendant assigns as error the failure of the trial court to quash the indictment on which defendant was tried "since the defendant appellant had previously been acquitted of the crime charged in that indictment, *i.e.*, murder in the first degree." The assignment has no merit.

Defendant concedes that the Supreme Court of North Carolina has held in many cases that when a new trial is awarded upon a defendant's appeal from a conviction of a lesser degree of the crime charged, the new trial will be upon the original indictment charging the greater offense and refers to *State v. Chase,* 231 N.C. 589, 58 S.E. 2d 364 (1950), and *State v. Correll,* 229 N.C. 640, 50 S.E. 2d 717 (1948). He contends, however, that the rule stated in those cases was changed by *Green v. United States,* 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed. 2d 199 (1957).

We do not agree with defendant's contention as to the holding in *Green.* In that case, defendant was charged in a two-count indictment with arson and murder and the second count was submitted on first and second-degree murder. The jury returned a verdict finding defendant guilty of arson and second-degree murder. The Federal Court of Appeals awarded defendant a new trial on the murder charge. At the retrial, over his objection, defendant was again tried for first-degree murder, was convicted of that charge, and sentenced to death. The Federal Court of Appeals affirmed the conviction but the U. S. Supreme Court reversed, holding that by implication defendant was acquitted of first-degree murder at the first trial and was placed in jeopardy a second time on that charge at the second trial.

The holding in *Green* has been the law in this jurisdiction for many years. *See State v. Wright,* 275 N.C. 242, 166 S.E.

2d 681, *cert. denied,* 396 U.S. 934, 24 L.Ed. 2d 232, 90 S.Ct. 275 (1969); *State v. Pearce,* 266 N.C. 234, 145 S.E. 2d 918 (1966), and cases therein cited. In the instant case, while defendant was acquitted of first-degree murder at his first trial, he was found guilty of second-degree murder and that is what he was tried for at his second trial. We hold that he was properly tried on the original bill of indictment.

[2] Defendant assigns as error the failure of the trial court to grant his motion for a mistrial for the reason that the bill of indictment charging first-degree murder was read in the presence of the jury. We find no merit in this assignment.

G.S. 15-144 sets forth the essentials for bills of indictment charging homicide and makes no distinction between an indictment charging murder in the first degree from one charging murder in the second degree. The indictment in this case closely follows the statute and we perceive no way defendant could have been prejudiced by its being read in the presence of the jury. It is true that in some instances bills of indictment charging murder will contain the words "premeditation and deliberation," the elements that distinguish murder in the first degree from murder in the second degree, but that was not done in this case. The assignment of error is overruled.

[3] Defendant assigns as error the court's instructions to the jury to the effect that if the State proved beyond a reasonable doubt that defendant intentionally inflicted a wound upon the victim with a deadly weapon that proximately caused her death, the law raises two presumptions: first, that the killing was unlawful, and second, it was done with malice; then, nothing else appearing, defendant would be guilty of second-degree murder. Defendant argues that while the instructions were previously consistent with well settled case law in this State, 4 Strong, N. C. Index 2d, Homicide § 14, they were invalidated by *Mullaney v. Wilbur,* 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975).

The assignment has no merit. Our State Supreme Court in *State v. Williams,* 288 N.C. 680, 220 S.E. 2d 558, (1975), held that *Mullaney* does not apply to the presumption of malice created when the State proves beyond a reasonable doubt that the accused intentionally inflicted a wound with a deadly weapon proximately causing death. *See also, State v. Hankerson,* 288 N.C. 632, 220 S.E. 2d 575, (1975), holding

that *Mullaney* will not be given retroactive effect in North Carolina and will apply only to trials conducted on or after 9 June 1975.

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

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

No error.

Judges VAUGHN and ARNOLD concur.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION AND CAROLINA CRANE CORPORATION (APPLICANT) APPELLEE v. HOME TRANSPORTATION COMPANY, INC., MOSS TRUCKING COMPANY, INC., McLEOD TRUCKING AND RIGGING COMPANY, INC., EVERETTE TRUCK LINES, INC., AND CLARKSON BROTHERS MACHINERY HAULERS, INC. (PROTESTANTS) APPELLANTS

No. 7510UC641

(Filed 7 January 1976)

Carriers § 2; Utilities Commission § 3— common carrier authority —necessity — sufficiency of evidence

In a hearing upon an application for common carrier authority to transport heavy commodities between all points and places within the State, the evidence was sufficient to support a finding by the Utilities Commission that public convenience and necessity require the proposed service in addition to existing authorized service.

Judge VAUGHN dissenting.

APPEAL by protestants from an order of the North Carolina Utilities Commission in Docket No. T-1381, Sub 2, dated 28 February 1974. Heard in the Court of Appeals 14 November 1975.

Carolina Crane Corporation (applicant) applied for a common carrier certificate of authority to transport Group 2, heavy commodities, over irregular routes between points and places throughout the State of North Carolina. Applicant cur-

rently has a certificate authorizing it to transport heavy commodities between points in Wake County and other points in the State.

Protestants are carriers that currently hold certificates authorizing them to transport heavy commodities between all points and places within the State.

A hearing was held before a hearing examiner appointed by the commission. The hearing examiner, after making his findings and conclusions entered a recommended order granting applicant the authority it had requested. Protestants excepted. The commission reviewed the record of the proceedings before the hearing examiner and adopted the recommended order as the order of the commission. Two members of the commission dissented.

Protestants' petition to rehear was denied. Protestants then duly gave notice of appeal to this court from the order granting the authority.

Vaughan S. Winborne and H. P. Taylor, Jr., for protestant appellants.

Bailey, Dixon, Wooten, McDonald & Fountain, by J. Ruffin Bailey and Ralph McDonald, for applicant appellee.

BRITT, Judge.

Under G.S. 62-262(e), an applicant for a common carrier certificate must prove:

> "(1) That public convenience and necessity require the proposed service in addition to existing authorized transportation service, and
>
> (2) That the applicant is fit, willing and able to properly perform the proposed services, and
>
> (3) That the applicant is solvent and financially able to furnish adequate service on a continuing basis."

At the hearing before the hearing examiner, applicant called six witnesses who represented five separate companies that are using or have used the services of the applicant in the transportation of heavy equipment. These witnesses testified that the services of applicant were satisfactory but that they were inconvenienced by the limited authority held by applicant.

The witnesses, generally, were of the opinion that there is a need for the services proposed by the applicant. Applicant offered other evidence tending to show its fitness and ability to perform the proposed service.

Protestants offered evidence tending to show that they were adequately serving the area covered by the application. Their evidence tends to show that they now have more equipment than is needed and that their equipment is specialized and very expensive. Much of their equipment stands idle and their financial condition will suffer if another carrier is authorized to serve the same area.

The commission found the facts in favor of the applicant and since there is some evidence to support the facts so found, this court is bound by the findings. The facts found support the conclusion that the public convenience and necessity requires the proposed service in addition to existing authorized service. " . . . [W]hat constitutes 'public convenience and necessity' is primarily an administrative question with a number of imponderables to be taken into consideration, *e.g.*, whether there is a substantial public need for the service; whether the existing carriers can reasonably meet this need, and whether it would endanger or impair the operations of existing carriers contrary to the public interest. Precisely for this reason its determination by the Utilities Commission is made not simply *prima facie* evidence of its validity, but '*prima facie* just and reasonable.' " *State ex rel. Utilities Comm. v. Great Southern Trucking Co.*, 223 N.C. 687, 690, 28 S.E. 2d 201, 203 (1943).

We, therefore, conclude that the order of the Utilities Commission should be

Affirmed.

Judge ARNOLD concurs.

Judge VAUGHN dissents.

Judge VAUGHN dissenting:

In my opinion the Recommended Order of the Hearing Examiner, subsequently ratified by a majority of the Commission, is erroneous as a matter of law and is unsupported by competent, material and substantial evidence in view of the entire record.

CITY OF HIGH POINT, PETITIONER v. H. F. FARLOW AND WIFE, PEARL E. FARLOW, RESPONDENTS

No. 7518SC592

(Filed 7 January 1976)

Eminent Domain § 7— condemnation resolution — interest to be taken — ambiguity

Trial court erred in entering partial summary judgment and ordering the matter submitted to a jury for ascertainment of damages for the taking of a fee where the resolution of petitioner was ambiguous as to whether the petitioner was taking an easement or a fee in this proceeding.

APPEAL by plaintiff from *Chess, Judge.* Judgment entered 30 May 1975 in Superior Court, GUILFORD County. Heard in the Court of Appeals 22 October 1975.

Pursuant to Chapter 1032 of the 1959 Session Laws, the City Council of the City of High Point adopted a resolution on 19 April 1973 for the condemnation of property owned by the defendants. A second resolution was adopted on 30 April 1973 which provided for the "immediate condemnation" of 1541 square feet of defendants' land for use in the Brentwood Conductor line." The preamble of the resolution stated that the public interest required an easement in the land but the remainder of the resolution simply refers to the "land." An easement is nowhere mentioned again.

Appraisers were duly appointed and recommended a reasonable value of $600 for the interest. Defendants excepted to the report and appealed to Superior Court on 25 September 1973. On 4 October 1973 the City Council adopted a "final resolution providing for the condemnation of easement in land." Defendants filed another exception and appealed to Superior Court on 23 October 1973. The City Clerk certified the case on appeal to the Superior Court. No further action was had until 7 May 1975 when defendants moved for partial summary judgment decreeing that the taking was of a fee in the land, not of a mere easement. In support, they offered a City Council resolution in a previous, unrelated condemnation of an easement. This earlier resolution used the term easement throughout. The court entered partial summary judgment and ordered the matter to be submitted to a jury for the ascertainment of damages for the taking of a fee. Petitioner appeals from this judgment.

City Attorney Knox Walker for petitioner appellant.

Schoch, Schoch, Schoch and Schoch by Arch K. Schoch for respondent appellees.

CLARK, Judge.

In oral argument before this Court is was stipulated by counsel that the purpose of the taking was for an overhead transmission line, referred to in the resolution of petitioner as "Brentwood Conductor lines." But this does not relieve the necessity for a declaration of whether the petitioner is taking an easement or a fee in this proceeding. The statute under which this condemnation is brought (Chapter 1032, Session Laws of 1959) requires that the condemnation resolution include the interest to be taken and purpose of the taking.

The resolution is ambiguous, once referring to an "easement" and otherwise referring to "land." In *Knukle v. S. C. Elec. & Gas Co.*, 251 S.C. 138, 161 S.E. 2d 163 (1968), a condemnation of "land" was held to be of an easement because that was all that was needed for a public purpose.

The judgment is reversed and this cause is remanded to the Superior Court of Guilford County with direction that it remand to petitioner for adoption of a resolution in compliance with Chapter 1032, Session Laws of 1959, stating clearly the public purpose for the taking and the interest sought to be taken.

Reversed and remanded.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. GEORGE ERNEST POOLE

No. 7520SC550

(Filed 7 January 1976)

Homicide §§ 14, 24— burden of proof — absence of malice — self-defense — nonretroactivity of Mullaney decision

Since the decision of *Mullaney v. Wilbur*, 421 U.S. 684 (1975) is not retroactive, it was not erroneous for the court in a murder trial held prior to the date of that decision to place on defendant the bur-

den of satisfying the jury that there was no malice in order to reduce the crime to manslaughter and that he acted in self-defense.

APPEAL by defendant from *Long, Judge.* Judgment entered 2 April 1975 in Superior Court, STANLY County. Heard in the Court of Appeals 15 October 1975.

The State sought a verdict of second-degree murder for the killing of Jessie Sturdivant. The evidence tended to show that Sturdivant accused defendant of cheating and that after an argument Sturdivant grabbed him around the neck from behind. Defendant threw him to the floor and shot him three times. Sturdivant died as a result of a wound which penetrated his heart.

The jury found the defendant guilty of voluntary manslaughter. Defendant appeals from judgment imposing imprisonment.

Attorney General Edmisten by Senior Deputy Attorney General R. Bruce White, Jr., and Assistant Attorney General Zoro J. Guice, Jr., for the State.

Coble, Morton, Grigg & Odom by Ernest H. Morton, Jr., for defendant appellant.

CLARK, Judge.

All of defendant's assignments of error relate to the trial court's charge to the jury.

Defendant contends that the court erred in (1) placing on defendant the burden of satisfying the jury that there was no malice in order to reduce the crime from second-degree murder, and (2) in the placing of the burden on the defendant to satisfy the jury that he acted in self-defense.

The defendant relies on *Mullaney v. Wilbur,* 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508 (1975), decided by the Supreme Court of the United States on 9 June 1975. In Mullaney it was held that Maine law, which required a defendant charged with murder to prove that he acted in the heat of passion on sudden provocation to reduce the homicide to manslaughter, was in violation of the Due Process Clause of the Fourteenth Amendment which requires that the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged; to satisfy that requirement the prosecution in a homi-

cide case must prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented.

In *State v. Hankerson,* 288 N.C. 632, 220 S.E. 2d 575 (1975), the Supreme Court of North Carolina declined, without further guidance from the United States Supreme Court, to give the decision retroactive effect. Thus, the case at bar, tried at the 1 April 1975 Session (judgment entered 2 April 1975) is not now controlled in North Carolina by the *Mullaney* decision of 9 June 1975.

We have carefully considered the other assignments of error. We note that defendant did not tender requests for further instructions on any subordinate feature of the case. Construing the charge contextually, we find that the trial judge properly applied the law to the evidence in all essential features of the case.

No error.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. THEODORE ROOSEVELT FREEMAN

No. 756SC678

(Filed 7 January 1976)

Forgery § 2— uttering forged check — aiding and abetting — sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for forgery and uttering a forged check where such evidence tended to show that defendant aided and abetted another in the perpetration of the crime.

APPEAL by defendant from *Tillery, Judge.* Judgment entered 16 April 1975 in Superior Court, HERTFORD County. Heard in the Court of Appeals 19 November 1975.

Defendant was charged with forgery and uttering a forged check in violation of G.S. 14-119. The jury found defendant not guilty of forgery and guilty of uttering a forged check in the

sum of $85.00 and from a judgment imposing imprisonment, defendant appeals.

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

L. Frank Burleson, Jr., for defendant appellant.

CLARK, Judge.

Defendant's contention that the trial court erred in denying his motion for nonsuit is without merit. Rosa Lee Spivey testified that she had been living with the defendant; that he could neither read nor write; that he suggested to her that she forge a check; that she prepared the check in his presence and told him the name of the payor, payee and the amount; that he took her to a store in his car and waited in the car while she went in and cashed it; and that she returned to the car with the money which they divided. Though defendant did not perpetrate the crime, the evidence tended to show that he aided and abetted Rosa Lee Spivey in doing so, and it was sufficient to withstand the motion for nonsuit. See *State v. Keller*, 268 N.C. 522, 151 S.E. 2d 56 (1966).

We have carefully examined the other assignments of error, and we find that defendant had a fair trial, free from prejudicial error.

No error.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. BRUCE LAMONT McNEIL

No. 7510SC638

(Filed 7 January 1976)

1. **Criminal Law § 60— fingerprint identification card — admissibility**

The trial court did not err in the admission of a fingerprint identification card.

2. **Criminal Law § 48— defendant's refusal to make statement to police — question by prosecutor — no prejudice**

Defendant was not prejudiced when the trial court allowed the prosecutor to ask defendant whether he refused to make a statement

to the police where defendant answered that he told the police that he "didn't know anything about this."

APPEAL by defendant from *Brewer, Judge.* Judgment entered 16 April 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 13 November 1975.

Defendant was indicted for the 17 February 1975 armed robbery of a Raleigh convenience store.

According to the State's evidence, defendant entered the "Kwik-Pik" in Raleigh, brandished a handgun, compelled the assistant manager, Howard Lassiter, to turn over $184 of the store funds and forced Mr. Lassiter into a storage room. At trial, Mr. Lassiter identified defendant as the assailant and indicated that Exhibit 1, a handgun, taken from defendant upon his arrest on 22 February 1975, looked " . . . like the pistol drawn on me." Two other customers in the store at the time of the robbery, however, were unable to make an identification of the defendant.

Mr. R. E. Lee, an identification technician for the City, County Identification Bureau, testified that he had taken ink fingerprints of defendant on a card, introduced as Exhibit 2, on 5 July 1973. Mr. J. H. Ross, also of the Identification Lab, then testified that prints lifted from the doorknob of the "Kwik-Pik" on the day of the robbery matched those found on the card (Exhibit 2).

Defendant and two witnesses for the defendant established an alibi defense.

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 for the decision are cited below.

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

Brenton D. Adams for defendant appellant.

MORRIS, Judge.

[1] Defendant first contends that the trial court erred in allowing into evidence a fingerprint identification card. We disagree. We can see no prejudicial effect in the introduction

of this card. *State v. Jackson,* 284 N.C. 321, 331-334, 200 S.E. 2d 626 (1973). Moreover, there is nothing in the record to indicate that the objectionable features noted in *Jackson* in fact appeared in or occurred during the trial of this case.

[2] Defendant also contends that the " . . . trial court erred in allowing the prosecution to ask the defendant whether he refused to make a statement to the police." We again disagree. On cross-examination, defendant stated that he had not

> " . . . discussed this case with anyone but that detective there and my lawyer. This detective is the only detective I have talked to about this case.
>
> Q. I'll ask you sir, if it's not true that rather than telling this detective what you testified on the stand, isn't it true that you didn't tell him anything, you refused to make a statement?
>
> MR. TWIGGS: Objection.
>
> THE COURT: Overruled.
>
> EXCEPTION NO. 24
>
> A. That's a story because I signed my waiver of rights. I told him I didn't mind talking.
>
> Q. You refused; didn't you?
>
> A. No, I told him I didn't if he got paper and I waived my rights to discuss the case with him, I told him I didn't know anything about this."

A contextual reading of this testimony indicates that there has been no prejudice to defendant from this line of questioning. In fact, his answer "I didn't know anything about this" would tend to support his alibi defense.

No error.

Judges PARKER and MARTIN concur.

STATE OF NORTH CAROLINA v. DONALD B. LOWERY

No. 7514SC614

(Filed 7 January 1976)

Constitutional Law § 32; Criminal Law § 91— continuance to obtain private counsel — denial of motion proper

The trial court exercised its judicial functions to provide defendant with effective counsel to insure his constitutional right to a fair trial, and it was not error for the court to deny defendant's motion for continuance for the purpose of obtaining private counsel.

APPEAL by defendant from *Canaday, Judge.* Judgment entered 13 February 1975 in Superior Court, DURHAM County. Heard in the Court of Appeals 24 October 1975.

On 7 October 1974, defendant was indicted for an armed robbery that occurred on 25 July 1974. On 21 October 1974 counsel was appointed to represent defendant.

The case was called for trial on 12 February 1975. Through court appointed counsel defendant entered a plea of not guilty. A jury was duly selected and empaneled. Defendant then told the court that he wanted to discharge his court appointed counsel and asked that the case be continued so that he could obtain other counsel. The case had previously been continued for defendant at the 23 January 1975 session of Superior Court. At that session, defendant told the presiding judge that he had retained other counsel but that his counsel could not be there. The docket sheet indicated that substantially the same thing had occurred on other occasions when defendant had been brought from the jail for trial. The presiding judge at the 23 January 1975 session called the docket sheet to indicate the foregoing and that the case would be tried the next time it appeared on the trial calendar. Defendant intimated to Judge Canaday on 12 February that he had called an attorney in Winston-Salem but it was clearly made to appear that that attorney had not been employed to represent defendant and in fact, did not represent defendant. Judge Canaday made findings in accordance with the foregoing, denied defendant's motion for continuance and directed that the trial proceedings be resumed. The judge also found that the attorney appointed to represent defendant was an active and competent member of the Durham County Bar. Although defendant told the judge he did not want the court appointed counsel to represent him,

the judge directed counsel to sit with defendant during the course of the trial so that defendant could have the opportunity to avail himself of the services of counsel to the extent that he elected to do so.

The jury returned a verdict of guilty as charged and judgment imposing a prison sentence of not less than 15 nor more than 20 years was entered. Counsel was appointed at public expense to perfect defendant's appeal to this Court.

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

Bryant, Bryant, Battle & Maxwell, P.A., by James B. Maxwell, for defendant appellant.

VAUGHN, Judge.

Counsel for defendant states that the real issue in this case is whether the court exercised its judicial functions to provide defendant with effective counsel to insure his constitutional right to a fair trial. It is perfectly obvious that the presiding judge in this case, as well as the judge who had previously continued the case on defendant's pretense that he could privately employ counsel, did all that he could to provide defendant with the assistance of counsel. It is also obvious that defendant was not so much interested in a fair trial as he was in having no trial at all.

The evidence against defendant was substantial and convincing. Among other things, three men who admitted participating in the robbery with defendant testified for the State and told of defendant's role in that crime.

We find no prejudicial error in defendant's trial.

No error.

Judges BRITT and ARNOLD concur.

STATE OF NORTH CAROLINA v. LEON WINFREY

No. 7512SC684

(Filed 7 January 1976)

Criminal Law § 99— remarks of court — no expression of opinion

Remarks by the trial court did not constitute an expression of opinion in this trial of defendant for driving while his license was permanently revoked wherein defendant elected to appear without counsel.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 7 May 1975 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 20 November 1975.

Defendant was charged in a warrant with operating a motor vehicle while his license was permanently revoked. He pleaded guilty to that charge in the District Court. From the judgment entered he appealed to the Superior Court.

In the Superior Court defendant elected to appear without counsel. He tendered a plea of "Guilty with an explanation." The judge directed that a plea of not guilty be entered. The jury found defendant guilty. Thereafter defendant retained counsel to represent him on appeal to this Court.

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

MacRae, MacRae & Perry, by Daniel T. Perry III, for defendant appellant.

VAUGHN, Judge.

The State offered evidence that defendant was operating a motor vehicle on the highway while his operator's license was permanently revoked. Defendant testified in his own behalf and admitted that he was operating a motor vehicle at the time in question and that he was doing so after having been notified of the revocation of his license. The "explanation" that he obviously wanted to offer all along was that, in substance, he was driving only because he had taken a friend to the friend's father's funeral.

On appeal, defendant's counsel urges that remarks by the judge during the course of the trial amounted to an expression of opinion on the evidence. We need not set out the instances

of which defendant complains. Throughout the trial defendant tried to testify when he was not on the stand, make inappropriate motions, inject feckless objections and generally, though apparently without malice, disrupt the trial. The judge elected to proceed with the trial under these difficult circumstances rather than hold defendant in contempt.

We have considered all of defendant's assignments of error. There has been no error shown that could have affected the verdict of the jury.

No error.

Judges MARTIN and CLARK concur.

STATE OF NORTH CAROLINA v. VICTOR BERNARD MOORE AND WILLIE LEE CARLTON

No. 754SC569

(Filed 7 January 1976)

1. **Criminal Law § 66— in-court identification — independent origin**

Robbery victim's in-court identification of defendants was properly admitted where the evidence supported the court's finding that the identification was based on the victim's clear opportunity to observe defendants shortly before and at the time of the robbery.

2. **Criminal Law § 134— no commitment as youthful offender — age not in record**

The court did not err in failing to find that defendant would not benefit from commitment as a youthful offender where there was nothing to indicate that defendant was under 21 at the time of sentencing.

APPEAL by defendants from *Martin, (Perry), Judge.* Judgments entered 5 February 1975 in Superior Court, SAMPSON County. Heard in the Court of Appeals 21 October 1975.

Defendants were convicted of the armed robbery of a ticket seller at a drive-in movie theater. From judgments imposing active prison sentences, defendants appealed.

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

E. C. Thompson III, for defendant appellant.

VAUGHN, Judge.

[1] The court's finding that the in-court identification of defendants by the victim of the robbery was based on the victim's clear opportunity to observe defendants shortly before and at the time of the robbery, is supported by all of the evidence. There was no error in allowing the victim to identify defendants at trial.

[2] Defendant Moore assigns as error the failure of the court to make a finding that he would not benefit from commitment as a "Youthful offender" before sentencing him. There is nothing in this record to indicate that Moore was under 21 at the time of sentencing and the assignment of error is overruled.

We note that the record on appeal does not contain a single exception. All assignments of error must be based on exceptions duly noted. Exceptions which appear for the first time under purported assignments of error will not be considered. We also note that the court allowed 120 days from the entry of judgments for docketing the record on appeal. The appeal was docketed on the 152nd day following entry of judgments. Failure to comply with the Rules subjects an appeal to dismissal. We have, nevertheless, elected to consider defendants' appeals on their merits and find no prejudicial error.

No error.

Judges BRITT and ARNOLD concur.

IN THE MATTER OF: JOHN LEWIS CROUCH

No. 7527DC644

(Filed 7 January 1976)

1. **Appeal and Error § 9— commitment to mental health facility — appeal — mootness**

Appeal of a person involuntarily committed to a mental health care facility was not moot although the commitment period had expired.

2. **Insane Persons § 1— commitment order — failure to record facts**

Order committing respondent to a mental health care facility was erroneous where the court failed to record the facts which support its findings as required by G.S. 122-58.7(i).

State v. Brown

APPEAL by respondent from *Harris, Judge.* Order entered 5 May 1975 in District Court, GASTON County. Heard in the Court of Appeals 10 November 1975.

Petitioner, Margaret R. Crouch, instituted this proceeding for the involuntary commitment of her husband, John Lewis Crouch. From the order of the district court entered 5 May 1975, committing him to Broughton Hospital for a period of ninety days, respondent appealed to this Court pursuant to G.S. 122-58.9.

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

Roberts and Caldwell, P.A., by Jesse B. Caldwell III, for respondent.

MARTIN, Judge.

[1] While it is clear from the record that the commitment period of ninety days has expired, this appeal is not moot. *See In re Carter,* 25 N.C. App. 442, 213 S.E. 2d 409 (1975), and *In re Mostella,* 25 N.C. App. 666, 215 S.E. 2d 790 (1975).

[2] G.S. 122-58.7(i) provides: "To support a commitment order, the court is required to find, by clear, cogent, and convincing evidence, that the respondent is mentally ill or inebriate, and imminently dangerous to himself or others. *The court shall record the facts which support its findings.* (Emphasis added.)" In this case the commitment order is erroneous on its face since it fails to record the facts which support its findings as required by statute.

For the reasons stated, the order appealed from is

Reversed.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. ODESSA GARNER BROWN

No. 7514SC685

(Filed 7 January 1976)

1. Criminal Law § 166— abandonment of exceptions

Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be deemed abandoned.

2. Criminal Law § 166— failure to file brief

Failure of appellant to file a brief works an abandonment of his assignments of error except those appearing upon the face of the record proper, which are cognizable *ex mero motu.*

APPEAL by defendant from *Canaday, Judge.* Judgment entered 24 April 1975 in Superior Court, DURHAM County. Heard in the Court of Appeals 20 November 1975.

The defendant was charged in a bill of indictment with felonious possession of heroin with intent to sell or deliver. Defendant pleaded not guilty and was tried by a jury.

The jury returned a verdict of guilty as charged. From a judgment imposing a term of imprisonment, the defendant seeks a review.

MARTIN, Judge.

[1, 2] No briefs have been filed, nor was oral argument undertaken. Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him. Rule 28, Rules of Practice in the Court of Appeals of North Carolina. Failure by appellant to file a brief works an abandonment of his assignments of error, except those appearing upon the face of the record proper, which are cognizable *ex mero motu. State v. Dockery,* 23 N.C. App. 554, 209 S.E. 2d 339 (1974).

Error does not appear upon the face of the record.

No error.

Judges VAUGHN and CLARK concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 7 JANUARY 1976

PHILLIPS v. MILLER No. 758SC671	Wayne (74CVS565)	No Error
SHEPHERD v. PARDUE No. 7523DC655	Alleghany (74CVD248)	Affirmed
STATE v. ALLEN No. 7528SC673	Buncombe (75CR1703)	No Error
STATE v. MURPHY No. 754SC692	Onslow (74CR3235)	No Error
STATE v. SMITH No. 7525SC573	Caldwell (74CR9220)	No Error
STATE v. STURDIVANT No. 7520SC402	Anson (74CR3987)	No Error
SUMMEY v. JONES No. 7529DC559	Rutherford (74CVD1221)	New Trial

Crumpton v. Crumpton

RUTH HARRIS CRUMPTON; RUTH C. GREEN AND HUSBAND, EDWARD W. GREEN, JR.; REBECCA C. SAUNDERS AND HUSBAND, CLINTON L. SAUNDERS; DIANA C. TUCK AND HUSBAND, TONY M. TUCK AND MARIAN C. MONK AND HUSBAND, THOMAS A. MONK, SR., PETITIONERS v. MALCOLM H. CRUMPTON AND WIFE, SANDRA H. CRUMPTON; EMMET GARRETT CRUMPTON AND WIFE, JUDY S. CRUMPTON; WILLIAM R. CRUMPTON, III AND WIFE, KAREN L. CRUMPTON; HARRIS CRIGGER CRUMPTON AND WIFE, DEBBIE CRUMPTON; STEVE CRUMPTON AND WIFE, SHARON CRUMPTON; BROOKS CRUMPTON, SINGLE; KNOX MITCHELL, SINGLE; GEORGE EDWARD MITCHELL AND WIFE, MARY MITCHELL; ROSE C. GREGORY, WIDOW; SHARON LYNN CRUMPTON; TONIA ROBIN CRUMPTON; LISA ANN CRUMPTON; DOUGLAS JAY CRUMPTON; CHAD ALLEN CRUMPTON; MISHA CRUMPTON; SHANEL CRUMPTON; WILLIAM ROBERT CRUMPTON, IV; SANDRA JOYCE CRUMPTON; RONDA LYNN CRUMPTON; AMY GARRETT GREEN; BRENDA GAIL SAUNDERS; CLINTON MARK SAUNDERS; WILLIAM MERRITT SAUNDERS; ANTHONY DARRON SAUNDERS; CHRISTOPHER JASON SAUNDERS; TONY MARTIN TUCK, JR.; THOMAS A. MONK, JR. AND WIFE, CAROLYN MONK; TAMMY MONK; CHRISTY MONK; CHARLES WILLIAM MONK; PAMELA GREGORY; MICHELLE MITCHELL; MRS. G. K. HARRIS, WIDOW; DOLIAN HARRIS AND WIFE, JANE KIRBY HARRIS; GEORGE E. HARRIS AND WIFE, KATHRINE HARRIS; JESSIE H. WADE, WIDOW; DOROTHY G. HARRIS, WIDOW; ROBERT EARL JAMES, SR., WIDOWER; BENJAMIN WILLIAM JAMES AND WIFE, JOYCE EVERETTE JAMES; ROBERT E. JAMES, JR. AND WIFE, GRACE F. JAMES; BETTY J. THOMPSON, WIDOW; KATIE HARRIS, SINGLE; CORINE H. GRANT, WIDOW; ELLA H. WINSTEAD AND HUSBAND, FRANK WINSTEAD, SR.; AND NETTIE LOU BULLOCK, RESPONDENTS

No. 759SC603

(Filed 21 January 1976)

Adoption § 5; Descent and Distribution § 5— adopted children — deed to natural grandmother with remainder to issue — no remainder in children

In a proceeding for a private sale of land with the proceeds of the sale to be held in trust for the life tenant and at her death the proceeds remaining to be distributed "to her issue then living, per stirpes," the trial court properly concluded as a matter of law that two children of one of the life tenant's deceased sons, by virtue of a final order of adoption, were removed from the bloodline of the life tenant and owned no remainder interest in the subject land or in the proceeds from the sale thereof. G.S. 48-23.

APPEAL by respondents from order of *Giles R. Clark, Judge.* Order entered 6 June 1975, in Superior Court, PERSON County. Heard in the Court of Appeals 23 October 1975.

The facts of this case are not in dispute. On 1 December 1941, G. E. Harris and his wife conveyed a tract of land in Person County to "Ruth Harris Crumpton for the term of her natural life, with remainder to her living issue, per stirpes,

. . . " The habendum clause of the deed provided that the grantee should hold the land "for and during the term of (sic) natural life, and at her death to her issue then living, per stirpes; Provided, however, that if she has no issue then living said land shall revert to the heirs at law of the grantor G. E. Harris." Ruth Harris Crumpton is still living. Two of her children are still living. A son, William Robert Crumpton, Jr., is deceased and left surviving him six children, all of whom are now living. A deceased son, George Edward Crumpton, who died in 1962, had five children. Two of his children—George Edward Mitchell, born 17 March 1943, and Edgar Knox Mitchell, born 16 December 1945—were adopted from him on 13 June 1955 in Guilford County. These two children are living and are the appealing respondents in this action. The other three children of George Edward Crumpton are also now living.

On 9 December 1974, petitioner, Ruth Harris Crumpton, and others, brought a special proceeding for a private sale of the land, with the proceeds of the sale to be held in trust for the life tenant and at her death the proceeds remaining to be distributed "according to law and according to the terms of the said Deed."

The two Mitchell children were included among the respondents. The only contested issue was whether the two Mitchell children, or their issue in the event either or both should predecease Ruth Crumpton, should share in the proceeds of the sale. The clerk entered an order directing a sale of the land and providing that George Edward Mitchell and Knox Mitchell would share in the proceeds of sale if they survived Ruth Crumpton and if either or both should predecease her their children would take in the same manner as children of the other three children of George Edward Crumpton. To this conclusion of law, the other three children of George Edward Crumpton excepted and appealed to the Superior Court. After hearing, the court entered an order concluding that "as a Matter of Law . . . the Respondents, George Edward Mitchell and Edgar Knox Mitchell by virtue of the Final Order of Adoption dated June 13, 1955, were removed from the bloodline of Ruth Harris Crumpton and own no remainder interest, vested or contingent, in the subject lands or in the proceeds from the sale thereof; . . . " From this order, Knox and George Edward Mitchell, the guardian ad litem for their children in esse, and

the guardian ad litem for any unborn or unknown issue of theirs, appealed.

Graham, Manning, Cheshire & Jackson, by Lucius M. Cheshire and James W. Tolin, for petitioner appellees.

Ronnie P. King for Knox Mitchell and George Edward Mitchell and his wife, Mary Mitchell, respondent appellants.

Alan S. Hicks, Guardian Ad Litem for Michelle Mitchell and any unknown or unborn persons being or being asserted to be the issue of Edgar Knox Mitchell or George Edward Mitchell, respondent appellant.

MORRIS, Judge.

The narrow question presented by this appeal is one of first impression in this State and requires examination and interpretation of certain portions of Chapter 48 of the General Statutes dealing with the adoption of minors.

Our Supreme Court has said that since the adoption statute " . . . is in derogation of the common law and works a change in the canons of descent, it must be construed strictly and not so as to enlarge or confer any rights not clearly given." *Grimes v. Grimes,* 207 N.C. 778, 780, 178 S.E. 2d 573 (1935).

Although relatively new to this country, and even newer to England, the history of adoptions dates back to antiquity and the procedure was known to and used by the Babylonians, Hebrews, Egyptians, Romans, Spartans, Athenians, and the ancient Germanic people. Kuhlmann, Intestate Succession by and from the Adopted Child, 28 Wash. U.L.Q. 221 (1943); Fairley, Inheritance Rights Consequent to Adoptions, 29 N. C. L. Rev. 227 (1951). The first adoption statute enacted in this country was probably the Massachusetts statute, adopted in 1851. The General Assembly of North Carolina in 1873 adopted a statute containing basically the same provisions as the Massachusetts statute. Unquestionably there was no sanction, at common law, for the creation of a legal parent-child status by the procedure of adoption, and it was not until 1926 that legal adoptions were made possible in England. However, by 1936, all states in this country had enacted legislation providing for adoption of minors. Therefore, it appears that the common law policy against adoption is now and has been for a good many years gone from the scene. The statutes providing for adoption of minors afford

a procedure whereby the child is taken from his natural family and made a member of a new family with full standing as though one of the blood of his new family. This result, with its attendant property rights, has evolved over a period of years, the reaching of the goal having necessitated amending and even rewriting of the adoption statute. An in depth discussion of the North Carolina adoption statutes and Supreme Court decisions on the subject can be found in Vol. 29 N. C. L. Rev. 227 covering the period up to 1951.

The first statute, and all amendments up to 1941, provided that when a child was adopted for life, the reolationship of parent and child was established "with all the duties, powers and rights belonging to the relationship of parent and child" and the adopted child was entitled to the *personal* estate of the *petitioner* in the same manner and to the same extent as if a natural child of the petitioner with the proviso that the petitioner could prevent the child's taking by specifically so stating that intent in the petition for adoption. See N. C. Revisal, C. 2, § 175 (1905).

In 1941 the adoption statute was rewritten, and the provision with respect to rights of inheritance was changed for the first time since 1873. This statute continued the distinction between adoptions for the minority of the child and those for the life of the child. When the adoption was for life, " . . . succession by, through, and from adopted children and their adoptive parents shall be the same as if the adopted children were the natural, legitimate children of the adoptive parents. Succession by children adopted for life and their lineal descendants from or through their natural parents or by or through the natural parents from such adopted children or their lineal descendants shall take place only where but for such succession the State of North Carolina would succeed to the intestate's property. Further, for all other purposes whatsoever a child adopted for life and his adoptive parents shall be in the same legal position as they would be if he had been born to his adoptive parents." G.S. 48-6 (1941). This provision clearly changed the law necessitating the holding in *Edwards v. Yearby,* 168 N.C. 663, 85 S.E. 19 (1915), that a natural parent inherited from a deceased minor to the exclusion of the adoptive parent. The provisions of G.S. 48-6 were made applicable only to adop-

tions made after 15 March 1941. In 1949, a 1947 rewrite of the statute was adopted, and § 48-23 provided:

> "The final order forthwith shall establish the relationship of parent and child between the petitioners and the child, and, from the date of the signing of the final order of adoption, the child shall be entitled to inherit real and personal property from the adoptive parents in accordance with the statutes of descent and distribution."

The legislation omitted the provision allowing inheritance by, from or through natural parents, and vice versa, only to prevent escheats, and the statutes of descent and distribution provided for the succession and inheritance rights in and to real and personal property of adopted children and adoptive parents. G.S. 29-1(14), (15), (16) and G.S. 28-149(10), (11), (12). By amendments enacted in 1955 adopted children were specifically prohibited from inheritance or succession rights to real and personal property by, through, or from a natural parent and the natural parents were prohibited from any entitlement to real or personal property by succession or inheritance by, through, or from such adopted child. G.S. 28-149(10) and (11) and G.S. 29-1(14) and (15). Also in 1955, the General Assembly again reiterated the intent to create a different legal status by the following language:

> "An adopted child shall have the same legal status, including all legal rights and obligations of any kind whatsoever, as he would have had if he were born the legitimate child of the adoptive parent or parents at the date of the signing of the final order of adoption, except that the age of the child shall be computed from the date of his actual birth." G.S. 48-23.

In 1963, the rights of the adopted child were further particularly spelled out when the General Assembly provided:

> "From and after the entry of the final order of adoption, the words 'child,' 'grandchild,' 'heir,' 'issue,' 'descendant' or an equivalent, or the plural forms thereof, or any other word of like import in any deed, grant, will or other written instrument shall be held to include any adopted person, unless the contrary plainly appears by the terms thereof, whether such instrument was executed before or after the entry of the final order of adoption and whether such

instrument was executed before or after the enactment of this Act." G.S. 48-23(c) (1963), now G.S. 48-23(3).

It seems abundantly clear that the General Assembly, on its own motion and also in response to judicial decisions, has, with every amendment and every rewrite of the adoption statute, evidenced its intent that by adoption the child adopted becomes legally a child of its new parents, and the adoption makes him legally a stranger to the bloodline of his natural parents. See *Rhodes v. Henderson,* 14 N.C. App. 404, 188 S.E. 2d 565 (1972).

The statute relieves the natural parents of all legal obligations, divests them of all rights with respect to the person adopted, and with respect to the person adopted, gives him the same legal status he would have had if he were born the legitimate child of the adoptive parent or parents at the date of the signing of the final order of adoption. We agree with Justice Higgins who quoted with approval 33 N.C.L. Rev. 522:

> " 'Here is a simple and clear rule which eliminates all doubt as to the standing and rights of an adopted child. For all legal purposes he is in the same position as if he had been born to his adoptive parents at the time of the adoption. . . Whatever the problem is concerning an adopted child, his standing and his legal rights can be measured by this clear test: "What would his standing and his rights be if he had been born to his adoptive parents at the time of the adoption?" ' " *Headen v. Jackson,* 255 N.C. 157, 159, 120 S.E. 2d 598 (1961).

We think the language of the New Hampshire Court in construing an adoption statute appropriate here:

> "By section 4 of the adoption statute (P.L. c. 292) the adoption decree makes the child 'the child of the petitioner to all legal intents and purposes.' Giving language its ordinary meaning and giving weight to the policy the statute discloses, the conclusion follows that adoption establishes a change of status by which in general the relatives become strangers in legal aspect and others take their place. The view taken in *Baker v. Clowser,* 158 Iowa, 156, 138 N.W. 837, 840, 43 L.R.A. (N.S.) 1056, that the statute 'in its broadcast interpretation only attempts to fix the relation between the adopted child and the adopting parent,' is too narrow when the natural and expected consequences

of the adoption are regarded. Nor does the rule employed in many cases elsewhere, that statutes in derogation of the common law are to be strictly construed, have any forceful bearing here. If a statute on a subject not recognized by the common law may be thought derogatory thereto, the rule has here been virtually suppressed by the predominant rule that all legislation shall be fairly construed according to its evident purpose. *Faulkner v. City of Keene,* 85 N.H. 147, 154, 155, 155 A. 195; *Mulhall v. Nashua Mfg. Co.,* 89 N.H. 194, 115 A. 449; *Clough & Co. v. Boston & M. Railroad,* 77 N.H. 222, 230, 90 A. 863, Ann. Cas. 1915B, 1195, and cases cited.

The statute does not seek to wholly destroy the natural ties of affection and interest between an adopted child and his own relatives. But broadly the law looks upon the child as it does a natural child of the adopting parents. The general purpose of the statute to free the child from his status arising from his relationship by blood, and to give him a new status as between him and those adopting him and their kindred, seems free from doubt. He is taken in legal contemplation from his natural family and made a member of a new family. Becoming the legal child of the petitioner, he enters the latter's family with nearly full standing as though one of its blood. The natural incidents therefrom are expected to follow." *Young v. Bridges,* 86 N.H. 135, 165 A. 272, 275 (1933).

The statute mandates that an adopted child shall have the same legal status as he would have had if he were born the legitimate child of the adoptive parents at the date of the final order of adoption. G.S.48-23(1). In this case, at the date of the final order of adoption—13 June 1955—Knox and George Edward Mitchell acquired the legal status of natural born children of their adoptive parents. One of the natural incidents resulting from this new status was that legally both children became legal strangers to the bloodline of their father, the son of the grantee in the deed conveying the property. No interest in the property had vested in them, and at that time, they, by force of the statute, ceased to be children of George Edward Crumpton and became the children of their parents by adoption. *Stamford Trust Co. v. Lockwood,* 98 Conn. 337, 119 A. 218 (1922). The application of the statute might in some cases work a hardship. Yet, the operation and status of adoption as a societal institu-

tion requires the result. The prevalence of adoptions in today's society points to the absolute necessity that adoption effect a complete substitution of families.

Appellants contend that to hold that Knox and George Edward Mitchell have no right nor interest in and to the proceeds of the sale of the land results in a taking of their property without due process of law. The position is without merit. At no time since their birth to the time of the judgment entered has either Knox or George Edward Mitchell had a vested interest in the property or its proceeds; their rights, if any, have been and are contingent.

> "Retrospective statutes destroying or diminishing contingent interests in property do not, per se, deprive the holder thereof of property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States or Article I, § 19, of the Constitution of North Carolina, or violate any other constitutional limitation upon legislative power. *Stanback v. Citizens National Bank*, 197 N.C. 292, 148 S.E. 313." *Peele v. Finch*, 284 N.C. 375, 382, 200 S.E. 2d 635 (1973).

Affirmed.

Judges PARKER and MARTIN concur.

JONELL S. PACKER v. TRAVELERS INSURANCE COMPANY

No. 7513SC674

(Filed 21 January 1976)

1. **Insurance § 87— vehicle liability policy — omnibus clause — lawful possession**

When lawful possession of a motor vehicle is shown, further proof is not required that the operator had the owner's permission to drive on the very trip and occasion of the collision in order for the operator to be covered under the omnibus clause of the owner's liability policy. G.S. 20-279.21(b)(2).

2. **Insurance § 87— vehicle liability policy — omnibus clause — lawful possession — personal use without permission**

Plaintiff's evidence was sufficient to support a verdict finding that defendant employee was in lawful possession of his employer's truck when it was involved in a collision with plaintiff and that the

employee was thus covered under the omnibus clause of the employer's liability policy where it tended to show that the employee was instructed by the employer to keep the truck at the employee's home over the weekend so that he could pick up other employees on Monday morning and drive them to the job site, and the accident occurred during the weekend while the employee was driving the truck for his personal use.

APPEAL by plaintiff from *Preston, Judge.* Judgment entered 16 May 1975 in Superior Court, COLUMBUS County. Heard in the Court of Appeals 19 November 1975.

On 17 June 1972 plaintiff sustained personal injuries in an automobile accident. The accident was caused by the negligent operation by one James McCrimmon of a truck registered in the name of Alice C. Horne and insured under a liability policy issued by the defendant insurance company. Liability of James McCrimmon was established by judgment entered in the Superior Court, Columbus County, on 18 January 1974 in an action by plaintiff against McCrimmon. Defendant, Travelers Insurance Company, refused to pay the judgment, and this action was instituted to establish defendant's liability to the extent of $10,000.00 under its contract of insurance.

Evidence offered at this trial tended to establish that the truck upon which defendant issued its liability insurance contract was registered in the name of Alice C. Horne and was regularly used in her husband's business and regularly driven by her husband's employees in the performance of duties in the business. Alice C. Horne's husband had full authority to designate to what use the truck would be put.

Plaintiff's evidence tended to show that during the week preceding Friday, 16 June 1972, James McCrimmon had been directed by Mr. Horne to drive the truck. McCrimmon regularly picked up some of Horne's employees in the morning to go to work and drove them to their homes in the afternoon after work. McCrimmon kept the truck at his (McCrimmon's) home overnight. He had previously kept the truck at his home over the weekend. On Thursday, 15 June 1972, McCrimmon kept the truck at his home overnight. Horne's employees were not scheduled for work on Friday. On Friday, 16 June 1972, McCrimmon picked up some of Horne's employees and drove them to Horne's residence in Whiteville. There Mrs. Horne gave the employees their paychecks, and Mr. Horne instructed McCrimmon to drive the employees to the bank to get their checks cashed and to take

one of the men to get his driver's license renewed. Horne further instructed McCrimmon to take the employees to their homes in Chadbourn and to keep the truck at his (McCrimmon's) home over the weekend. McCrimmon was to pick the employees up on Monday morning and drive them to the job site. McCrimmon did not have permission to drive the truck for his personal use. On Saturday, 17 June 1972, while driving the truck for his personal use, McCrimmon negligently operated the truck, causing the injuries to plaintiff.

Defendant's evidence tended to show that McCrimmon was instructed by Horne to return the truck to Horne's house in Whiteville on Friday, 16 June 1972, after taking the employees to the bank and to their homes in Chadbourn. Another employee of Horne had been permitted to keep the truck over the weekend on occasions, but he was not permitted to drive it for his personal use.

Defendant moved for a directed verdict at the close of plaintiff's evidence and again at the close of all the evidence. In each instance the motion was denied. An issue was submitted to and answered by the jury as follows:

> "Was James McCrimmon, at the time of the accident on June 17, 1972, in lawful possession of and driving the 1963 Dodge pickup truck of Alice Horne, with her permission, express or implied?
>
> "ANSWER: Yes."

Upon defendant's motion the trial judge entered judgment for the defendant notwithstanding the verdict upon the grounds that "plaintiff has failed to show that said vehicle insured by The Travelers was being operated at the time of the accident by James McCrimmon with the permission of the named insured or that James McCrimmon was in lawful possession of said vehicle."

Plaintiff appealed, assigning as error the entry of judgment for defendant notwithstanding the verdict.

Marshall, Williams, Gorham & Brawley, by A. Dumay Gorham, Jr., for the plaintiff.

McLean, Stacy, Henry & McLean, by Everett T. Henry, for the defendant.

BROCK, Chief Judge.

[2] The evidence offered by plaintiff failed to establish that James McCrimmon was operating the truck with the permission of the insured owner to drive on the very trip and occasion of the collision. We agree with the trial judge in his conclusion with respect to plaintiff's failure to show permission. Nevertheless, in our opinion the failure of plaintiff to offer evidence of permission to drive on the very trip and occasion of the collision is not fatal to plaintiff's case. Plaintiff's evidence was sufficient to justify a verdict finding that James McCrimmon was in lawful possession of the insured's vehicle at the time of the collision. We therefore hold that the trial judge erred in concluding that plaintiff had failed "to show . . . that James McCrimmon was in lawful possession of said vehicle." It follows that entry of judgment for defendant notwithstanding the verdict was error.

[1] By Chapter 1162, Session Laws 1967, the legislature amended G.S. 20-279.21(b)(2) by adding to the persons insured under an owner's liability insurance policy "any other person in lawful possession" of the insured's vehicle. Clearly the legislature intended a change in the liability insurance coverage previously required by statute. The preamble to Chapter 1162, Session Laws 1967, gives considerable insight into the legislative intent. The following portions of the preamble are instructive:

> "WHEREAS, it is the established public policy of North Carolina to require as a prerequisite to the lawful licensing of a motor vehicle for use upon the public highways that the owner of the vehicle have and maintain in full force and effect a liability insurance policy; and
>
> "WHEREAS, the owner of every motor vehicle has the absolute authority under the law to allow or not to allow anyone else to operate his vehicle, . . . ; and
>
> "WHEREAS, many innocent and blameless citizens who are victims of serious personal injuries and property loss are unable to receive any compensation whatsoever because of difficulty of proof under the terms of liability insurance policies, and it is difficult and often impossible for injured parties and operators to prove that one lawfully in possession of a vehicle had the express or implied permission of the owner to drive on the very trip and occasion of the collision; and

> "WHEREAS, liability coverage under the laws of North Carolina is provided for an operator of a vehicle who has the 'express or implied permission' of the titled owner but does not extend to persons otherwise lawfully in possession of vehicles . . . : Now, therefore, ... "

Thereafter in Section 1 the amendment adding as an insured "any other persons in lawful possession" is set forth. It is instructive also that Section 2 provides: "It shall be a defense to any action that the operator of a motor vehicle was not in lawful possession on the occasion complained of." It seems clear to us that when lawful possession is shown, further proof is not required that the operator had the owner's permission to drive on the very trip and occasion of the collision. *See Insurance Co. v. Broughton*, 283 N.C. 309, at 314, 196 S.E. 2d 243 (1973), where the 1967 amendment is briefly discussed.

In a comprehensive annotation, 5 A.L.R. 2d 600, three general rules of interpretation of the omnibus clause of liability insurance coverage are set forth at page 622.

> (1) The strict rule: "For the use of the car to be with the permission of the assured within the meaning of the omnibus clause, the permission, express or implied, must have been given to the employee not only to the use of it in the first instance, but also to the particular use being made of the car at the time in question."
>
> (2) The liberal rule: "The employee need only to have received permission to take the vehicle in the first instance, and any use while it remains in his possession is 'with permission' though that use may be for a purpose not contemplated by the assured when he parted with possession of the vehicle."
>
> (3) The moderate or minor deviation rule: "A slight deviation from the scope of the authority or permission granted will not be sufficient to exclude the employee from the coverage under the omnibus clause, but a material deviation will be held to constitute a use of the automobile without the employer's implied permission."

The Motor Vehicle Safety and Responsibility Act of 1947 provided that insurance policies issued in conformity therewith must insure, as an insured, the person named and any other person using or responsible for the use of the motor vehicle

with the permission, express or implied, of the named insured, "or any other person in lawful possession." Session Laws 1947, Chapter 1006, Section 4(2) (b). However, in 1953 the legislature repealed this provision and provided for insurance coverage for "the person named therein and any other person . . . using any such motor vehicle . . . with the express or implied permission of such named insured. . . . " Session Laws 1953, Chapter 1300, Section 21. The 1953 amendment deleted the coverage for "any other person in lawful possession."

The change made in the 1947 act by the 1953 amendment was considered significant by our Supreme Court in its opinion in *Hawley v. Insurance Co.*, 257 N.C. 381, 126 S.E. 2d 161 (1962). In construing the provision of the 1947 act, the Court in *Hawley* at page 387 stated: "This provision was sufficiently broad to embrace the liberal rule. It required that policies of insurance insure all operators, irrespective of limits of permission, if in lawful possession of the vehicle." In construing the 1953 amendment which effectively deleted the coverage for "any other person in lawful possession," the Court further stated at page 387: "We interpret this statutory change to mean that the Legislature intended no more radical coverage than is expressed in the moderate rule of constructon, i.e., coverage shall include use with permission, express or implied." Since the *Hawley* decision, our courts have applied the third rule set out above; i.e., the moderate or minor deviation rule.

We are now faced with a statutory amendment which is the reverse of the one considered by the Supreme Court in *Hawley, supra.* The legislature was cognizant of the interpretation of the 1953 amendment as compared to the interpretation of the provision of the 1947 act before the amendment. With this history of the legislative enactments in the interpretations placed thereon, the legislature in 1967 reinstated the provision which had been deleted in 1953. This 1967 amendment, when viewed in the light of the legislative and judicial history and in the light of the preamble to the 1967 amendment, leads to one rational conclusion. It was the intent of the legislature that North Carolina should follow no less than a liberal rule comparable to the second rule quoted above.

In *Jernigan v. Insurance Co.*, 16 N.C. App. 46, 190 S.E. 2d 866 (1972), this Court interpreted the 1967 amendment to signify that the legislature favors adoption of a liberal rule of construction in applying the coverage under the omnibus clause.

However, a statement not necessary to a decision in that case was made that permission, express or implied, is an essential element of lawful possession. Such an interpretation would violate the clear intent of the legislature as expressed in the preamble to the 1967 amendment. The foregoing statement of this Court in *Jernigan, supra,* was dictum and should not be considered authoritative.

[2] It is our opinion that the plaintiff, once having offered evidence tending to show lawful possession of the truck by James McCrimmon, was entitled to have the issue of lawful possession submitted to the jury. As stated above, the plaintiff in this case did offer evidence from which the jury could find James McCrimmon was in lawful possession of the insured's vehicle. The jury answered the issue, finding that James McCrimmon was in lawful possession. The evidence supports the verdict, and the verdict will support a judgment for the plaintiff.

The issue submitted to the jury in this case placed a heavier burden on plaintiff than was warranted under G.S. 20-279.21(b)(2), as amended in 1967. The issue required a finding of permission as well as lawful possession. It was the necessity of proof of permission that the 1967 amendment was designed to obviate. Although lawful possession by the operator may be shown by evidence of permission granted to the operator to take the vehicle in the first instance, the plaintiff is not required to show more than lawful possession at the time of the accident. However, the error in the issue in this case cannot be said to be prejudicial since the jury answered the issue in favor of the plaintiff.

The judgment for the defendant notwithstanding the verdict is reversed, and this cause is remanded for entry of judgment for the plaintiff upon the verdict.

Reversed and remanded.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. ROBERT JOSEPH KARBAS

No. 7510SC637

(Filed 21 January 1976)

1. **Criminal Law §§ 16, 92— concurrent jurisdiction in district and superior courts — consolidation of felony and misdemeanor charges — nol pros of misdemeanor charge in district court**

A misdemeanor charge for driving under the influence and a felony charge of manslaughter were based on the same transaction within the meaning of G.S. 7A-271(a)(3), and the superior court therefore had jurisdiction of both charges and had the right to proceed to the trial on the misdemeanor charge under the joinder exception of this statute, the "original jurisdiction" of the district court having been lost after the *nolle prosequi* was entered in that court.

2. **Automobiles § 126; Criminal Law § 55— driving under the influence — blood samples — chain of custody**

In a prosecution for driving under the influence and manslaughter, the trial court properly allowed the testimony of an expert witness relative to the alcohol content of the defendant's blood where the chain of custody of the blood samples taken from defendant was sufficiently established.

APPEAL by defendant from *Lee, Judge.* Judgments entered 7 March 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 13 November 1975.

On 3 March 1975, defendant came on for trial under an indictment charging (1) manslaughter and (2) operating a motor vehicle on a public highway while under the influence of intoxicating liquor. In a pretrial motion by defendant to dismiss the "driving under the influence" charge on grounds that the Superior Court lacked jurisdiction of that charge, it was stipulated that the District Court, Wake County, had entered theretofore a *nolle prosequi.* The motion was denied and the two charges were consolidated for trial.

The State's evidence tends to show that on 17 October 1973, defendant was driving his car in the Town of Wake Forest; that Charles Runion looked out his apartment window and saw a light colored Ford station wagon strike the curb on the median on North Avenue and was on the wrong side of the road; Runion watched the vehicle until it disappeared from his view and approximately four seconds later, he heard a crash. He went to the scene and found defendant's station wagon on the wrong side of the highway and observed a Plymouth Duster, "nose to

nose with a light colored Ford station wagon." Other witnesses testified that they went to the scene of the collision and saw the defendant behind the steering wheel of the Ford and that he had a mild odor of alcohol about his breath. A chemical analysis of blood taken from the defendant revealed .16% alcohol in his blood.

Defendant offered the testimony of Gretchen Horton to the effect that defendant was at her home drinking coffee and that he did not appear to be intoxicated when he left. Defendant testified that prior to going to the Horton home he had consumed four beers, and that immediately prior to the accident, he dropped a lit cigarette in the car, made several attempts to retrieve it, and on the last attempt saw an approaching vehicle.

Defendant was found guilty on both charges by a jury and from judgment imposing imprisonment, defendant appeals.

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

Gulley & Green by Charles P. Green, Jr., for defendant appellant.

CLARK, Judge.

[1] Defendant's contention that the Superior Court did not have jurisdiction of the "driving under the influence" charge is based on the argument that the Superior Court could acquire jurisdiction of the misdemeanor only by appeal from a District Court which retained its exclusive, original jurisdiction with the *nolle prosequi*. With this position we disagree. G.S. 7A-272 grants original jurisdiction for the trial of misdemeanor cases to the District Court, "except as provided in this article." G.S. 7A-271(a) provides in part as follows:

> "The superior court has exclusive, original jurisdiction over all criminal actions not assigned to the district court division by this article, except that the superior court has jurisdiction to try a misdemeanor:
>
> * * *
>
> (3) Which may be properly consolidated for trial with a felony under G.S. 15-152;"

G.S. 15A-926(a) has replaced former G.S. 15-152 and both statutes provide for the same situation, a transactional test for

coverage by them: "Two or more offenses may be joined in one pleading when the offenses, whether felonies or misdemeanors or *both,* are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan. . . . " (Emphasis added) G.S. 15A-926(a).

Where two courts have concurrent jurisdiction of certain offenses, the court first exercising jurisdiction in a particular prosecution obtains jurisdiction to the exclusion of the other. But when it enters a *nol prosequi* it loses jurisdiction and the other court may proceed. 2 Strong, N. C. Index 2d, Criminal Law, § 16, p. 500 (1967).

A charge of reckless driving, of operating an automobile on the highway while under the influence of intoxicating liquor and of assault with an automobile may be properly joined in one indictment as separate counts charging distinct offenses of the same class growing out of the same transaction. *State v. Fields,* 221 N.C. 182, 19 S.E. 2d 486 (1942).

We find that the "driving under the influence" misdemeanor charge and the manslaughter felony charge were based on the same transaction within the meaning of G.S. 7A-271(a)(3), and that therefore the superior court had jurisdiction of both charges and had the right to proceed to the trial on the misdemeanor charge under the joinder exception of this statute, the "original jurisdiction" of the district court having been lost after the *nolle prosequi* was entered in that court. The defendant's assignment of error is overruled.

[2] Defendant also assigns as error the admission of the testimony of the expert witness relative to the alcohol content of the defendant's blood on the grounds that the State failed to establish the chain of custody for the blood samples. In this regard the State's evidence tended to show that Joan Roche, a lab technician at Wake Memorial Hospital, was found by the court to be qualified to take blood samples. She testified that she filled two tubes with blood taken from the unconscious defendant at the request of the Town of Wake Forest Officers Gibson and Coordes and in their presence; she then labeled the tubes as to the name of the defendant, time, date and place. On voir dire hearing Officer Coordes testified that soon thereafter he and Officer Gibson took the blood samples to Memorial Hospital in Chapel Hill for analysis but found no one on duty,

so they returned to the Wake Forest Police Department and placed the tubes of blood, packed in ice in a plastic cup, in the refrigerator. The refrigerator was in the line of sight of the dispatcher who testified that he saw the officers place the cup therein about 6:30 a.m. and that no one came into the station and approached the refrigerator until about 8:00 a.m. when Police Chief Newsome arrived. Then the blood samples were shown to him by Officer Gibson. The tubes were repacked with ice and taken by Officer Gibson and Chief Newsome and delivered by them to Mr. Boling, a chemist in the laboratory of the Chief Medical Examiner at Chapel Hill. Boling was found by the court to be an expert in the chemical analysis of blood, and he testified that he analyzed the blood delivered to him by the officers; that the blood samples were labeled in the name of Robert Joseph Karbas and that he found .16% alcohol in the blood.

Real evidence, when sufficiently identified, should be freely admitted, subject to the general requirements of relevancy and materiality and with due regard to the danger of unfair prejudice in the particular case and subject also to exclusionary rules grounded upon constitutional principles. 1 Stansbury, N. C. Evidence, § 117 (Brandis rev. 1973). Whether real evidence, the substance sought to be introduced, has passed through several hands to a qualified expert for analysis, there must be "a chain of custody" method of identification. If one link in the chain is entirely missing, the substance cannot be introduced into evidence or made the basis for the test report of an expert. The evidence must not leave to conjecture who had it and what was done with it between the taking and the analysis. The integrity of the substance taken must be shown with reasonable certainty, usually by evidence of proper labeling, care and handling. The "chain of custody" evidence may be supported in appropriate cases by legal inferences: i.e., that (1) a deposit in the mails of a letter properly stamped and addressed was received in due course by the addressee. 2 Stansbury, N. C. Evidence, § 236 (Brandis rev. 1973), and (2) articles regularly mailed are delivered in substantially the same condition in which they are sent. 29 Am. Jur. 2d, Evidence, § 830, p. 922 (1967).

There is no absolute standard of proof. Proof beyond all possibility of doubt is not required, and all possibility of tampering need not be excluded. Anno., 21 A.L.R. 2d 1216 (1952). If all the evidence and relevant legal inferences reasonably

support the conclusion that the substance analyzed is the same as that taken, then the analysis, or the substance analyzed, is admissible into evidence. This determination is made by the trial judge from evidence presented in trial before the jury, or from evidence presented in a voir dire hearing granted on motion by a party or *ex mero motu.* If the trial judge conducts a voir dire hearing, findings of fact or conclusions of law are not required except where substantial issues of fact or questions of law are raised in the hearing. The trial judge determines any preliminary questions of fact and law upon which admissibility depends. The jury determines the credibility, probative force, and weight of all the evidence admitted in the trial. 1 Stansbury, N. C. Evidence, § 8 (Brandis rev. 1973).

In this case we find that the "chain of custody" evidence did not disclose that a link in the chain was missing, that the evidence was sufficient to give the trial judge reasonable assurance that the blood taken from the defendant was the blood analyzed by the chemist, and that his testimony relative to the finding of alcohol in the blood sample was properly admitted.

Finally, defendant urges this Court to adopt the dissent in the case of *Schmerber v. California,* 384 U.S. 757 (1966), and to hold that the taking of the defendant's blood without his knowledge and consent compels him to be a witness against himself in violation of the Fifth Amendment. We feel that we must deny the defendant's invitation to overrule the Supreme Court of the United States.

No error.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. KENNETH RAY BROWNING

No. 7514SC703

(Filed 21 January 1976)

1. Homicide § 9— self-defense — defense of home — applicability to curtilage — assault by occupant of same home

A person is not obliged to retreat when he is assaulted while in his dwelling house or within the curtilage thereof, whether the assailant be an intruder or another lawful occupant of the premises.

2. **Homicide § 28— defense of home — killing within curtilage — occupant of same home — instructions**

In a prosecution of defendant for the murder of his brother, defendant was entitled to an instruction that he had no obligation to retreat from or leave his own home in the face of an assault by his brother where there was evidence that the killing occurred within the curtilage of the home which defendant and his brother both occupied, and that at the time of the shooting the brother was advancing on defendant armed with a hammer and a knife.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 21 March 1975 in Superior Court, DURHAM County. Heard in the Court of Appeals 12 January 1976.

Defendant Kenneth Ray Browning was indicted for the murder of his brother, Billy Marvin Browning. On arraignment the State announced it would seek a conviction only for second degree murder. Defendant pled not guilty.

The State offered evidence to show that Billy Browning's death was due to complications resulting from a gunshot wound in his chest inflicted when defendant shot him during the course of a quarrel which occurred in the yard of their mother's home on the afternoon of 26 May 1974. Both men lived with their mother at the time. Immediately after the shooting Billy Browning was taken to the hospital where he subsequently underwent a series of operations. His condition became progressively worse until his death in the hospital on 25 August 1974.

The State offered the testimony of a Mrs. Rigsbee concerning a conversation she had with Billy Browning at the hospital. She testified:

> "He (referring to Billy Browning) said Kenny and Lacy (another brother) was in the garage arguing and he got into it. He said Kenny come at him and he hit Kenny and knocked him down, and said Kenny went in the house and in a few minutes he called him. He said he picked up the hammer and went out to the garage door, and said Kenny started shooting at him. He said he dodged a couple of bullets, and he turned around to see which way Kenny was going to shoot at him next, and said he felt something go through his chest. He said, he threw the hammer and fell and that was all he remembered."

Defendant did not testify. He presented the testimony of his mother, who had witnessed the shooting. She testified that

she heard loud talking, "sounded like fussing," so she went out in the back, that she saw Billy had knocked Kenny to a sitting position in the door to the shed in the backyard, that she tried to talk to Billy but found she couldn't, that she looked around and Kenny was gone, and that she got out and Billy came out behind her. She testified:

> "He (referring to Billy) had a hammer in one hand and a knife in the other. Then Kenny stepped out of the back kitchen door with that rifle. Kenny shot twice. Kenny was all bent over so it wouldn't hit Billy to hurt him, he shot down at his feet. . . . . While Kenny was firing the two shots, Billy just kept a-coming. He still had the knife and hammer in his hand. . . .
>
> "Then Kenny fired again, and Billy threw the hammer and hit Kenny on the arm and caused the gun to come up and shoot him in the shoulder."

The jury returned a verdict finding defendant guilty of voluntary manslaughter. Judgment was imposed sentencing defendant to prison for not less than seven nor more than twelve years. Defendant appealed.

Attorney General Edmisten by Associate Attorney David S. Crump for the State.

Michael C. Troy, Robert A. Beason, and Sydenham Benoni Alexander, Jr. for defendant appellant.

PARKER, Judge.

Defendant assigns error to the refusal of the court to give a requested instruction that defendant had no obligation to retreat from or leave his own home in the face of an assault by his brother. This assignment of error has merit.

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

in repelling the attack and overcoming his adversary." *State v. Johnson,* 261 N.C. 727, 729, 136 S.E. 2d 84, 86 (1964).

This rule applies not only to attacks made upon a person within his own dwelling house, but applies as well to attacks made within the curtilage of the home. "And the curtilage of the home will ordinarily be construed to include at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings." *State v. Frizzelle,* 243 N.C. 49, 51, 89 S.E. 2d 725, 726 (1955); See Annot., 52 A.L.R. 2d 1458 (1957).

Evidence in the present case discloses that the fatal shooting occurred while defendant and his brother were in the backyard of their mother's home in which both resided. The argument and fight commenced while the two were in a structure, variously referred to as "little shack," "shed," or "garage," which defendant's mother testified was about twenty feet from the back door of the kitchen. The shooting occurred while decedent was advancing upon defendant at a point between the shack and the back door. We hold this to be "within the curtilage of the home" so as to make operative the rule that one attacked on his own premises is entitled to stand his ground under the decision in *State v. Frizzelle, supra.*

[1] We also hold that defendant was entitled to the benefit of an instruction concerning the above rule even though his assailant shared the same living quarters with him and had an equal right to be upon the premises. We find no decision of our Supreme Court on this point, and the decisions from other jurisdictions are not in agreement. Annot., 26 A.L.R. 3rd 1296 (1969). The rule which is supported by what we deem to be the better reasoned cases, and the rule which we now adopt, is that a person is not obliged to retreat when he is assaulted while in his dwelling house or within the curtilage thereof, whether the assailant be an intruder or another lawful occupant of the premises. This rule is consistent with, though it is not directly supported by, the decision of our own Supreme Court in *State v. Absher,* 220 N.C. 126, 16 S.E. 2d 656 (1941). In that case the defendant, a son-in-law of the home owner, was living with his in-laws by invitation of his father-in-law. A dispute arose between defendant and his brothers-in-law, who lived in the same dwelling. Defendant was ordered to leave by his mother-in-law. According to defendant's version, he undertook to do so

but before he could leave the premise a fight occurred during the course of which defendant killed one of his brothers-in-law. The trial court charged the jury that if they found that defendant refused to leave the premises when directed to do so, he became a trespasser, and that in such case the other members of the family had the right to use such force as would be reasonably necessary to evict him, and that defendant, as a trespasser, had no right to repel this force. Defendant was convicted of second degree murder. On appeal, our Supreme Court granted a new trial, the opinion pointing out that, although there was no question that defendant might have been ejected upon reasonable notice, to reduce him to the status of a trespasser *eo instanti* he was ordered out of the house was altogether inconsistent with any status which could arise under the evidence. The opinion of the Supreme Court, in awarding a new trial, said (p. 131):

> "Whether the version of the defendant is true or not, it is in the evidence and cannot be ignored by the court. It demanded, at least as an alternative statement of the law, arising upon this phase of the evidence, that the court should have given the ordinary instructions with regard to the right of self-defense in case of assault where a person has the right to be."

In the case presently before us, neither the defendant nor his brother who assailed him was asked to leave the premises by their mother. Each was lawfully on the premises which was the home of each, and under the rule which we adopt each had the right to remain there and to defend himself.

[2] In the present case not only was the defendant on his own premises but there was also evidence that at the time of the shooting his brother was advancing on him armed with a hammer and a knife. At no point in the charge did the court instruct the jury as to defendant's right to stand his ground. "Where there is evidence that defendant was on his own premises when he was assaulted, or that a felonious assault was being made upon a defendant without fault on his part, it is error for the court to fail to submit the question and to charge upon defendant's right to stand his ground without retreating." 4 Strong, N. C. Index 2d, Homicide, § 28, pp. 248, 249.

For the error noted, the defendant is entitled to a

New trial.

Judges HEDRICK and ARNOLD concur.

DORIS G. MOORE v. BENTON DOUGLAS MOORE, LOWE'S COMPANIES, INC., AND LOWE'S COMPANIES PROFIT-SHARING PLAN AND TRUST

No. 7526SC691

(Filed 21 January 1976)

Divorce and Alimony § 21; Judgments § 8— consent judgment for alimony payment — failure to sign judgment — no binding effect

Defendants Lowe's Companies, Inc. and Lowe's Companies Profit-Sharing Plan and Trust were not bound by a consent judgment entered into by plaintiff wife and defendant husband whereby defendant husband would pay plaintiff alimony by making withdrawals from his account with the Plan since the Companies and the Plan did not sign the consent judgment, and the trial court properly denied plaintiff's motion for an order requiring the Companies and the Plan to permit defendant husband to withdraw a certain sum from his account with them in order to pay plaintiff alimony.

APPEAL by plaintiff from *Snepp, Judge.* Order entered 1 May 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 20 November 1975.

Plaintiff and defendant, Benton Douglas Moore, entered a separation agreement on 7 July 1971 which provided in part as follows:

> "12. Husband . . . agrees that he will pay to Wife an amount equal to one-half of the amount at which all interests and monies in the Lowe's Companies Profit-Sharing Plan and Trust held in his name . . . are valued at the date of execution hereof. Husband shall withdraw said amount from said . . . Plan . . . in as few installments as is permissible . . . pursuant to the agreement . . . governing . . . said . . . Plan . . . . Husband further . . . agrees with Wife that the amount owed by him to Wife pursuant to the first sentence of this paragraph 12 *shall continue to be an obligation from him to Wife regardless of whether it is or is not permissible* . . . for him to make withdrawals from said . . . Plan . . . . "

On 20 October 1971, plaintiff brought this action against Benton Moore, Lowe's Companies, Inc. (hereinafter referred to as Companies) and defendant Lowe's Companies Profit-Sharing Plan and Trust (hereinafter referred to as the Plan), alleging that Benton Moore had not made the payments required by Paragraph 12 of the aforementioned separation agreement. On 14

February 1973 a consent judgment was signed by plaintiff and her attorneys, by Benton Moore and his attorney, and by Judge Grist, but not by any representative of the Companies or the Plan. The consent judgment provided in part as follows:

> "1. Paragraph 12 of the Separation Agreement . . . is hereby deleted and in lieu thereof the following paragraph 12 is hereby substituted:
>
> 'Husband . . . agrees that he will pay to the Wife . . . an amount equal to one-half (1/2) of the amount at which all interests and monies in the . . . Plan . . . held in his name . . . are valued at the date of the execution hereof, and the parties agree that that amount is Two Hundred Sixty-Eight Thousand Three Hundred Thirty-Four and 24/100 ($268,334.24) Dollars. Husband shall withdraw said amount from aforesaid . . . Plan . . . in the following way and manner: The sum of $20,000.00 in 1971; $21,880.53 in 1972; and the balance . . . shall then be paid over a period of ten years in equal installments of Twenty-Two Thousand Six Hundred Forty-Five and 37/100 ($22,645.37) each year . . . . Husband further . . . agrees with Wife that the amount owed by him to Wife as herein set forth shall continue to be an obligation from him to Wife, regardless of whether it is or is not permissible . . . for him to make withdrawals from said Plan . . . .'
>
> * * *
>
> 8. IT IS FURTHER ORDERED that the amount owed by defendant Moore to the plaintiff, his Wife, continues to be an obligation from him to the plaintiff regardless of whether it is or is not permissible for him to make withdrawals from said . . . Plan . . . .
>
> * * *
>
> 11. IT IS FURTHER ORDERED that [the] Plan . . . is hereby ordered and directed to pay each of said withdrawals made by the defendant Moore . . . .
>
> 12. IT IS FURTHER ORDERED that [the] Companies . . . and [the] Plan . . . shall take all further necessary and proper action under the provisions of the . . . Plan . . . to implement the foregoing Orders of this Court."

The rules of the Plan provide that an employee of the Companies may make withdrawals from his account, subject to

the approval of the administrative committee. One of those rules is that an employee may never withdraw more than 25% of his total vested interest in the Plan. In this case, the administrative committee permitted Benton Moore to withdraw $70,000 in 1973 and $28,684.09 in 1974, even though he was required to pay plaintiff $22,645.37 each year. His total withdrawals amounted to $148,564.62. The value of his vested interest as of 31 December 1974 was $401,835.46. In 1975 Moore requested permission to withdraw $45,000.00 from his account, but he was not allowed to make any withdrawal.

Plaintiff moved for an order requiring the Companies and the Plan to permit Moore to withdraw $22,645.37 from his account in order to pay plaintiff. The court denied her motion. From this denial, plaintiff appeals.

Elbert E. Foster; Myers & Collie by Charles T. Myers and George C. Collie for plaintiff.

McElwee, Hall & McElwee by Edgar B. Gregory for defendants.

CLARK, Judge.

Plaintiff contends that the consent judgment imposed a fiduciary duty on the defendants Companies and Plan, requiring them to disapprove any application made by Benton Moore for withdrawals in excess of the $22,645.37 annual alimony payments and that by allowing defendant Moore to make excessive withdrawals in 1973 and 1974, defendants violated their fiduciary duty because these withdrawals depleted the funds that should have been kept available for payment of her alimony.

It is noted that the consent judgment, though entered 14 February 1973, provided for withdrawals of $20,000.00 in 1971, $21,880.53 in 1972, and the balance in ten equal annual installments of $22,645.37 each. The record discloses that defendant Moore had made prior voluntary withdrawals of $8,000.00 in 1971 and $41,880.53 in 1972. Yet the judgment did not mention the 1972 withdrawal which was well in excess of the 1972 alimony payment, nor did the judgment provide for limiting the amount of the annual withdrawals thereafter to the amount of the alimony payments. The defendant Moore's voluntary withdrawals of funds amount to the total sum of $148,564.62. The value of his vested interest in the trust on 31 December 1974

was $401,835.46. Thus, the total of his prior withdrawals, based upon the 31 December 1975 valuation of his vested interest, exceeded 25% of such value. This excessive withdrawal is explained by the fact that the value of his vested interest on 31 December 1973 was $540,406.66 but thereafter declined with the market value of Lowe's Companies, Inc. common stock, which apparently made up a substantial part, if not all, of the trust assets. Though the judgment may by implication impose on defendant Moore the duty to safeguard the interests of the plaintiff by withdrawing from the Plan annually only the sum due as alimony, the judgment when construed contextually does not deprive the trustees of their control of the Plan assets or their disposition of funds to beneficiaries according to the prescribed rules.

The consent judgment of 14 February 1973 amended a prior separation agreement and was in substance a contract between plaintiff and defendant Moore, both of whom signed it, which was approved and signed by the trial judge. Though defendants Companies and Plan at the time were parties-defendant to the proceeding, they did not sign the judgment. A consent judgment rendered without the consent of a party will be held inoperative in its entirety. *Lynch v. Loftin,* 153 N.C. 270, 69 S.E. 143 (1910). "The agreements of the parties are reciprocal, and each is the consideration for the other." *Overton v. Overton,* 259 N.C. 31, 37, 129 S.E. 2d 593, 598 (1963). The judgment imposed upon the defendant Moore the personal obligation of paying to plaintiff Moore an agreed sum each year; the payments were to be made from funds of the Profit-Sharing Plan and Trust when the funds were available to him; and if not available, "the amount owed . . . shall continue to be an obligation from him to Wife, . . . " The defendant Companies is not bound by the terms of the judgment since they did not consent. We do not agree with plaintiff's assertion that defendants Companies and Plan are fiduciaries for plaintiff and under the duty of safeguarding her interests. On the contrary, their primary duty was to all the beneficiaries of the Profit-Sharing Plan and Trust, and in the performance of this duty they must retain control of the assets, dispense funds, and otherwise administer the trust according to their prescribed rules. The consent judgment so implies.

The judgment appealed from is

Affirmed.

Judges VAUGHN and MARTIN concur.

WACHOVIA REALTY INVESTMENTS, BUCK NICKEL, ROBERT H. PEASE, CHARLES G. REAVIS, JR., ROBERT E. SMITH, EVERETT C. SPELMAN, SR., EDWARD H. WARNER, CALDER W. WOMBLE AND BLAND W. WORLEY, TRUSTEES v. HOUSING, INC., C. P. ROBINSON, JR. AND BETTY LYNN WILSON ROBINSON v. C. P. ROBINSON, JR.

No. 7521SC747

(Filed 21 January 1976)

Rules of Civil Procedure § 54— determination of fewer than all claims — premature appeal

In an action for a deficiency judgment brought by plaintiff against defendant Housing, Inc. where the trial court granted summary judgment for plaintiff as to its claim but set the case for trial on the issue of whether Housing was entitled to a setoff under G.S. 45-21.36 or to indemnity from third-party defendant Robinson, the judgment was interlocutory and the appeal of defendant Housing was premature.

APPEAL by defendant, Housing, Inc., from *Walker, Judge.* Judgment entered 17 June 1975 in Superior Court, FORSYTH County. Heard in the Court of Appeals 14 January 1976.

Plaintiff alleged in its complaint that on 6 May 1970 it entered into a "Building Loan Agreement" with defendant Housing. The agreement provided that plaintiff would lend Housing $3,624,220 for use in the construction of the North Hills housing project in Winston-Salem. The loan was not to be made in a lump sum, but instead, funds were to be advanced by plaintiff to Housing each month pursuant to draw requests submitted by Housing, showing the amount of expenses Housing had incurred in connection with the project during the preceding month. On the same day that the Building Loan Agreement was signed, Housing also executed a note to plaintiff for $3,624,220 and a deed of trust covering the land where the housing project was to be built. Defendants Robinson guaranteed payment of all Housing's debts to plaintiff. Housing de-

faulted in its payments on the note, and the deed of trust was foreclosed and the property sold. This action was brought for a deficiency judgment.

Defendant Housing admitted executing the Building Loan Agreement, note, and deed of trust, but denied that it was liable for a deficiency judgment. It alleged that in February 1971 its two stockholders, C. P. Robinson, Jr. and Carl W. Johnson, entered into an agreement to divide their business enterprises. They agreed that Robinson would be responsible for all debts and expenses relating to the North Hills project; that he would receive all profits from this project; and that he would turn over all his stock in Housing to Johnson. To carry out this agreement, Housing executed a power of attorney to Robinson and Harold Hunter, making them its attorneys-in-fact for the purpose of paying all expenses and receiving all funds connected with the North Hills project. Housing alleged that plaintiff approved this agreement between Johnson and Robinson and thereby entered into a novation freeing Housing of any liability under the note and deed of trust. Alternatively, Housing alleged, plaintiff's approval of this agreement had reduced Housing to the status of a surety, with Robinson as principal debtor, and Housing had been freed of any liability as surety by subsequent dealings between plaintiff and Robinson. Housing also alleged that it was entitled to a setoff under G.S. 45-21.36, and it raised certain other affirmative defenses. It impleaded Robinson as a third-party defendant, alleging that it was entitled to indemnity from him if it were held liable to plaintiff.

Both plaintiff and Housing moved for summary judgment. Voluminous depositions and other materials were submitted in connection with these motions. The court granted summary judgment for plaintiff as to its claim, but set the case for trial on the issues of whether Housing was entitled to a setoff under G.S. 45-21.36 or to indemnity from Robinson.

Womble, Carlyle, Sandridge & Rice by W. P. Sandridge, Jr., for plaintiff appellee.

Hoyle, Hoyle & Boone by John T. Weigel, Jr.; Smith, Moore, Smith, Schell & Hunter by Jack W. Floyd and O. Max Gardner III, for defendant appellant.

CLARK, Judge.

The judgment of the trial court, though granting summary judgment for plaintiff on its claim, retained the cause "for

determination of what amount, if any, are the defendants entitled to as a setoff" under G.S. 45-21.36, and "as to the rights, if any, of the defendant Housing, Inc. to indemnification by the defendant C. P. Robinson, Jr." Under G.S. 1A-1, Rule 54(b) the trial court "may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment." In this case there was no determination in the judgment that there is no reason for delay.

It is obvious that this judgment adjudicated "fewer than all the claims or the rights and liabilities of fewer than all the parties." Therefore, under G.S. 1A-1, Rule 54(b) there was no final judgment, and it "shall not then be subject to review *either by appeal or otherwise* except as expressly provided by these rules or other statutes."

In *Arnold v. Howard,* 24 N.C. App. 255, 210 S.E. 2d 492 (1974), the court, in construing G.S. 1A-1, Rule 54(b), ruled that G.S. 1-277 was not a statute expressly providing for review by appeal or otherwise within the meaning of the above-quoted term "except as expressly provided by these rules or other statutes." Briefly, G.S. 1-277(a), and also G.S. 7A-27(d), provide for appeal from an interlocutory order which affects a substantial right, or in effect determines the action and prevents a judgment from which an appeal might be taken, or discontinues the action, or grants or refuses a new trial. *Arnold v. Howard, supra,* has been followed by this Court in numerous decisions. See *Durham v. Creech,* 25 N.C. App. 721, 214 S.E. 2d 612 (1975); *Leasing, Inc. v. Dan-Cleve Corp.,* 25 N.C. App. 18, 212 S.E. 2d 41 (1975); *Siders v. Gibbs,* 26 N.C. App. 333, 215 S.E. 2d 813 (1975); *Christopher v. Bruce-Terminix Co.,* 26 N. C. App. 520, 216 S.E. 2d 375 (1975); *Mozingo v. Bank,* 27 N.C. App. 196, 218 S.E. 2d 506 (1975); *Ostreicher v. Stores, Inc.,* 27 N.C. App. 330, 219 S.E. 2d 303 (1975); and *Builders, Inc. v. Felton,* 27 N.C. App. 334, 219 S.E. 2d 287 (1975).

So we have interpreted G.S. 1A-1, Rule 54(b) to mean that if the order or judgment adjudicates fewer than all the claims, or the rights and liabilities of fewer than all the parties, and there is no determination in the order or judgment that "there is no just reason for delay," then the order or judgment is not subject to appellate review on the ground that it affects a substantial right, or other grounds enumerated in G.S. 1-277 or G.S. 7A-27(d). Under this Rule the order or judgment is

not final and "is *subject to revision* at any time before entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." (Emphasis added.)

One of the obvious purposes of Rule 54 is to minimize fragmentary appeals. It permits appeals only from final judgments, upon the trial court's determination of "no just reason for delay." Appellate review of an "interlocutory order" under Rule 54 may be had under the provision "shall not then be subject to review either by appeal or otherwise *except as expressly provided by these rules or other statutes.*" (Emphasis added.) This provision, not included in the Federal Rules, may give us, by certiorari or otherwise, limited power to allow appellate review of a Rule 54 interlocutory order, but in view of all of the provisions of the Rule, including the right of the trial court to revise the order or judgment at any time before final adjudication, this provision should be strictly construed; and discretionary authority thereunder, if any, should be exercised sparingly in extraordinary circumstances to avoid a harsh result.

G.S. 1-289 and G.S. 1-269 require the filing of an undertaking or making of a deposit to stay the execution of a money judgment. Any injustice or hardship that may result from execution issued under a "final judgment" which adjudicates "fewer than all the claims or the rights and liabilities of fewer than all the parties" is alleviated by G.S. 1A-1, Rule 62(g), which provides: "When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered." Sub judice, it appears from the record on appeal that execution was issued on the judgment for plaintiff in this case. Defendant Housing filed in this Court a petition for stay of execution, which was denied because of failure to comply with Rule 23, New North Carolina Rules of Appellate Procedure. The defendant, Housing, could have moved for stay of execution in the trial court under Rule 62(g), or, in the alternative, on the ground that execution was improvidently issued because the judgment was interlocutory and not final. And the defendant may now move in the trial court for withdrawal of the execution issued on an interlocutory judgment.

Rule 54 is a simple and workable one. It should be knowledgeably applied in the trial courts and reasonably interpreted in the appellate courts in accord with its purpose.

Appeal dismissed.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. CHARLIE WALKER

No. 7519SC368

(Filed 21 January 1976)

1. **Homicide § 28— self-defense — failure to instruct on defense of home — harmless error**

The trial court in a homicide case erred in failing to include in its instructions on self-defense any reference to defendant's right to defend himself in his own home from trespassers and assailants where there was some evidence that deceased was about to attack defendant with a water glass when he shot her; however, such error was harmless beyond a reasonable doubt where defendant contended that the shooting was accidental rather than in self-defense, the court adequately instructed on accident and misadventure, and defendant had the benefit of an instruction on self-defense to which he was not entitled.

2. **Homicide §§ 14, 24— burden of proof — self-defense, accident, misadventure — nonretroactivity of Mullaney decision**

Since the decision of *Mullaney v. Wilbur*, 421 U.S. 684 (1975) is not retroactive, it was not erroneous for the court in a homicide trial held before the date of that decision to place on defendant the burden of proving self-defense, accident or misadventure.

APPEAL by defendant from *Crissman, Judge.* Judgment entered 21 February 1975 in Superior Court, ROWAN County. Heard in the Court of Appeals 29 August 1975.

Defendant was indicted for the murder of one Ester Mae Massey, who had cohabited with defendant for approximately 14 years. Five months before her death, Ester allegedly deserted defendant and moved to South Carolina with another man. Ester returned to defendant's home in October 1974, and she and defendant quarreled over the presence of defendant's new girl friend. Defendant testified that he asked Ester to leave his home and return to South Carolina, but Ester refused to leave.

The actual events immediately preceding and precipitating the shooting are controverted, but two shots were fired and Ester lay dead. When the police arrived, Ester's body was on the floor. A 10 to 12-ounce water glass lay nearby in a small pool of water. Defendant told the arresting officers that Ester had drawn back her hand to throw the glass at him and he shot reflexively, claiming he thought the weapon was unloaded. Defendant explained that he brandished the weapon only to scare Ester into leaving.

Defendant's story, however, is not uncontroverted. Calvin Britt, Ester's teenage son, testified at trial that Ester never attacked defendant and that the water glass lay on the coffee table until it was jarred off by Ester's body tumbling from the couch.

The investigating officer read from a statement given by defendant that "Ester Mae began to curse him and his temper flew hot and he pulled his pistol from his pocket and shot her twice. He, Charlie Walker, shot her once and she fell to the floor but she kind of set up and Charlie Walker shot her again."

At trial defendant testified that when deceased drew back to hit him with the glass, he knew she could hit him because she had stabbed him once and broken his arm once. He got scared and nervous and snatched his gun. "I was going to scare her out of the house with an empty gun. I didn't know the gun was loaded. I was going to try and scare her out and when I turned around the gun went off twice before I knowed it. It was an automatic pistol. It was quick. God only knows I didn't know the gun was loaded."

The State went to trial on a second-degree murder theory and all lesser included offenses. Upon a plea of not guilty, the jury returned a verdict of guilty of voluntary manslaughter. From judgment sentencing him to 16 to 20 years imprisonment, defendant appealed.

Attorney General Edmisten, by Associate Attorney William H. Guy, for the State.

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

MORRIS, Judge.

Defendant brings forward as purported error three aspects of the trial court's charge to the jury. Defendant maintains

that (1) the court's instructions regarding self-defense failed to include the defendant's right to defend himself in his home and lacked any reference to the legal concept of a "home"; (2) the court misstated the law by instructing the jury that defendant had the burden of proving self-defense, accident or misadventure; and (3) the court erred in purportedly limiting defendant's possibility of acquittal to a finding of self-defense or accident.

[1] Defendant first contends that the trial court erred by failing to include in its instructions on self-defense any reference to defendant's right to defend himself in his home from trespassers and assailants and by omitting any definition of the term "home." It is clear from the undisputed evidence that defendant was in his home, and no definition of the word was necessary.

Judge Clark, recently speaking for this Court, noted that where " . . . the evidence for the defendant tended to show that at the time of the assault, defendant was in his own home; that he was assaulted by the victim; that the victim refused to leave after being requested to do so several times; and that he shot when the victim started to grab him . . . the trial court was required under G.S. 1-180 to declare and explain the law arising from the evidence as it related to the rights of the defendant to evict a trespasser from his home and to defend himself and his home from attack." *State v. Kelly,* 24 N.C. App. 670, 672, 211 S.E. 2d 854 (1975). See also *State v. Spruill,* 225 N.C. 356, 358, 34 S.E. 2d 142 (1945); 40 Am. Jur. 2d, Homicide, § 179.

However, to warrant a *sua sponte* instruction there must be *some* evidence; if there is none, then there is no error in a court's failure to charge as to the principle of self-defense in one's home. *State v. Pettiford,* 239 N.C. 301, 79 S.E. 2d 517 (1954).

In the instant case, there is some evidence, albeit contested, that Ester was about to attack defendant. Thus, it would seem initially, that *Kelly* might be dispositive. However, if the failure to instruct was harmless beyond a reasonable doubt, defendant is not entitled to a new trial. Defendant contends on appeal that he killed in self-defense in his own home where he had no duty to retreat from an assault. Defendant's own evidence, however, indicates that he *did not know the gun was loaded.* It is inconceivable that one could expect to stand his ground and

repel an assault with an unloaded gun. His further testimony is to the effect that he only intended to "scare her out" of the house with the unloaded gun; that although he knew she could hit him with the glass, he thought he could scare her into leaving by pointing an unloaded gun at her. Then, he says, the gun went off, and it was a quick two shots because the gun was automatic. This evidence is inconsistent with self-defense and calls for an instruction on accident and misadventure rather than defense in one's own home. The court adequately instructed on accident and misadventure. Out of an abundance of caution, the court also instructed on self-defense. Defendant has had the benefit of both, although the record clearly indicates accident as his defense. We are of the opinion that the court's failure to charge on self-defense in his own home, if error, is harmless beyond a reasonable doubt.

[2] Defendant next contends that the court erred in charging the jury that defendant had the burden of proving self-defense, accident or misadventure.

In charging the jury, the trial court stated:

"When an intentional killing is admitted or established, the law presumes malice from the use of a deadly weapon and the defendant is guilty of murder in the second degree unless he can satisfy you, members of the jury, of the truth of the facts which justify his act or mitigates it to manslaughter.

The burden is on the defendant to establish such facts to the satisfaction of the jury unless they arise out of the evidence against him. The intensity of the proof required is that you, members of the jury, must be satisfied. Even proof by the greater weight of the evidence may be sufficient to satisfy you members of the jury. Hence, the correct rule as to the intensity of such proof, is that when the intentional killing of a human being with a deadly weapon is admitted or is established by the evidence, the law then casts upon the defendant the burden of proving to the satisfaction of the jury, not by the greater weight of the evidence, nor beyond a reasonable doubt, but simply to the satisfaction of you, members of the jury, the legal provocation that will rob the crime of malice and thus reduce it to manslaughter or will excuse it altogether upon the grounds of self-defense or accident or misadventure."

The United States Supreme Court recently held that a statute, requiring a defendant to prove that he killed in the heat of passion on sudden provocation in order to reduce the crime from murder to manslaughter, is violative of due process. *Mullaney v. Wilbur,* 421 U.S. 684 (1975).

Our Supreme Court, however, has recently addressed the problems raised in *Mullaney* and held

> " . . . that by reason of the decision in *Mullaney* the Due Process Clause of the Fourteenth Amendment prohibits the use of our long-standing rules in homicide cases that a defendant in order to rebut the presumption of malice must prove to the satisfaction of the jury that he killed in the heat of a sudden passion and to rebut the presumption of unlawfulness, that he killed in self-defense. The instructions given here insofar as they placed these burdens of proof on the defendant violate the concept of due process announced for the first time in *Mullaney.* We decline, however, for reasons hereinafter stated, to give *Mullaney* retroactive effect in North Carolina. We hold that because the trial judge instructed the jury in accordance with our law of homicides as it stood, and in a trial conducted, before the *Mullaney* decision, the defendant is not entitled to the benefit of the *Mullaney* doctrine. We will, however, apply the decision to all trials conducted on or after June 9, 1975." *State v. Hankerson,* 288 N.C. 632, 220 S.E. 2d 575 (1975).

Therefore, this contention is overruled in view of our Supreme Court's determination that in North Carolina *Mullaney* is to be given prospective effect only.

Finally, defendant contends that the court prejudicially limited the defendant's possibility for acquittal to a jury finding of self-defense or accident. This argument is without merit. The court's charge must be read contextually, and when so read, the trial court never limited the jury to acquittal based only on self-defense or accident.

No error.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. LEONARD ROGER TOMS

No. 7529SC689

(Filed 21 January 1976)

Criminal Law § 75— confession — defendant's indication of wish to remain silent — continued interrogation

Defendant's in-custody statements to a sheriff were inadmissible in evidence where defendant told the sheriff that he did not want to talk, but the sheriff continued to interrogate defendant and another and elicited incriminating statements from defendant after some 30 to 45 minutes of interrogation.

APPEAL by defendant from *Baley, Judge.* Judgment entered 14 March 1975 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 20 November 1975.

Defendant was charged in a bill of indictment, proper in form, with the felony of robbery with a dangerous weapon.

The State's evidence tended to show that defendant and one Johnny Mack Thompson were riding in defendant's car on the occasion in question. They saw the victim, Homer Wall, alone in the yard of the Baptist Church at Caroleen. Defendant said, " 'Let's rob that man.' . . . 'We will just get that money.' " Thompson agreed. Defendant drove to a point out of sight of the church. Thompson walked back through the bushes to the church and, with the use of a .32 caliber pistol, took the victim's wallet. The victim knew and recognized Thompson. After taking the victim's wallet, Thompson ran back to the defendant's car where defendant was waiting. Thompson took $120.00 from the victim's wallet, threw the wallet away, gave defendant $40.00, and kept $80.00 for himself.

After the robbery defendant drove his car to another location where he and Thompson were apprehended by the sheriff. The sheriff arrested both defendant and Thompson and took them to the Rutherford County jail. After being fully advised of his rights, Thompson made a full confession implicating defendant. Defendant thereafter told the sheriff, "That is the way it happened," and then related in some detail his and Thompson's actions.

Defendant offered no evidence.

Attorney General Edmisten, by Associate Attorney William H. Guy, for the State.

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

BROCK, Chief Judge.

Defendant argues that it was error to admit into evidence before the jury his in-custody statements to the sheriff. Defendant asserts that the statements were made during an interrogation that continued after defendant had advised the sheriff that he wished to remain silent and not answer questions. Defendant makes no contention that he was not fully advised of his *Miranda* rights. He cites the familiar *Miranda* rule that declares: "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966).

In this case the interrogation overstepped the above-quoted basic restriction imposed by *Miranda.* When the prosecutor initially asked the sheriff what, if anything, the defendant Leonard Toms told him concerning the robbery, the sheriff replied: "At the beginning he didn't tell me anything; he refused to talk. I questioned him and Johnny Mack Thompson, oh, 45 minutes I guess—30 to 45 minutes and finally Johnny Mack Thompson said, 'We's in it, we might as well tell.' " At this point, upon objection by defendant, the jury was sent from the courtroom, and a *voir dire* was conducted to determine the admissibility of any statement defendant Leonard Toms may have made. Under questioning by the prosecutor on *voir dire,* the sheriff stated: "Johnny Mack Thompson is the one that told me how it happened, what led up to it, and all about it, and Leonard said, 'This is how it happened.' I asked him if this was the way it happened and he said, 'That is the way it happened.' " The following was elicited from the sheriff on cross-examination:

> "Q. Now, whenever you got him to sign that, I ask you if he didn't tell you at that time that he didn't know anything about his rights?
>
> "A. No, sir, he didn't. He said he didn't want to talk.

"Q. So that you took him out and away and brought the other man in?

"A. No, sir. They were sitting within two feet of each other at that time. He told me that he did not want to talk at that time.

"Q. Sometime later you started in on Thompson?

"A. I started in on both of them all together. I questioned the combination of the two, thirty to forty-five minutes.

"Q. Now, when this man told you he did not want to talk, did you take him and lock him up then or did you keep him sitting there?

"A. He sat right in the office. I never got but that one original waiver of his rights. As I recall, that was the only one. At the time he gave me that he said he didn't have anything to say to me. It was about 30 to 45 minutes after that that I say that he said, 'That is right'."

We do not believe that *Miranda* holds that a defendant may never again be questioned once he indicates that he wishes to remain silent. In fact, in the case of *Michigan v. Mosley*, ____ U.S. ____, 96 S.Ct. 321, 46 L.Ed. 2d 313 (1975), the U. S. Supreme Court, in discussing the rule above stated, said: "Clearly, therefore, neither this passage nor any other passage in the *Miranda* opinion can sensibly be read to create a *per se* proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent." However, it seems clear under *Miranda* that when a defendant indicates that he wishes to remain silent, the then current interrogation must cease. The length of the cessation or the conditions under which interrogation might be resumed are not involved here. In this case the interrogation did not even pause. By his own statement the sheriff, immediately after defendant said he did not want to talk, "started in on both of them all together." He "questioned the combination of the two, thirty to forty-five minutes" before defendant made an incriminating statement.

The interrogation procedure in this case constituted a violation of defendant's right to remain silent. It was prejudicial

error to admit defendant's incriminating statement into evidence before the jury.

New trial.

Judges BRITT and MORRIS concur.

F. KENT ATWATER, DECEASED, EMPLOYEE; MRS. BETTY ATWATER, WIDOW; SUSAN ATWATER ANNAS, DEBORAH ATWATER CANIPE, AND LINDA K. ATWATER, CHILDREN, v. RADIO STATION WJRI, INC., EMPLOYER; UNITED STATES FIDELITY & GUARANTY COMPANY

No. 7525IC626

(Filed 21 January 1976)

Master and Servant § 56— workmen's compensation — death not connected with employment — sufficiency of evidence

Although there was circumstantial evidence that deceased radio station employee fell against crates of empty bottles in the station bathroom, causing intra-abdominal bleeding resulting in his death, the evidence did not compel a finding that the deceased employee suffered such a fall and was sufficient to support the Industrial Commission's determination that deceased did not sustain an injury by accident resulting in his death arising out of and in the course of his employment.

APPEAL by claimants from the North Carolina Industrial Commission. Award entered by the Commission on 24 April 1975. Heard in the Court of Appeals 13 November 1975.

Kent Atwater was employed by Radio Station WJRI in Lenoir for more than twenty years. He had variously served as announcer, news director, program director, and general manager. According to claimants' witness, Rush Cole, everyone knew that Kent drank on occasions. He stated, "I don't know if he was a better announcer when he had been drinking a little bit." Mrs. Atwater was aware that Kent had cirrhosis of the liver. He had been hospitalized in late 1972 with a liver problem. He returned to work part-time for a few weeks, and by the first of 1973 was working full-time.

On the morning of 30 May 1973 Kent Atwater went to work at the customary time. Between 10:00 and 10:30 a.m. the station engineer, on the way to his office which was next door

to the bathroom, saw the bathroom door ajar and the light on. Without looking inside, he reached in and turned the light off and left the door ajar. Empty soft drink bottles were stored in three crates in the bathroom. A few seconds after the engineer reached his office, he heard the rattling of drink bottles from the bathroom. Out of curiosity he walked immediately to the bathroom door, a distance of about three steps. There he saw Kent Atwater standing just inside the door beside the crates of empty bottles. Kent Atwater looked pale. The engineer said, "morning, Kent, how are you?" Kent replied, "I don't feel too good, Chief." Kent then walked down the hall to the control room. He extended his hand as though to brace himself and started falling. The engineer caught him and helped to stretch him out on the floor. An ambulance was called. Kent did not say anything about falling in the bathroom. Mrs. Atwater talked with Kent at the hospital. He complained of pain in the abdominal area, but he did not say anything about falling in the bathroom at the radio station. Kent's condition worsened, and he was transferred by ambulance to Winston-Salem, but he was dead on arrival there.

An autopsy was performed, and in the opinion of the pathologist the cause of death was "acute massive intra-abdominal hemorrhage with shock." The pathologist found no bruise marks on the skin in the abdonimal area, either the outside of the skin or the inside of the skin area. He found a great deal of blood in the abdominal cavity. In his opinion the blood came from four or more linear lines of compression on the bowel walls, which lines he described as being four to five centimeters in length, or "plus or minus two inches." The pathologist opined that "it would be possible for a rather severe blow to occur to the external abdomen which would not leave bruised marks and yet do the compression marks that I found on the bowels on the inside."

The employer and carrier offered evidence which tends to show that other employees talked with Kent Atwater while he was waiting for the ambulance. One Donnie Goodale asked Kent "what's wrong?" To which Kent replied "I don't know. I have just got a tummy ache, and it's been bothering me some. And I can't stay out of the bathroom." Kent stated that he felt "as if he had eaten some apples."

During the evening before 30 May 1973 Kent was in the company of Jeff Joines, a co-employee. They were gathering

news about a traffic fatality. Joines described Kent as looking pale and appearing not to be in good health. Joines remarked to Kent that he didn't look very good. Kent replied, "Yeah, I haven't been feeling good."

Defendants' evidence further tended to show that Kent Atwater did not state to anyone at the radio station anything about falling in the bathroom against the crates of bottles.

The Hearing Commissioner found facts and concluded that Kent Atwater did not sustain an injury by accident resulting in his death arising out of and in the course of his employment on 30 May 1973. Upon appeal the Commission, Commissioner Vance dissenting, affirmed the findings and conclusions of the Hearing Commissioner.

Townsend and Todd, by J. R. Todd, Jr., for the claimants.

Edwin G. Farthing, for the employer and the carrier.

BROCK, Chief Judge.

We agree with claimants that the finding in Findings of Fact 3, that on the evening of 29 May 1973 "deceased employee appeared to have been drinking some form of alcoholic beverages," is not supported by evidence. We also agree that the finding in Findings of Fact 4, that on the morning of 30 May 1973 that the deceased employee's "eyes were bloodshot," is not supported by evidence. However, these findings are not crucial, and without them the same result would obtain. We therefore consider them nonprejudicial.

The crux of claimants' argument on appeal is the failure of the Commission to find that Kent Atwater fell against the crates of empty bottles in the bathroom of the radio station during the morning of 30 May 1973, causing the linear lines of compression on the bowel walls from which the acute, massive intra-abdominal hemorrhage and shock occurred causing his death. There was circumstantial evidence from which it could be inferred that deceased fell against the crates of empty bottles in the bathroom. It seems to be claimants' argument that the evidence required, as a matter of law, a finding of such a fall and that such a fall caused the injuries which resulted in the death of Kent Atwater. We do not agree.

The Commission is the fact finding body, and its findings of fact, when supported by competent evidence, are binding

upon appeal. The Commission is not bound to believe all of the evidence it hears and certainly is not bound to find the circumstances to be as claimants contend their circumstantial evidence tends to show.

We find nothing inconsistent between the evidence and the facts found by the Commission. Also we find nothing inconsistent between the facts found and the denial of compensation.

Affirmed.

Judges HEDRICK and CLARK concur.

IN THE MATTER OF: THE APPEAL OF PILOT FREIGHT CARRIERS, INC., FROM AN ACTION OF THE BOARD OF ALDERMEN OF THE CITY OF WINSTON-SALEM ASSESSING AD VALOREM TAXES ON CERTAIN INTERSTATE ROLLING STOCK OWNED BY PILOT FOR TAXABLE YEARS 1965, 1966, 1967 AND 1968

No. 7521SC551

(Filed 21 January 1976)

1. **Taxation § 25— interstate equipment — assessment for back taxes**

The trial court properly held that the city in which Pilot Freight Carriers stored its interstate equipment could not rely on former G.S. 105-332 to assess back taxes, since that statute was repealed by the enactment of the New Machinery Act of 1971 which did not contain a savings clause, and the resolution by the city Board of Aldermen seeking an assessment for back taxes was not passed until 1972.

2. **Taxation § 25— discovery statute — assessment for back taxes — notice to taxpayer**

The city in which Pilot Freight Carriers stored its interstate equipment could rely upon the "discovery" statute, G.S. 105-312, and could assess taxes from the current year, which was 1972 when the city Board of Aldermen acted, and the five years previous to 1972, and any defects in notice provided Pilot by the city were waived where Pilot was notified of the proposed action by the Board of Aldermen and Pilot's attorney appeared and argued before the resolution requesting an assessment of back taxes was adopted by the Board.

APPEAL by Pilot Freight Carriers, Inc. and City of Winston-Salem from *Albright, Judge.* Judgment entered 28 April 1975 in Superior Court, FORSYTH County. Heard in the Court of Appeals 16 October 1975.

Pilot Freight Carriers, Inc., is a common carrier of property operating in interstate commerce and had its principal office in Winston-Salem, Winston Township, throughout the years 1965, 1966, 1967, and 1968.

For the years 1965, 1966, 1967, and 1968 Pilot listed its interstate equipment for tax purposes in Vienna Township outside the City of Winston-Salem, paying taxes thereon to the county but not the City.

The City delayed making a determination with respect to the collection of taxes against several companies, including Pilot, for prior years until the litigation with respect to the tax situs of such property was completed in the McLean case. See *In re Trucking Co.*, 281 N.C. 242, 188 S.E. 2d 452 (1972). The County Tax Supervisor transferred the tax listings for the other trucking companies to Winston Township for 1969 taxes. He did not transfer Pilot's listing since Pilot began to store its equipment outside the City as of 1969.

Following the decision in *In re Trucking Co., supra,* and the decision in *In re Trucking Co.*, 281 N.C. 375, 189 S.E. 2d 194 (1972), the city attorney recommended on 4 December 1972 that back taxes, but no penalties, be assessed against Pilot and the other companies for 1965, 1966, 1967 and 1968. On 18 December 1972 the Board of Aldermen passed a resolution requesting the assessment of back taxes against Pilot and several other trucking companies.

On 29 January 1973, Pilot gave notice of appeal to the State Property Tax Commission. The State Commission heard the matter on 22 May 1974 and rendered an opinion on 11 December 1974 concluding that the City could not rely upon G.S. 105-332 to assess back taxes; that the City could rely upon the "discovery" statute, G.S. 105-312, but that the statute only authorized the City to assess taxes for the "current year" (which was 1972 when the Board acted) and the five years previous to 1972; and that Pilot had been afforded due process although the City had not followed the procedure set out in G.S. 105-312.

The Commission upheld the assessments for 1967 and 1968 but struck the assessments for 1965 and 1966 since those years were more than five years previous to 1972.

Pilot appealed the portion of the decision holding that it must pay the taxes for the years 1967 and 1968, and the City

appealed from the portion of the decision holding that Pilot did not have to pay the taxes in question for the years 1965 and 1966. The superior court affirmed the decision of the State Property Tax Commission. Pilot appealed as to the years 1967 and 1968, and the City appealed as to the years 1965 and 1966.

Deal, Hutchins and Minor, by William K. Davis and Richard Tyndall, for Pilot Freight Carriers, Inc.

Womble, Carlyle, Sandridge and Rice, by Roddey M. Ligon, Jr., for City of Winston-Salem.

MARTIN, Judge.

CITY appeal.

[1] City appellant contends that the court erred in holding that Pilot did not have to pay taxes for 1965-1966. It does not contest the conclusion that G.S. 105-312, the "discovery" statute, extends only back to 1967, but relies upon the old 105-332 (See 1965 Replacement Volume 2D), which was repealed effective 1 July 1971. This statute provided that any property which was "validly listed for taxation in any county, municipal corporation or taxing district shall be thereby also validly listed for taxation by any county, municipal corporation or taxing district in which it has a taxable situs."

When Pilot listed its interstate equipment for county tax purposes in 1965 and 1966, the property had a tax situs within the City. At that time G.S. 105-332 was in full force and effect.

Upon passage of the Machinery Act, effective 1 July 1971, G.S. 105-332 was repealed, with no saving clause, and new G.S. 105-395 provides:

> " . . . Unless otherwise specifically provided herein, all other provisions of this Machinery Act (being Subchapter 11 of Chapter 105 of the General Statutes) shall become effective July 1, 1971, *and shall apply to all taxes due and uncollected as of that date* as well as to those that shall become due thereafter." (Emphasis supplied.)

Thus, the intention of the Legislature to give the New Machinery Act of 1971 retroactive effect is expressly declared. Assuming arguendo, that the 1965-66 taxes were due the City pursuant to G.S. 105-332, the repeal of that statute by the

enactment of the New Machinery Act of 1971, without a saving clause, put an end to the right of the City to collect the tax.

The decision of the State Property Tax Commission that Pilot did not have to pay to the City taxes on its interstate equipment for the years 1965 and 1966 is based upon appropriate findings of fact supported by material and substantial evidence and is in accord with law. The superior court correctly sustained the decision of the Commission.

PILOT appeal.

[2] Pilot appellant contends the Board of Aldermen were relying upon the old G.S. 105-332 (Repealed 1971) in assessing back taxes and that the City cannot now rely upon the "discovery" statute. The "discovery" statute (the old G.S. 105-331 and the present G.S. 105-312) authorizes the City to "discover" unlisted property and to tax it for the "current year" and for five previous years. Thus, the City could discover any property not listed for the current and five prior years. The only year which could conceivably be the current year is 1972. That is the first time any affirmative action of any kind was taken against Pilot. A discovery is made when the property is listed by the tax supervisor. With 1972 as the current year, the earliest year for which the City could discover unlisted property was 1967.

Conceding the City had the power to assess taxes for 1967-1968 under G.S. 105-312, Pilot argues that the City failed to follow the procedures for notice as outlined in G.S. 105-312(d). It was stipulated that Pilot was notified of the proposed action by the Board of Aldermen and that Pilot's attorney appeared and argued before the 18 December 1972 resolution was adopted. Such participation ordinarily waives any defects in notice. See *Collins v. Highway Comm.*, 237 N.C. 277, 74 S.E. 2d 709 (1953). Further, G.S. 105-394 provides that immaterial irregularities in notice do not invalidate taxes imposed.

The decision of the State Property Tax Commission holding that Pilot had to pay taxes on its interstate equipment to the City for the years 1967 and 1968 is based upon appropriate findings of fact supported by material and substantial evidence and is in accord with law. The superior court correctly sustained the decision of the Commission.

The result is:

On City appellant's appeal the judgment of the superior court is

Affirmed.

On Pilot appellant's appeal the judgment of the superior court is

Affirmed.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. JOHNNY LEE BOZEMAN

No. 755SC688

(Filed 21 January 1976)

1. **Criminal Law § 66— in-court identification of defendant — observation at crime scene as basis**

Trial court in an armed robbery prosecution properly allowed a witness to make an in-court identification of defendant where the witness observed defendant as he left the scene of the crime and where the witness subsequently made a photographic identification of defendant.

2. **Robbery § 4— armed robbery — ownership of property taken — proof unnecessary**

In a prosecution for armed robbery of two convenience store employees where the indictment charged defendant with taking money " . . . from the presence, person, place of business, and residence of Harbor Farmes Incorporated DBA Convenient Food Mart Masonboro Loop Rd. New Hanover County—Gladys Hanson and Dickie Kirkum Custodians," the State's failure to offer evidence that the property taken belonged to Harbor Farmes Incorporated did not require nonsuit on the ground of variance, since it is not necessary that ownership of the property be laid in a particular person in order to allege and prove armed robbery.

APPEAL by defendant from *Cowper, Judge.* Judgment entered 10 June 1975 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 20 November 1975.

Defendant was charged in a bill of indictment with armed robbery.

The State offered evidence, in substance, as follows:

Richard Kirkum and Gladys Hanson testified that on 11 December 1973 they were employed at a Convenient Food Mart in Wilmington. At about 11:00 o'clock that night two men came into the store, with their faces covered, and one of them held a gun at Kirkum's head. He ordered Mrs. Hanson to give him the money from the cash register. She gave him the money, and the men left the store. Charles Swann testified that on 11 December 1973 he drove by the Convenient Food Mart and saw that a robbery was taking place. He parked near the store and watched as the robbers left. One of them uncovered his face as he left the store, and Swann was able to observe him and identify him as the defendant. As the robbers drove away, Swann followed them and saw that the license number of their car was DKZ885. Three detectives from the New Hanover County Sheriff's Department went to the home of defendant, who owned the car with license number DKZ885, and as they drove up to his home, he fled.

Defendant offered evidence tending to show that on the night of 11 December 1973 he was at home with his wife and did not take part in any armed robbery.

The jury returned a verdict of guilty as charged. Defendant appealed from judgment imposing a prison sentence.

Attorney General Edmisten, by Assistant Attorney General John M. Silverstein, for the State.

Burney, Burney, Sperry & Barefoot, by Roy C. Bain, for defendant appellant.

MARTIN, Judge.

[1] Defendant contends that the court erred in admitting Swann's identification testimony. Before this testimony was admitted, a voir dire hearing was held to determine its admissibility. At this hearing, Swann testified concerning his opportunity to observe defendant and that after the robbery an employee of the Sheriff's Department showed him a group of photographs and he identified one as a photograph of defendant. The court made extensive findings of fact based on competent evidence concerning Swann's observation of defendant, and concluded that the in-court identification of the defendant by the witness Swann was of independent origin based

solely on what he saw at the time of the crime and was admissible. Findings of fact by the trial judge and conclusions drawn therefrom on voir dire examination are binding on the appellate courts if supported by competent evidence. *State v. Nelson,* 23 N.C. App. 458, 209 S.E. 2d 355 (1974); *State v. West,* 17 N.C. App. 5, 193 S.E. 2d 381 (1972). Defendant's objection to the admission of Swann's in-court identification was properly overruled, and the evidence thereof was properly admitted.

[2] Defendant assigns as error the failure of the trial judge to direct a verdict of not guilty because of insufficient evidence and a fatal variance between the evidence and the indictment.

The indictment charged defendant with taking "$183.00 in money; of the value of $183.00 dollars, from the presence, person, place of business, and residence of Harber Farmes Incorporated DBA Convenient Food Mart Masonboro Loop Rd. New Hanover County—Gladys Hanson and Dickie Kirkum Custodians." The State offered no evidence that the property taken belonged to Harbor Farmes Incorporated and defendant contends that because of this he should have been granted a nonsuit for variance. This contention is without merit. " . . . (I)t is not necessary that ownership of the property be laid in a particular person in order to allege and prove armed robbery. . . . An indictment for robbery will not fail if the description of the property is sufficient to show it to be the subject of robbery and negates the idea that the accused was taking his own property." *State v. Spillars,* 280 N.C. 341, 185 S.E. 2d 881 (1972).

No error.

Judges VAUGHN and CLARK concur.

UNITED STATES STEEL CORPORATION v. RONALD LASSITER

No. 753SC729

(Filed 21 January 1976)

1. Accounts § 1— action on account — summary judgment

In this action on an account, plaintiff movant for summary judgment met its burden of showing that there was no genuine issue as to any material fact when it submitted its verified complaint including an itemized statement of the account, defendant's answer to interrogatories, and affidavits of its credit manager and its assignor's

bookkeeper, and that burden was not overcome by the general denial in defendant's answer and his affidavit merely reaffirming the general denial.

2. **Limitation of Actions § 13— payment on account — beginning of statute anew**

Each payment made on a current account starts the running of the statute of limitations anew as to all items not barred at the time of payment.

APPEAL by defendant from *Fountain, Judge.* Judgment entered 27 May 1975 in Superior Court, PITT County. Heard in the Court of Appeals 13 January 1976.

This is an action on an account. In its verified complaint, plaintiff alleged that defendant had become indebted to Pitt-Greene Fertilizer and Fuel Company, Inc. (Pitt-Greene) in the amount of $70,743.18 for services performed by Pitt-Greene; that Pitt-Greene had assigned the account to plaintiff; and that defendant was liable to plaintiff for said amount on a mutual, open and current account. An itemized statement of the account was attached to, and by reference made a part of, the complaint.

Defendant filed answer in which he merely denied the material allegations of the complaint. At a later date, he filed an amendment to his answer in which he pled the three years' statute of limitations.

Plaintiff moved for summary judgment. Its motion was supported by its verified complaint and statement of account attached thereto; answers to interrogatories in which defendant admitted that he had made payments on the account by turning over to plaintiff checks made payable to him from tobacco sales warehouses and insurance companies; and affidavits by the former bookkeeper of Pitt-Greene and the district credit manager of plaintiff setting forth, among other things, that as of 30 November 1968 defendant owed Pitt-Greene $284.61, that thereafter, by virtue of purchases made by defendant and after giving credit for all payments, the indebtedness increased to $70,458.57, and the last payment made by defendant was on 30 November 1971 in amount of $796.57. The action was instituted on 17 July 1974.

In opposition to the motion, defendant submitted his verified answer and his affidavit in which he merely reaffirmed his answer. Neither the answer nor the affidavit set forth any specific facts.

The court granted summary judgment in favor of plaintiff for the amount prayed and from the judgment, defendant appealed.

James, Hite, Cavendish & Blount, by Robert D. Rouse III, for plaintiff appellee.

Roland C. Braswell for defendant appellant.

BRITT, Judge.

First, defendant contends the trial court erred in granting summary judgment for the reason that the pleadings raised a genuine issue as to a material fact, namely, whether defendant is indebted to plaintiff in any amount. We find no merit in the contention.

[1] While the party moving for summary judgment has the burden of positively and clearly showing that there is no genuine issue as to any material fact, *Brawley v. Heymann,* 16 N.C. App. 125, 191 S.E. 2d 366 (1972), *cert. denied* 282 N.C. 425, 192 S.E. 2d 835 (1972), when the movant carries that burden the opposing party may not rest upon the mere allegations of his pleading but must respond with affidavits or other evidentiary matter which sets forth specific facts showing that there is a genuine issue for trial. G.S. 1A-1, Rule 56(e).

In this case, when plaintiff, at the hearing on its motion, submitted its verified complaint including an itemized statement of the account, defendant's answers to interrogatories, and the affidavits of Pitt-Greene's former bookkeeper and plaintiff's district credit manager, it met its burden and that burden was not overcome by the general denial in defendant's answer and his affidavit which was a mere reaffirmance of the general denial.

Defendant further contends that the trial court erred in rejecting his plea of the three years' statute of limitations. This contention has no merit.

[2] It is well settled in this jurisdiction that each payment made on a current account starts the running of the statute of limitations anew as to all items not barred at the time of payment. *Little v. Shores,* 220 N.C. 429, 17 S.E. 2d 503 (1941); *Supply Company v. Banks,* 205 N.C. 343, 171 S.E. 358 (1933); *Supply Company v. Dowd,* 146 N.C. 191, 59 S.E. 685 (1907). Plaintiff's verified statement discloses that no item was as much as three years old when a payment was made and the suit

was instituted within three years after the last payment was made.

The judgment appealed from is

Affirmed.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA, EX REL. COMMISSIONER OF INSURANCE v. COMPENSATION RATING AND INSPECTION BUREAU OF NORTH CAROLINA

No. 7510INS636

(Filed 21 January 1976)

Master and Servant § 80— workmen's compensation rate filing — disapproval without notice and hearing

The Commissioner of Insurance erred in disapproving a workmen's compensation rate filing made by the Compensation Rating and Inspection Bureau without giving the Bureau notice and an opportunity to be heard. G.S. 58-27.2(a).

DEFENDANT appeals from an order of the Commissioner of Insurance, John Randolph Ingram, entered 25 April 1975. Heard in the Court of Appeals 13 November 1975.

On 7 December 1972, the appellant, the Compensation Rating and Inspection Bureau of North Carolina, filed with the Commissioner of Insurance of North Carolina a proposal on behalf of its member companies which write workmen's compensation insurance in North Carolina seeking increased and revised workmen's compensation rates for classifications which have exposure under the United States Longshoremen's and Harbor Worker's Compensation Act, known as "F" classifications.

Following the 7 December 1972 filing the Bureau made repeated requests of the Commissioner that the filing be acted upon because of the fact that its member insurance carriers were being required to pay benefits under the "F" classifications at substantially high levels although the approved rates for such coverage continued to reflect the lower benefit levels previously in effect. Included among these requests were letters from the General Manager of the Bureau addressed to the Commissioner dated 16 April 1973, 30 November 1973, 31 December

1973, 17 January 1974, 1 April 1974, and 24 July 1974. A request for action upon the 7 December 1972 filing was also made to the Commissioner by counsel for the Bureau in a letter dated 2 August 1974.

Despite the repeated requests on the part of the Bureau for consideration of its 7 December 1972 filing, the Commissioner took no action on the filing until 25 April 1975 when he issued an order disapproving the filing. The Commissioner's order of 25 April 1975 was issued without any prior notice to the Bureau and without affording to the Bureau any opportunity to be heard. On 23 May 1975, the Bureau filed its Motion to Vacate Order in which it requested the Commissioner to rescind and set aside his order of 25 April 1975, to allow the Bureau to file such amendments and supplemental data and exhibits to its 7 December 1972 filing, and to set the matter for hearing.

Also on 23 May 1975, the Bureau filed its Exception and Notice of Appeal to the North Carolina Court of Appeals.

No action was taken by the Commissioner on the Motion to Vacate.

Attorney General Edmisten, by Assistant Attorney General Isham B. Hudson, Jr., for the State.

Allen, Steed and Pullen, P.A., by Thomas W. Steed, Jr., for defendant appellant.

MARTIN, Judge.

Appellant contends that the order of the Commissioner dated 25 April 1975 disapproving the rate filing proposal is contrary to the applicable statutory rate-making procedure found in G.S. 58-27.2(a) in that the Commissioner failed to hold a hearing on the matter. We agree.

To affirm an order denying rate increases when there was no opportunity for notice and hearing subjects both the public and the insurance carriers to danger of arbitrary action by the Commissioner.

Reversed and remanded for further proceedings in accordance with this opinion.

Judges MORRIS and PARKER concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 21 JANUARY 1976

BONDSHU v. BONDSHU No. 7512DC589	Cumberland (73CVD434)	Affirmed
GARRETT v. STATE HIGHWAY COMM. No. 7523IC653	Wilkes (Docket U-9310)	Affirmed
KOCSI v. LLOYD No. 755DC652	New Hanover (74CVD3526)	No Error
LISS v. LISS No. 7526DC433	Mecklenburg (74CVD7920)	Appeal Dismissed
PETREE v. INSURANCE CO. No. 7521DC475	Forsyth (75CVD240)	New Trial
STATE v. FARRIOR No. 754SC917	Duplin (75CR1983)	Action Abated Appeal Dismissed
STATE v. SMITH No. 7510SC714	Wake (74CR80262)	No Error
STATE v. WOODY ET AL No. 7513SC749	Columbus (74CR6084) (74CR6087) (74CR6073) (74CR6280)	No Error

WILLIAM G. SKINNER v. MARGARET SKINNER

No. 7512DC707

(Filed 4 February 1976)

1. **Rules of Civil Procedure § 11; Pleadings § 8— verification of complaint — illiterate plaintiff — attack on verification**

The trial court erred in allowing defendant's motion to strike the verification of plaintiff's complaint, though plaintiff testified on cross-examination that he had not read the complaint and that he "did not know what was on it because it was read to him," since the verification was made by plaintiff's affidavit taken before a notary public, who is one of the officers competent for that purpose under G.S. 1-148, the verification was in the usual form and contained the statements required by G.S. 1A-1, Rule 11(b), plaintiff could not read but could write his name, and plaintiff's testimony was consistent throughout that someone did read the complaint to him and that he did sign the verification.

2. **Husband and Wife § 4; Trusts § 19— wife's property — conveyance to husband and wife as tenants by entirety — no resulting trust**

The trial court erred in determining that a resulting trust arose upon the conveyance by defendant of a 5.27 acre tract of land to plaintiff and herself as tenants by the entirety, though the land was purchased with defendant's separate funds, and it was error for the court to order plaintiff to convey his interest in the tract to defendant since defendant could not engraft a trust *upon her own conveyance* in the absence of fraud, mistake, or undue influence, which was negated by evidence that the provisions of G.S. 52-6 were complied with in the execution of the deed creating the tenancy by the entirety.

APPEAL by plaintiff from *Herring, Judge.* Judgment entered 14 May 1975 in District Court, CUMBERLAND County. Heard in the Court of Appeals 12 January 1976.

Plaintiff instituted an action for absolute divorce from defendant wife on 12 June 1974, alleging in his verified complaint that the parties had been separated for more than a year. Defendant answered, denying continuous separation and alleging abandonment as a second defense. Defendant also filed a first counterclaim for divorce from bed and board on the grounds that on 23 March 1973 plaintiff abandoned the defendant without just cause; a second counterclaim for alimony on the ground of adultery; and a third counterclaim asking that plaintiff be required to convey to her his interest in a 5.27 acre tract of land held by the parties as tenants by the entirety on the ground that she furnished the entire purchase price for

said land and did not intend a gift of same to her husband, thereby giving rise to a resulting trust in her favor.

At the close of the plaintiff's evidence, defendant moved to strike the verification of plaintiff's complaint and to dismiss the action for divorce. The motion was allowed.

At the close of defendant's evidence, the plaintiff moved for a directed verdict as to defendant's first, second, and third counterclaims. The motion was allowed as to the second counterclaim but denied as to the first and third counterclaims. Upon submission of issues, the jury found (1) the residence of Defendant in Cumberland County for more than six months preceding the institution of her counterclaim for divorce from bed and board, (2) the marriage of the parties to each other on 1 April 1972, as alleged in the counterclaim, (3) the plaintiff did not abandon the defendant without just cause on 23 March 1973, and (4) the plaintiff is a trustee of a resulting trust in favor of defendant of the real property described in the counterclaim.

Judgment was entered (1) dismissing plaintiff's action for absolute divorce, (2) denying defendant's counterclaim for divorce from bed and board and for alimony, and (3) declaring plaintiff to be a trustee of a resulting trust and ordering plaintiff to convey his interest in the 5.27-acre tract to defendant.

In apt time plaintiff moved pursuant to G.S. 1A-1, Rule 50(b)(1) for judgment notwithstanding the verdict as the verdict relates to defendant's third counterclaim. The motion was denied, and plaintiff appealed.

Blackwell, Thompson, Swaringen, Johnson & Thompson, P.A. by Larry A. Thompson for plaintiff appellant.

McCoy, Weaver, Wiggins, Cleveland & Raper by L. Stacy Weaver, Jr. for defendant appellee.

PARKER, Judge.

[1] Plaintiff first assigns error to the court's actions in allowing the defendant's motion to strike the verification to his complaint and in dismissing plaintiff's action for absolute divorce. This assignment has merit.

G.S. 50-8 requires that "[i]n all actions for divorce the complaint shall be verified in accordance with the provisions

of Rule 11 of the Rules of Civil Procedure and G.S. 1-148." G.S. 1A-1, Rule 11(b) states: "In any case in which verification of a pleading shall be required by these rules or by statute, it shall state in substance that the *contents of the pleading verified are true* to the knowledge of the person making the verification, except as to those matters stated on information and belief, and as to those matters he believes them to be true. Such verification shall be made by affidavit of the party" . . . (Emphasis added). G.S. 1-148 specifies which officers are competent to take affidavits for the verification of pleadings.

Examination of the verification to plaintiff's complaint as the same appears in the record filed with this court discloses that it was made by plaintiff's affidavit taken before a notary public, who is one of the officers competent for that purpose under G.S. 1-148. The verification was in the usual form and contained the statements required by G.S. 1A-1, Rule 11(b). Defendant contends that it was nevertheless properly stricken because on cross-examination plaintiff testified he had not read the complaint, that he "did not know what was on it because it was read to him," and because his testimony discloses that plaintiff was not fully aware of the nature of what he was doing when he signed the verification. The record further discloses, however, that plaintiff testified that he had never learned to read, though he could write his name, and his testimony was consistent throughout that someone read the complaint to him and that he did sign the verification. There was no showing that plaintiff did not in fact sign the verification, and nothing in the record suggests that the signature which appears thereon was not in fact his signature. The certificate to the verification signed by the notary public and attested by her seal certifies that the verification was "[s]worn to and subscribed" before her, and nothing in the record impeaches that certification. Nothing in plaintiff's testimony suggests that the essential statement required by Rule 11(b), the statement that "the contents of the pleading verified are true to the knowledge of the person making the verification" was in any way false. It is clear that plaintiff was not a well-educated person, and it is apparent he could be easily confused under cross-examination. We find such uncertainties as he expressed under cross-examination as to the exact nature of his act in verifying the complaint to be an insufficient basis to warrant impeachment of his verification. Accordingly, we

hold the court erred in allowing defendant's motion to strike the verification and in dismissing plaintiff's complaint.

[2] Plaintiff also assigns error to the court's actions in denying his motions for a directed verdict and for judgment notwithstanding the verdict as to defendant's third counterclaim in which defendant wife seeks to have plaintiff husband declared to be a trustee of a resulting trust in her favor as to any interest he may have in the 5.27-acre tract of land, legal title to which is held by the parties as tenants by the entirety. In this connection defendant's evidence shows the following:

Defendant purchased the 5.27-acre tract in 1970, prior to her marriage to plaintiff, and the deed conveying the land to her was recorded in 1970. At the time of purchase she made a down payment and gave back a purchase money deed of trust to secure the balance of the purchase price, which was payable in 60 monthly installments. At the time of trial a portion of these monthly installments still remained to be paid. However, both the down payment and all monthly installments of purchase price which had been paid up to the date of trial were paid by defendant from her separate funds. On 1 April 1972 plaintiff and defendant were married to each other. On 12 July 1972 defendant wife signed a warranty deed conveying the 5.27-acre tract to herself and her husband, the plaintiff herein, as tenants by the entirety. Defendant testified that plaintiff had asked her several times "to put his name on the deed," and that she did so "because she could tell the marriage was not going as well as it should and since he argued and wanted his name on the deed that it would make everything smoother, so she decided she would do it, as she wanted to keep the marriage going." Defendant also testified that she "did not intend to make a gift to him at the time and she went to the courthouse and had a private examination by the Clerk of the Superior Court." On cross-examination defendant testified that at the time she signed the deed "she was happily married to him, as happy as any other couple," and that when she signed the deed "she was familiar with the contents of the deed and she was familiar with the language in the deed that said 'that the purpose of the deed is to create a tenancy by the entirety in the Grantees herein,' and that was her intention at the time she signed the deed; she understood that there was a right of survivorship."

A copy of the deed, defendant's exhibit 8, is included in the record. Examination of this deed, which was dated 12 July 1972 and was recorded on the same date, discloses that it was a deed of bargain and sale in customary form, which recited a valuable consideration, contained an habendum in regular form, and contained full covenants of warranty. Defendant's acknowledgment to the deed was taken before the Assistant Clerk of Superior Court, who certified that the defendant, upon being privately examined separate and apart from her husband touching her voluntary execution of the deed, acknowledged "that she signed the same freely and voluntarily without fear or compulsion of her said husband or any other person," and that she still voluntarily assented thereto. The certificate of the Assistant Clerk also contains the statement as required by G.S. 52-6 that it had been made to appear to the Assistant Clerk and she found as a fact that the instrument was "not unreasonable or injurious" to the wife.

We find that the court erred in denying plaintiff's motion for a directed verdict and in denying his subsequent motion for judgment notwithstanding the verdict as to defendant wife's third counterclaim. There was neither allegation nor evidence that any fraud, duress, or undue influence was practiced by anyone against the defendant wife in order to induce her to execute the deed. There is no contention that any express trust was created. Defendant wife's position seems to be that because the tract of land was hers and was purchased entirely with her separate funds, and because she testified that at the time she signed the deed she did not intend to make a gift to her husband, a trust in her favor resulted. Citing such cases as *Ingram v. Beasley,* 227 N.C. 442, 42 S.E. 2d 624 (1947), *Tire Co. v. Lester,* 190 N.C. 411, 130 S.E. 45 (1925), and *Deese v. Deese,* 176 N.C. 527, 97 S.E. 475 (1918), defendant seeks to equate the present case to one in which it is shown that the funds of one person are used to purchase property, title to which is taken in another. In such a case the payment of the purchase money raises a resulting trust in favor of him who furnishes the money unless a contrary intention or a contrary presumption of law prevents. As the above cited cases disclose, such a trust arises between husband and wife, in favor of the wife, when land is deeded to both for consideration furnished by the wife, although the contrary rule applies when the purchase money is furnished by the husband, for in such case there is a presumption that he intended to make a gift to his

wife. Under the facts disclosed by the evidence in the present case, however, no resulting trust arises. Here, there was no conveyance by a third party to the husband upon consideration furnished by the wife. On the contrary, the wife is here attempting to engraft a trust *upon her own conveyance.* This she may not do in the absence of fraud, mistake, or undue influence, none of which are here shown. *Gaylord v. Gaylord,* 150 N.C. 222, 63 S.E. 1028 (1909).

Our Supreme Court, in its opinion on a second appeal of the case of *Tire Co. v. Lester, supra,* discussed the effect of a deed made by a wife conveying her separate property to her husband where no consideration was paid. Citing *Gaylord v. Gaylord, supra,* the Court said:

> "[I]n a deed giving on the face clear indication that an absolute estate was intended to pass, either by recital of valuable consideration, or by an express covenant to warrant and defend the title, no trust would result in favor of the grantor by reason of the circumstance that no consideration was in fact paid, and that the main current of decision is in the direction of establishing the principle that, as between the parties, a trust cannot be fastened on an absolute deed by evidence that the grantee paid no consideration, or that he agreed to hold the premises for the grantor." *Tire Co. v. Lester,* 192 N.C. 642, 646, 135 S.E. 778, 780 (1926).

G.S. 39-13.3(b) provides that "[a] conveyance of real property, or any interest therein, by a husband *or a wife* to such husband and wife vests the same in the husband and wife as tenants by the entirety unless a contrary intention is expressed in the conveyance." (Emphasis added.) No such contrary intention was expressed in the conveyance involved in the present case. Subsection (e) of G.S. 39-13.3 further provides that "[a]ny conveyance by a wife authorized by this section is subject to the provisions of G.S. 52-6." As heretofore noted, the provisions of G.S. 52-6 were fully complied with in connection with the conveyance involved in the present case. These statutes express a clear legislative intent that so long as the provisions of G.S. 52-6 are complied with, a wife may convey her separate property to her husband, or to her husband and herself, as freely and with the same consequences as the husband may convey his property to his wife.

In the court's ruling denying plaintiff's motions for a directed verdict and for judgment notwithstanding the verdict as to defendant's third counterclaim, we find error. The judgment declaring plaintiff a trustee and ordering him to convey his interest in the 5.27-acre tract of land to the defendant is reversed, and this case is remanded for trial of plaintiff's action for absolute divorce and for entry of judgment for plaintiff notwithstanding the verdict as to defendant's third counterclaim. See G.S. 1A-1, Rule 50(b)(2).

Error and remanded.

Judges HEDRICK and ARNOLD concur.

WILLIAM MARK STARNES, MINOR, BY HIS NEXT FRIEND, W. D. STARNES v. CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY AND DR. JAMES P. HAMILTON AND J. JOHNSON

No. 7526SC416

(Filed 4 February 1976)

1. **Hospitals § 3— patient burned during surgery — no liability of hospital**

In an action by plaintiff against defendants for damages for negligently burning him instituted prior to the N. C. Supreme Court decision abolishing the doctrine of charitable immunity, the applicable law was that a patient, paying or nonpaying, who was injured by the negligence of an employee of a charitable hospital could recover damages from it only if it was negligent in the selection or retention of such employee, or perhaps if it provided defective equipment or supplies; however, plaintiff's evidence was insufficient to require submission of an issue as to the hospital's negligence to the jury where there was no evidence that (1) a hot water bottle used to warm plaintiff during surgery was defective or that the bottle was not reasonably suited to warm infant patients during surgery, (2) the hospital was negligent in hiring and retaining certain personnel, (3) the hospital's publishing of a procedure manual which recommended 120° as the proper temperature for hot water bottles was a contributing factor to plaintiff's injury, or (4) the hospital was negligent in supplying an anesthetist instead of an anesthesiologist for the operation.

2. **Physicians and Surgeons §§ 12, 16— warming procedure during surgery — responsibility of anesthetist — patient burned — sufficiency of evidence of negligence**

In an action to recover damages for burns sustained by plaintiff during surgery, plaintiff's evidence as to negligence of the anesthetist

was sufficient to be submitted to the jury where it tended to show that the responsibility of warming the patient for the operation was that of the anesthetist, defendant Johnson, and that the warming procedure used during plaintiff's surgery resulted in the burns.

3. Physicians and Surgeons § 16— warming procedure during surgery — responsibility of anesthetist — patient burned — no negligence of surgeon

Evidence was insufficient to be submitted to the jury on the issue of the negligence of defendant doctor who performed the operation during which plaintiff was burned by a hot water bottle used to keep him warm during the surgery, since the evidence showed that responsibility for the hot water bottle rested with the anesthetist and not the surgeon.

APPEAL by plaintiff from *Falls, Judge.* Judgment entered 28 January 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 15 September 1975.

Plaintiff was born on 27 May 1966 at Charlotte Memorial Hospital. Seven days later plaintiff underwent emergency surgery to correct an intestinal obstruction. The operation was performed by Dr. James P. Hamilton, a pediatric surgeon. The anesthetic was administered by Miss Johnson, a registered nurse and trained anesthetist. It was necessary to warm the plaintiff during the operation because of the tendency of a newborn child to lose body temperature rapidly once he is rendered unconscious. The method used to warm plaintiff consisted of a hot water bottle covered by an inverted flash pan approximately 3 inches high, 18 inches long, and 12 inches wide. The pan served as the platform on which the surgery was performed. The circulating nurse filled the hot water bottle and put it under the pan. Miss Johnson, the anesthetist, placed lifters or several layers of cotton on top of the inverted flash pan. At approximately 5:00 p.m. the plaintiff was brought into the operating room, placed on the surface prepared by Miss Johnson and the circulating nurse, and covered by appropriate sheets. Immediately thereafter Dr. Hamilton entered the operating room and commenced the operation; it lasted two hours and ten minutes. Although the surgery corrected the intestinal blockage, plaintiff incurred a third degree burn on his backside, covering most of the surface area of his buttocks, during the operation. Plaintiff's evidence suggests that the hot water bottle used in the heating apparatus was filled with excessively hot water and caused the burn.

On 3 June 1969 plaintiff instituted this action against the Hospital, Miss Johnson (the anesthetist), and Dr. Hamilton for damages for negligently burning the plaintiff. At the close of plaintiff's evidence, each of the three defendants moved for directed verdict. The trial judge granted judgment of directed verdict as to each defendant, and from these judgments plaintiff appeals.

John D. Warren, for the plaintiff.

Boyle, Alexander & Hord, by Richard H. Hicks, Jr., for the defendants, Charlotte-Mecklenburg Hospital Authority and J. Johnson.

Jones, Hewson & Woolard, by H. C. Hewson, for the defendant, Dr. James P. Hamilton.

BROCK, Chief Judge.

When the defendant moves for a directed verdict after the presentation of plaintiff's evidence, the question presented for the court is whether the evidence, when considered in the light most favorable to the plaintiff, is sufficient for submission to the jury. *Sink v. Sink,* 11 N.C. App. 549, 181 S.E. 2d 721 (1971). Thus our sole task on review is to determine whether the trial judge properly decided this question with respect to each of the three defendants.

DEFENDANT HOSPITAL

[1] In open court the parties agreed to the following stipulations: (1) that defendant Hospital is a non-profit institution to which the doctrine of charitable immunity applies; and (2) that plaintiff's claim is governed by North Caroliina law prior to the decision of *Rabon v. Hospital,* 269 N.C. 1, 152 S.E. 2d 485 (1967), in which our Supreme Court abolished the doctrine of charitable immunity. Thus we are bound by pre-*Rabon* law and the doctrine of charitable immunity in our determination of whether a directed verdict was properly entered in favor of defendant Hospital.

Plaintiff's principal claim against the Hospital is based on the Hospital's duty "to furnish standard equipment and to make reasonable inspection and remedy any defects discoverable by such inspection." *Payne v. Garvey,* 264 N.C. 593, 142 S.E. 2d 159 (1965). While this form of corporate or administrative

negligence has never been affirmatively adopted in North Carolina, "[d]ecided cases indicate that the present state of the law in North Carolina is as follows: A patient, paying or nonpaying, who is injured by the negligence of an employee of a charitable hospital may recover damages from it only if it was negligent in the selection or retention of such employee (citations omitted), *or perhaps if it provided defective equipment or supplies* (citation omitted)." (Emphasis added.) *Rabon v. Hospital, supra.* We are convinced that the duty to provide safe and proper equipment is analogous to and equally compelling as the long-standing requirement that a charitable institution exercise due care in the selection and retention of its employees. *Williams v. Hospital,* 237 N.C. 387, 75 S.E. 2d 303 (1953). However, even if we recognize that the defendant Hospital can be held liable for injuries resulting from the use of defective equipment, plaintiff's evidence is insufficient to require the submission of this issue to the jury.

Plaintiff's evidence tends to show that the Hospital used hot water bottles to warm infant patients for surgery; that at the time of the operation a better, more controllable, and safer heating device—a K-thermal blanket—was available on the market and used by two other hospitals in Charlotte; and that according to a pediatric surgeon who testified as an expert witness for plaintiff, it was "bad medical practice" to use the hot water bottle method instead of the K-thermal blanket for the type of operation and patient involved in this case. Evidence that the K-therm device is "better" or "safer" does not prove that the hot water bottle was defective or unsafe. "[The hospital] is not required to furnish the latest or best appliances, or to incorporate in existing equipment the latest inventions or improvements even though such devices may make the equipment safer to use. An appliance is not defective by reason of the failure to have incorporated therein the latest improvement or invention developed for its use." *Emory Univ. v. Porter,* 103 Ga. App. 752, 120 S.E. 2d 668 (1961). At most, the hospital is required to furnish equipment which is reasonably suited for the purposes for which it is intended. Here, the injury resulted not from the defective nature of the hot water bottle, but from the manner in which it was prepared and applied. There is no evidence that the hot water bottle was defective or that it was not reasonably suited to warm infant patients in surgery. It had been used in the past with sufficient success to gain acceptance as a standard procedure. Had the hot water bottle been

prepared at the proper temperature, the evidence suggests that plaintiff would not have been injured. In conclusion we hold that plaintiff's evidence is insufficient to withstand defendant Hospital's motion for directed verdict on the issue of whether the Hospital was negligent in using the hot water bottle method instead of the K-thermal blanket.

Plaintiff also attempted to prove that defendant Hospital negligently hired and retained Dr. Montgomery, the director of the anesthesiology department at the time of plaintiff's operation, and Mr. Bondranko, the director of the Hospital's anesthesiology school where Miss Johnson, the plaintiff's anesthetist during the operation and a party in this case, received her training. There is absolutely no evidence to support this theory of liability. Although it is apparent that neither the anesthesiology department nor Hospital training program provided specific instruction on the preparation and use of hot water bottles, there is nothing in the evidence which suggests that these omissions amount to a breach of the duty of care imposed upon Dr. Montgomery and Mr. Bondranko in their respective capacities.

Plaintiff attempted to prove "corporate" or "administrative" negligence on the part of defendant Hospital for publishing a procedure manual which recommended 120° as the proper temperature for hot water bottles. Plaintiff's evidence tends to show that the maximum acceptable temperature of a hot water bottle to warm an infant patient during surgery is 105° and that 120° water in the bottle would burn the patient. However, there is no indication that the prescribed temperature in the manual was a contributing factor to plaintiff's injury or that the circulating nurse relied upon this information in preparing the hot water bottle used in plaintiff's operation. The testimony of Nurse Jordan, the person who prepared the bottle, contains no reference to the manual and indicates, at least by implication, that she knew 120° was too hot.

> "There are several rooms together in an operating suite. It has a faucet in it and that is where I went to get the water hot for the bottle; I turned on the hot water spigot and I let it run as hot as it would get and then I turned on the cool water and let it run until I tested it on my arm and I thought it was right. I didn't spray it. When I felt it was the right temperature, whatever that was, I filled up the bottle. I didn't use a thermometer or

any other instrument to check the heat of the water, nothing other than my arm. I am sure that there is a thermometer somewhere in the operating room that I could have used. I am sure that they had plenty of thermometers in the hospital if I had wanted one. No kind of instrument was used to check the heat of the water, nothing but my arm, so I do not know what specific degree of temperature the water was. I knew what the water was going to be used for. I didn't know whether the child was one, two, three or four or how many days old. I knew it was a newborn baby.

. . . .

". . . I don't know where the water was heated that I got out of the spigot; I just know that it comes hot out of the tap. I don't know how hot it comes out of the tap, I don't know the degrees it gets hot, hot enough to steam. When I got it out, I don't recall that it was steaming. It may have been steaming to start with but not after I regulated it."

"From the standard procedure in such operations, some type of sheet is usually put over the pan, just an ordinary bed sheet. In my deposition, I was asked did I know what temperature that it took to blister the skin of a seven day old infant, and I said, 'No, sir.' Since then I have not learned what it would take to blister a seven day old infant. As to what temperature it takes to blister the skin of an adult, as to exact temperature, I don't know, but the range, I would say, would probably be 120 to 130 degrees, but I don't think that would blister them, but I think it would make them pretty hot, but I don't think water that wasn't hot on my arm would burn a child."

Finally plaintiff argues that the defendant Hospital was negligent in supplying an anesthetist instead of an anesthesiologist for the operation. Again the evidence fails to support this allegation. While an anesthesiologist might have greater expertise than an anesthetist due to more extensive training, this alone is insufficient to show that the Hospital was negligent in employing Miss Johnson, an anesthetist, to administer the anesthetic to plaintiff during the operation. Plaintiff's assignment of error to the directed verdict for defendant Hospital is overruled.

DEFENDANT JOHNSON

[2] Plaintiff assigns error to the directed verdict for defendant Johnson, the anesthetist at plaintiff's operation. Plaintiff's evidence tends to show that it was the duty of the department of anesthesiology, through the anesthesiologist or the anesthetist assigned for the operation, to warm the patient for and during the operation. In this operation the infant was to be warmed and kept warm to prevent the patient from losing body temperature and entering shock. Although the evidence tends to show that the circulating nurse is responsible for setting up the operating room properly, and that in this case the circulating nurse actually filled the hot water bottle that is alleged to have burned the infant, the evidence further tends to show that the anesthesiologist or the anesthetist at times fills the hot water bottle; furthermore, when the circulating nurse fills it, she turns it over to the department of anesthesiology.

Plaintiff's evidence bearing upon the question of responsibility for the temperature of the hot water bottle is conflicting. It is understandably conflicting because plaintiff, of necessity, relied largely upon the testimony of the hospital and operating room personnel. Albeit the testimony described the filling of the hot water bottle as a "team effort," i.e., whoever arrived first and had the time, we think the evidence tends to show the responsibility of warming the patient for the operation to be that of the anesthetist, defendant Johnson. This evidence would permit the jury to draw the reasonable inference that in order to fulfill the responsibility of warming the patient, the anesthetist was responsible for either filling the hot water bottle with water of proper temperature or making certain that the hot water bottle was so filled. In our opinion the question was one for resolution by the jury and not by the court. We hold that plaintiff's evidence was sufficient to require submission to the jury of the issue of negligence on the part of the anesthetist, defendant Johnson, and that a directed verdict for defendant Johnson was error.

DEFENDANT DR. HAMILTON

[3] Plaintiff's third and final assignment of error pertains to the directed verdict entered in favor of Dr. Hamilton, the doctor who performed the operation during which plaintiff was burned. First plaintiff contends that Dr. Hamilton had *respondeat superior* liability for the negligent acts of Miss Johnson,

the anesthetist. We find no evidence to support this argument. The department anesthesiology assigned the anesthetist for the operation. Dr. Hamilton had no responsibility for her training or assignment. Absent some conduct or situation that should reasonably place the surgeon on notice of negligent procedure, we think the surgeon is entitled to rely on the expertise of the anesthetist. We find nothing to support general *respondeat superior* liability on the part of the surgeon.

Next plaintiff argues that Dr. Hamilton was negligent in failing to inspect the temperature of the hot water bottle either before or during the operation. Dr. Hamilton testified that on previous occasions he had requested the K-thermal device and was explicitly denied the use of this device by the Hospital. While this testimony reflects a preference for the K-thermal device, it is insufficient by itself to show that Dr. Hamilton had a duty, in the exercise of reasonable care as plaintiff's surgeon, to inspect the hot water bottle and insure that it was filled at the proper temperature. Indeed all of the evidence tends to show that it was neither customary nor feasible for Dr. Hamilton to inspect this particular facet of preparing the operating room for surgery. Such an inspection would likely destroy the surgeon's prior efforts to render himself aseptic for the operation.

Finally plaintiff asserts that Dr. Hamilton was negligent in failing to request an anesthesiologist in place of the anesthetist. We find no evidence to support this argument, and we conclude it is without merit.

The result is this:

Directed verdict for defendant Hospital is affirmed.

Directed verdict for defendant Dr. Hamilton is affirmed.

Directed verdict for defendant Johnson is reversed and a new trial ordered.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. FRANKLIN WRIGHT

No. 7524SC782

(Filed 4 February 1976)

1. **Constitutional Law § 29— absence of Negroes from jury panel — failure to conduct hearing**

The trial court did not err in failing to conduct a hearing and make findings of fact upon defendant's motion to dismiss the jury panel for the reason that there were no Negroes on the panel since defendant's motion raised no question of systematic and arbitrary exclusion of Negroes and the fact that no Negroes were drawn for jury duty for the particular session of court did not constitute a *prima facie* showing of systematic and arbitrary exclusion of Negroes from jury duty.

2. **Constitutional Law § 30— request for disposition of detainer charges — failure to comply with statute**

Defendant's letter to the clerk of superior court requesting disposition of charges which were the basis of a detainer did not comply with the provisions of G.S. 15-10.2, and defendant is not entitled to relief under that statute, where he failed to send the letter by registered mail to the district attorney, failed to give notice of his place of confinement, and failed to include a certificate from the Secretary of Correction.

3. **Constitutional Law § 30— 17 months between indictment and trial — speedy trial**

Defendant was not denied his constitutional right to a speedy trial by a delay of 17 months between his indictment and trial where defendant was serving a prison sentence for another charge during such time, only four one-week criminal sessions were held in the county between the session at which defendant was indicted and his trial, counsel was appointed for defendant at the first such session, defense counsel made no request for a speedy trial, defendant's case was not reached at earlier sessions because cases of persons in the county jail were disposed of first, and defendant contended he had lost contact with witnesses but failed to show the names of such witnesses, any efforts to contact them or what their testimony would have been.

APPEAL by defendant from *Martin (Harry C.), Judge.* Judgment entered 19 May 1975 in Superior Court, WATAUGA County. Heard in the Court of Appeals 21 January 1976.

Defendant was charged in a bill of indictment, proper in form, with the felonious breaking or entering of a restaurant in Blowing Rock, North Carolina, and with the felonious larceny of approximately $600.00 therefrom. The jury found defendant guilty as charged. Judgment of imprisonment for a term of not less than three nor more than five years was en-

tered to commence at the expiration of two ten-year sentences imposed in Wake County on 17 December 1973.

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

Robert H. West, for the defendant.

BROCK, Chief Judge.

[1] By his first assignment of error defendant argues that the trial judge should have conducted a hearing and made findings of fact upon his pre-trial motion to dismiss the jury panel for the reason that there were no Negroes on the panel. Defendant, a Negro, asserts that the fact there were no Negroes on the jury panel before the court creates a *prima facie* showing of discrimination in the selection of jurors and that the burden was on the State to offer evidence to overcome this *prima facie* showing, or his motion should be allowed. "A defendant has no right to be tried by a jury containing members of his own race or even to have a representative of his own race to serve on the jury." *State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750 (1974). Although a defendant has the right to be tried by a jury from which members of his own race have not been systematically and arbitrarily excluded, the defendant in this case does not challenge the system under which the jurors were drawn. He merely moved to dismiss the jury panel because there were no Negroes on the panel drawn for the session of court. Such a motion raises no question of systematic and arbitrary exclusion of Negroes, nor does the fact that no Negroes were drawn for jury duty for the particular session of court constitute a *prima facie* showing of systematic and arbitrary exclusion of Negroes from jury duty. There was no need for a hearing or for findings of fact upon defendant's motion. This assignment of error is without merit and is overruled.

By his second assignment of error defendant argues that the trial judge committed error in overruling his pre-trial motion to dismiss the charges against him for failure of the State to grant him a speedy trial.

The offense alleged in the indictment against defendant occurred on or about 23 August 1973 in Watauga County. On 7 September 1973 defendant was arrested on an unrelated charge in Franklin County. While in jail in Franklin County, he was served with the warrant in this case on 5 October 1973.

Thereafter defendant was transferred to Wake County where he was held for trial on two unrelated charges. On 13 November 1973, while incarcerated in jail in Wake County awaiting trial, defendant mailed a handwritten motion for a speedy trial to the Clerk of Superior Court, Watauga County. On 17 December 1973 defendant was sentenced in Wake County to two ten-year terms of imprisonment.

Watauga County is primarily a peaceful rural mountain county. Although Appalachian State University is located in Boone, and some of the county is devoted to resort communities, historically Watauga County has not been in need of extended sessions of Superior Court for the trial of criminal cases.

During the calendar year 1974 there were only three regularly scheduled sessions of Superior Court in Watauga County for the trial of criminal cases; i.e., January, April, and September. Each of these was a one-week session. The bill of indictment in this case was returned a true bill by the grand jury at the January 1974 session. Defendant was transported to Watauga County for the April 1974 session, at which time counsel was appointed for him. There has been no proper request for a speedy trial since counsel was appointed in April 1974. From the argument of counsel it appears that defendant's case was calendared for the September 1974 session but that he was not tried at that session.

During the calendar year 1975, prior to defendant's trial, there were only two regularly scheduled sessions of Superior Court in Watauga County for the trial of criminal cases; i.e., January and March. Each of these was a one-week session. From the argument of counsel it appears that defendant's case was calendared for trial at both the January and March session but that he was not tried. Due to a backlog of felony cases, two one-week special sessions of Superior Court for the trial of criminal cases were scheduled for Watauga County; i.e., during the weeks of 12 May 1975 and 19 May 1975. Defendant was tried during the week of 19 May. Upon the call of his case for trial, defendant moved to dismiss the charges for failure to grant a speedy trial. The denial of this motion is the subject of defendant's second assignment of error.

It is common knowledge that the district attorney properly first disposes of cases wherein the accused is incarcerated in the county jail awaiting trial. Apparently this was the pro-

cedure followed by the district attorney serving Watauga County. In so doing, at each session the session expired before defendant's case could be reached. Defendant was in custody of the Department of Correction serving two ten-year prison sentences. He was not incarcerated in the county jail awaiting trial. Nowhere does defendant suggest that the district attorney failed to try all of the cases during the intervening sessions that time would permit.

The foregoing resume concerning Watauga County and the sessions of Superior Court there for the trial of criminal cases is, of course, not dispositive of defendant's claim that he was denied a speedy trial. Those things are pointed out merely for the purpose of placing in perspective defendant's alleged denial of a speedy trial and the opportunity the State had to bring him to trial.

[2] Although defendant offered no evidence to show that a detainer had been filed with the Wake County authorities by Watauga County while defendant was being held for trial in Wake County, his argument suggests that such was the case. Defendant's argument suggests that the detainer was the reason for his letter to the Clerk of Superior Court, Watauga County, in November 1973 requesting a speedy trial. However, defendant's letter requesting a speedy trial did not comply with the provisions of G.S. 15-10.2. For example, he failed to send the letter by registered mail to the district attorney; he failed to give notice of his place of confinement; and he failed to include a certificate from the Secretary of Correction. Having failed to follow the provisions of the statute, defendant is not entitled to the statutory relief. *State v. White,* 270 N.C. 78, 153 S.E. 2d 774 (1967).

[3] Defendant argues nevertheless that he has been denied a speedy trial as guaranteed by the Sixth Amendment to the Constitution of the United States, which is made applicable to the States by the Due Process Clause of the Fourteenth Amendment. *See Klopfer v. North Carolina,* 386 U.S. 213, 18 L.Ed. 2d 1, 87 S.Ct. 988 (1967). Defense counsel acknowledges that the four-pronged test for determining whether an accused has been denied his Sixth Amendment right to a speedy trial as announced in *Barker v. Wingo,* 407 U.S. 514, 33 L.Ed. 2d 101, 92 S.Ct. 2182 (1972), was adopted in North Carolina about seven years before *Barker* by the opinion in *State v. Hollars,*

266 N.C. 45, 145 S.E. 2d 309 (1965). Therefore the test in *Barker* is not new to the jurisprudence of North Carolina.

"Whether a speedy trial is afforded must be determined in the light of the circumstances of each particular case . . . Four factors are relevant to a consideration of whether denial of a speedy trial assumes due process proportions: the length of the delay, the reason for the delay, the prejudice to defendant, and waiver by defendant." *State v. Hollars, ibid.*

The length of delay between indictment and trial in this case was from January 1974 to May 1975, a period of approximately seventeen months. While a delay of seventeen months should be avoided if possible, it is not such a delay that on its face shocks one's sense of fairness. Although a convict in the penitentiary is entitled to the constitutional protection of a speedy trial, in determining the effect of the length of delay in trial, it must be noted that such a person is not deprived of the freedom an acquittal would bring to a person being held in jail only for the purpose of awaiting trial.

With respect to the reason for the delay, it must be noted that the delay of seventeen months occurred in a county which historically has not required many sessions of Superior Court for the trial of criminal cases in order to retain a current docket. As noted earlier, it is not suggested by defendant that the district attorney failed to utilize all of the time of the few trial sessions available to him. Also, as noted earlier, there is nothing in this record to suggest that defense counsel made a request for a speedy trial from the time he was appointed to represent the defendant in April 1974 nor that an opportunity for trial was available to the district attorney had such a request been made.

With respect to the prejudice to the defendant, it is noted that defendant testified at the May 1975 session in support of his motion to dismiss because of denial of a speedy trial. He has failed to show by his motion or testimony in what manner he has been prejudiced. In his motion to dismiss defendant stated: "That due to this time period of NINETEEN (19) months, the defendant have (sic) lost all contact with important witnesses to his defense, from them moving out of State and can't be contacted." In his testimony defendant stated: "The reason why I filed a motion for dismissal is because I wanted witnesses, you know, called in my behalf, and due to the time

limit, the witnesses done (sic) moved away and can't be contacted because I don't even try to contact them, you know." These statements are completely unsupported by any evidence of efforts to contact witnesses, by evidence of subpoenas issued for witnesses, by evidence of the witnesses' names, or what testimony such witnesses would be in position to give. Also it is noted that the State's witness Bruce Johnson, with whom defendant claimed to have been living while in Watauga County, was available for information concerning witnesses' names and whereabouts. The record shows no effort by defendant to obtain information from Bruce Johnson. In his testimony on defense at his trial, defendant recalled that at the time of the offense he was visiting a girl he knew in Blowing Rock. He has shown no effort to secure her testimony at trial. We are unable to determine in what way defendant was prejudiced with respect to witnesses and his ability to prepare his defense.

We do not feel that the facts in this case require a discussion of whether defendant to some extent may have waived his right to a speedy trial. We note however that his letter requesting a speedy trial was written at a time before he had been indicted in Watauga County and at a time when he was being held in the Wake County jail awaiting trial on charges arising in Wake County. The letter was addressed to the clerk of court and not to the district attorney or the judge. Immediately after his indictment he was taken to Watauga County where counsel was appointed to represent him, and no further request for a speedy trial has been shown.

In view of all the circumstances of this case, and applying the four balancing tests which weigh the conduct of both the prosecution and the defendant, we are compelled to the view that defendant has not been deprived of a speedy trial in contravention of his Sixth Amendment right.

No error.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. ALBERT RHODES

No. 7530SC730

(Filed 4 February 1976)

Criminal Law § 99; Constitutional Law § 32— warning to witness about perjury — absence of jury — no expression of opinion — no deprivation of effective assistance of counsel

The trial court in an incest case did not express an opinion in violation of G.S. 1-180 when he told a witness out of the jury's presence that he would not tolerate perjury and admonished her to tell the truth; nor did such action by the court deprive defendant of the effective representation of counsel by coercing defense counsel into failing to pursue a line of questioning of the witness, the wife of defendant and mother of the prosecutrix, to show that she had falsely accused defendant since it is clear that any decision of counsel not to examine the witness further was a matter of trial tactics and not the result of coercion by the court.

Judge BRITT dissenting.

APPEAL by defendant from *Wood, Judge.* Judgment entered 25 April 1975 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 15 January 1976.

Defendant was charged with the crime of incest; to wit: carnal knowledge with his 12-year-old stepdaughter. From a plea of not guilty, the jury returned a verdict of guilty. From judgment sentencing him to a term of imprisonment, defendant appealed.

Attorney General Edmisten, by Special Deputy Attorney General James L. Blackburn, for the State.

Swain and Leake, by Robert S. Swain and Joel B. Stevenson, for defendant appellant.

MORRIS, Judge.

The only question argued by defendant in his brief and before the court is his contention that the trial court, by admonishing a witness out of the jury's presence to tell the truth, rendered an opinion in violation of G.S. 1-180, prejudiced the defendant's case, prevented that witness from pursuing that particular aspect of her testimony, discouraged defendant's counsel from pursuing that particular line of testimony because of fear of suborning perjury, and ultimately undercut defend-

ant's effective confrontation and cross-examination of the witness. This contention is without merit.

Under the guidelines of G.S. 1-180, "[t]he duty of absolute impartiality is imposed on the trial judge. . . ." *State v. Best,* 280 N.C. 413, 417, 186 S.E. 2d 1 (1972). This broadly stated rule of law in North Carolina reflects a long-standing concern that " 'every person charged with crime has an absolute right to a fair trial. By this it is meant that he is entitled to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm. . . .' " (Citation omitted.) *Id.,* at 418.

Therefore, legislative concern, as stated in G.S. 1-180, recognizes the uniquely interdependent respect that the trial court holds for the jury and vice versa. " 'The trial judge occupies an exalted station. Jurors entertain great respect for his opinion, and are easily influenced by any suggestion coming from him. As a consequence, he must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury. . . .' " (Citation omitted.) *Id.,* at 418. Yet, when an objectionable opinion statement purportedly has been made and possibly violates G.S. 1-180, that remark, standing by itself, may not necessarily constitute reversible error. To establish reversible error, courts must consider the remark " '. . . *in the light of the circumstances under which it was made.*' " (Citations omitted.) *Id.,* at 418.

In this case, the judge before warning the witness that he would not tolerate perjury sent the jury from the courtroom. The jury heard nothing, and when they went home that evening during the recess from their deliberation on the verdict, they were warned firmly to avoid any discussion of the case with anyone. Thus, we must assume, barring evidence to the contrary, of which we have none, that the jury followed this warning and heard none of the trial court's remarks to the witness. Where the jury has heard nothing with respect to a trial judge's comments and opinions, then G.S. 1-180 is simply inapplicable. *State v. Garrett* and *State v. Brank,* 5 N.C. App. 367, 168 S.E. 2d 479 (1969), cert. denied 276 N.C. 85 (1970). Also see *State v. Rush,* 13 N.C. App. 539, 186 S.E. 2d 595 (1972); *State v. Butcher,* 10 N.C. App. 93, 177 S.E. 2d 924 (1970).

When a trial court presides over the cases on its docket it remains duty bound ". . . to supervise and control the course

of a trial so as to insure justice for all parties . . . [and this includes the responsibility] to control the examination and cross-examination of witnesses." *State v. Greene,* 285 N.C. 482, 489, 206 S.E. 2d 229 (1974). We believe this trial court met all of its requisite responsibilities to be both impartial in the eyes of the jurors and to control the overall course of the trial then in process.

Nor do we agree that the court's actions resulted in defendant's not having effective representation. Counsel for defendant contends that because of the court's warning to the witness with respect to perjury, he did not examine her further in the presence of the jury. The witness, defendant's wife, and the mother of the prosecuting witness, had testified that she did not remember making a statement to the officers with respect to the alleged incidents of incest which, she said in her statement, took place in her presence. She admitted that the signature on the statement was hers but testified she did not remember signing it. She also testified she remembered nothing on that date until about four o'clock, at which time she did recall "coming to myself" in the Sheriff's Department. The court allowed the State to examine her as a hostile witness, and she testified that she had been treated at at least two hospitals for temporary amnesia. On cross-examination, defendant's counsel questioned her with respect to whether she had been in any hospitals. When he attempted to examine her with respect to her mental condition, the court sustained the State's objection and advised counsel that if he planned to have medical testimony about that, he would allow her to testify. Counsel stated that he had not then made that decision. She testified that she came to the Sheriff's office "on January 22, 1974, with Charlie Messer and Rev. Ridley," and that she was there all day but had no recollection of any statement purported to be made by her. She was allowed to testify that the reason she did not remember was that she had taken a double dose of medication because her daughter had upset her. At that point the court excused the jury and told the witness that he was not "impressed with her truthfulness," that in keeping with the duty "to get the truth" he felt that he needed to warn her. He further said: "I just want to let you know that you are treading on very dangerous ground here. And all I'm asking you to do is to tell the truth, Mrs. Rhodes, whatever the truth is." The witness responded: "All right. I'll just tell the truth. My husband did not do any of it. He's not that type of man. . . ."

After questioning the witness further about whether she was threatened with indictment by the Sheriff, the court said: "All right, I'm going to allow the State to continue to cross-examine her. I think that the jury will determine what the truth is. I still want you to keep in mind that you are treading upon perjury here in your testimony. All I want is the truth. What the court seeks is the truth. I don't want this man convicted of false testimony. Nor do I want this tragedy to happen."

The jury was brought back in and counsel for the defendant stated he had no further questions. The State continued its cross-examination and the witness again testified that she did not remember making a statement. Defendant now contends that the court prevented the witness from testifying to the falsity of her accusation against the defendant and also coerced defense counsel into failing to pursue that line of questioning. It seems clear that any decision of counsel not to examine the witness further was a matter of trial tactics and not the result of coercion from the court. Nor can it be said that the court prevented the witness from testifying that the accusations against defendant were false. The court merely admonished the witness to tell the truth, "whatever the truth is." Defendant's contentions are without merit.

No error.

Chief Judge BROCK concurs.

Judge BRITT dissents.

Judge BRITT dissenting.

I agree with the majority that the trial judge did not violate the provisions of G.S. 1-180 as that statute relates to the expression of an opinion before the jury. That was not the case here. I do think, however, that the able trial judge went too far in his warnings and admonitions to the witness Marie Rhodes, and that his statements to her in the absence of the jury were coercive.

The record reveals that after three witnesses had testified for the State, the district attorney requested a voir dire in the absence of the jury to have the court declare Marie Rhodes a hostile witness. At that time she was examined and cross-ex-

amined at length with respect to the testimony which she proposed to give at trial and its conflict with written statements she signed soon after the occurrence of the alleged offense. Following the voir dire, the court declared Marie Rhodes a hostile witness and permitted the State to call her as a witness and cross-examine her with respect to the written statements.

The jury was returned to the courtroom and the witness was questioned by the district attorney. Soon after defendant's counsel began his cross-examination, the trial judge, on his own motion, excused the jury again. At that time, His Honor not only told the witness several times that she was "treading on dangerous ground" and that the court was "not going to tolerate any perjury in this case," but pointed out what he considered were defects and inconsistencies in her testimony.

Assuming, *arguendo,* that it is permissible for the trial judge to warn a witness with respect to perjury, there should be no coercion. While the offense with which defendant is charged is sordid and shocking, he is entitled to have the *jury* weigh the evidence, separate the true from the false, and arrive at a just verdict. Should any witness commit perjury during the trial, indictment and prosecution of the witness for perjury would be appropriate.

My vote is for a new trial.

STATE OF NORTH CAROLINA v. CHARLES L. JENSEN

No. 7512SC715

(Filed 4 February 1976)

1. Homicide § 21— corpus delicti — defendant as perpetrator of crime — sufficiency of evidence

The trial court properly denied defendant's motions for nonsuit in a murder prosecution where the evidence tended to show that skeletal remains which were positively identified as those of defendant's wife were found in a shallow grave in woods, defendant's 23 year old wife had previously suddenly disappeared at a time when she was in apparent good health, no announcement for any plans for departure was made by either defendant or his wife to their landlady or friends, deceased's clothing and personal effects were abandoned in their apartment, defendant went AWOL from his army post at approximately the same time that his wife disappeared, and his wife's

body was found buried in the manner and at a place as described by defendant in his statements to two friends.

2. **Homicide § 24— strangling in heat of passion — burden of proof — jury instructions**

That portion of the trial court's charge to the jury in which the court stated in effect that if the jury found beyond a reasonable doubt that defendant strangled his wife, to reduce the crime to voluntary manslaughter the defendant must satisfy the jury that there was no malice on his part but that in strangling his wife he acted in the heat of passion was not invalidated by *Mullaney v. Wilbur*, 421 U.S. 684, since that case is applicable to cases tried on or after 9 June 1975 and defendant was tried in March 1975.

APPEAL by defendant from *Hobgood, Judge.* Judgment entered 27 March 1975 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 14 January 1976.

Defendant was indicted in June 1974 for the murder on or about 29 June 1973 of Karen Newman Jensen and was subsequently extradicted from the State of Utah to stand trial in this State. Defendant pled not guilty. The State presented evidence to show that on 7 June 1974 skeletal remains were unearthed from a shallow grave between two pine trees in a wooded area on a farm north of Spring Lake in Cumberland County. Examination of the remains by authorities established the identity of the deceased to be defendant's wife, Karen Newman Jensen. The State introduced testimony of defendant's landlord who described the unexpected departure of the Jensens around the end of June 1973 and her subsequent entry into the apartment formerly occupied by them where she found remaining personal effects of the couple, including various items of women's clothing but very few men's clothing. Defendant was entered as AWOL on Army records effective the third of July 1973.

Mark Stevens, a friend of defendant, testified concerning a conversation held with defendant in December 1973. Defendant told Stevens that he and his wife went on a picnic five or six miles north of Spring Lake, that they got into an argument, that he got mad and strangled her by the throat until she died, that he dug a hole about a foot and a half deep between two pine trees and buried her in the hole, and that he then returned home and left the area AWOL. Upon reading a newspaper article concerning the discovery of the body, Stevens related this conversation to the Fayetteville City police.

Diane Hoach related a conversation held with defendant in June 1974 in which he stated regarding his wife that "she did not exist," that "he'd taken care of it," that "[n]obody would ever find her again or see her again," and that "he'd buried her in a shallow grave . . . in the county." Defendant told Mrs. Hoach that he accidentally shot his wife when he tried to get from her a shotgun with which she had threatened him after an argument.

Defendant testified that he last saw his wife the morning of 29 June 1973, that he searchd for her over that weekend, and that he departed for Kansas City on that Sunday. In December 1973 he called his army superior, reported himself AWOL, and was returned to the Fort Bragg stockade. Defendant denied being connected in any way with the death of his wife, denied ever making an admission to Mark Stevens that he strangled her, and could not remember any conversation with Diane Hoach concerning an incident with his wife.

After close of evidence for the State and defendant, the Court allowed defendant's motion for nonsuit as to first degree murder. The jury returned a verdict of guilty as to second degree murder. From judgment imposing a prison sentence, defendant appealed.

Attorney General Edmisten by Special Deputy Attorney General T. Buie Costen for the State.

McRae, McRae & Perry by James C. McRae for defendant appellant.

PARKER, Judge.

Defendant assigns error to denial of his motions for nonsuit. He contends there was insufficient evidence *aliunde* his extrajudicial confessions to warrant submitting the case to the jury. We find no error.

The proof of every crime consists of (1) proof that the crime charged was committed by someone and (2) proof that defendant was the perpetrator of the crime. The first shows the *corpus delicti;* the second shows defendant's guilty participation therein. *State v. Thomas,* 15 N.C. App. 289, 189 S.E. 2d 765 (1972). A naked extrajudicial confession or admission of guilt by one accused of crime, uncorroborated by other evidence, is not sufficient to sustain a conviction. *State v. Jenerett,*

281 N.C. 81, 187 S.E. 2d 735 (1972); Annot., 45 A.L.R. 2d 1360 (1956). There must be evidence apart from the confession or admission *tending* to establish the fact that a crime of the character charged has been committed, i.e. *tending* to establish the *corpus delicti*. *State v. Thomas,* 241 N.C. 337, 85 S.E. 2d 300 (1955). *State v. Whittemore,* 255 N.C. 583, 122 S.E. 2d 396 (1961). "This does not mean, however, that the evidence tending to establish the *corpus delicti* must also identify the defendant as the one who committed the crime." *State v. Cope,* 240 N.C. 244, 247, 81 S.E. 2d 773, 776 (1954). Moreover, the corroborative evidence need not be direct, but may be circumstantial, 2 Stansbury's N. C. Evidence (Brandis Revision), § 182, and "[t]he rule does not require that the independent evidence of *corpus delicti* shall be so full and complete as to establish unaided the commission of a crime." *State v. Burgess,* 1 N.C. App. 104, 107, 160 S.E. 2d 110, 112 (1968). It will be sufficient if the circumstances shown by the corroborative evidence are such "as will, *when taken in connection with the confession,* establish the prisoner's guilt in the minds of the jury beyond a reasonable doubt." *State v. Whittemore, supra,* at p. 589; [For a history of the development of the rule in this State, see Note, 42 N.C.L. Rev. 219 (1963).] In a recent case Justice Branch, speaking for our Supreme Court, stated the rule to be now "well settled that if the State offers into evidence sufficient extrinsic corroborative circumstances as will, when taken in connection with an accused's confession, show that the crime was committed and that the accused was the perpetrator, the case should be submitted to the jury," *State v. Thompson,* 287 N.C. 303, 324, 214 S.E. 2d 742, 755 (1975).

[1] Applying the foregoing principles and viewing the corroborative evidence in the presence case in the light most favorable to the State, we find it sufficient, when taken in connection with defendant's extrajudicial confessions, to require submission of the case to the jury. The *corpus delicti* in criminal homicide involves two elements: (1) The fact of the death. (2) The existence of the criminal agency of another as the cause of death. *State v. Johnson,* 138 S.E. 19, 193 N.C. 701 (1927). Here, the finding of skeletal remains which were positively identified as those of defendant's wife clearly established the fact of her death. All of the circumstances shown by the evidence support a reasonable inference of the existence of the criminal agency of another as the cause of death. The body of one who dies from natural causes, accident, or suicide, is not

normally disposed of by burial in an unmarked, shallow grave, in a remote wooded area of a farm. The circumstances that defendant's 23-year-old wife suddenly disappeared at a time when she was in apparent good health, that no announcement for any plans for departure was made either by defendant or his wife to their landlady or friends, that her clothing and personal effects were abandoned in their apartment, that defendant went AWOL from his army post at approximately the same time that his wife disappeared, that his wife's body was found buried in the manner and at a place as described by defendant in his statements to Stevens and Hoach, furnish strong corroborative support for his confessions. It is not essential, as defendant contends, that the State's evidence *aliunde* his confession establish the exact cause of death. Indeed, "[t]o meet the foundational test the prosecution need not eliminate all inferences tending to show a non-criminal cause of death. Rather, a foundation may be laid by the introduction of evidence which creates a reasonable inference that the death could have been caused by a criminal agency . . . even in the presence of an equally plausible non-criminal explanation of the event." *State v. Hamilton* and *State v. Beasley,* 1 N.C. App. 99, 102, 160 S.E. 2d 79, 81 (1968). We hold the State's evidence here *aliunde* defendant's incriminating admissions, when taken in connection with his admissions, sufficient to warrant submission of the case to the jury. Defendant's motions for nonsuit were properly denied.

[2] Citing *Mullaney v. Wilbur,* 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508 (1975), the defendant contends that the court erred in that portion of its charge to the jury in which the court stated in effect that if the jury found beyond a reasonable doubt that defendant strangled his wife, to reduce the crime to voluntary manslaughter the defendant must satisfy the jury that there was no malice on his part but that in strangling his wife he acted in the heat of passion. The instruction given conforms to the law in effect in this State prior to the *Mullaney* decision, which was decided 9 June 1975. In *State v. Hankerson,* 288 N.C. 632, 220 S.E. 2d 575 (1975), decided 17 December 1975, our Supreme Court declined to give *Mullaney* retroactive effect. Trial of the present case took place in March 1975, prior to the decision in *Mullaney.* On the authority of *State v. Hankerson, supra,* we do not apply the principles announced in *Mullaney* to the present case, and defendant's assignment of error based upon *Mullaney* is overruled.

Defendant also assigns error to certain other portions of the court's charge to the jury. We have carefully considered all of defendant's contentions in this regard. However, considering those portions of the charge to which exception is taken contextually and considering the charge as a whole, we find no prejudicial error. Defendant has had a fair trial. In the trial and in the judgment appealed from we find

No error.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. ARTHUR DAVID CHANDLER

No. 7527SC624

(Filed 4 February 1976)

1. **Criminal Law § 73— officer's reason for going to crime scene — testimony not hearsay**

An officer's testimony that he went to a store because he received a radio call that there had been a robbery-shooting at the store was not objectionable as hearsay since the statement was not made to prove the truth of the matter asserted, that is, that there had been a robbery-shooting, but rather to explain the officer's presence and time of arrival at the crime scene.

2. **Robbery § 4— armed robbery — sufficiency of evidence**

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of armed robbery of a store proprietor where it tended to show that defendant was present when his companion borrowed a pistol identified as the one with which the store proprietor was shot, and defendant admitted in a statement to an officer that he removed checks from the store immediately after shooting the proprietor.

3. **Criminal Law § 113; Conspiracy § 7— instructions on conspiracy — no evidence of conspiracy — absence of prejudice**

In this prosecution for first degree murder and armed robbery, defendant was not prejudiced when the court instructed the jury on conspiracy after telling the jury that, although defendant was not charged with conspiracy, it was necessary for the court to define the term "conspiracy" in order for the jury to understand the instructions.

APPEAL by defendant from *Ervin, Judge.* Judgment entered 13 March 1975 in Superior Court, GASTON County. Heard in the Court of Appeals 12 November 1975.

State v. Chandler

Defendant was charged in a bill of indictment with first degree murder and with armed robbery.

The evidence tends to show that Milous Holland saw Ted Carter with David Chandler on 30 July 1974. At that time, Holland loaned Carter his loaded .32 caliber pistol. Holland next saw his pistol at the police station.

Harold Thomas Davis saw the defendant on 2 August 1974 at the Smyre Gang Clubhouse near Spencer Mountain. Upon the request of the defendant, Davis loaned his 1973 red Vega to Chandler. Carter left in the vehicle with Chandler around 8:30 a.m. and returned around 12:00 noon. The two borrowed the car a second time that afternoon for about twenty minutes.

J. H. Jordan was in his place of business, Roberson's Place, on 2 August 1974 when two persons parked in the front of the store in a red Vega and sat there talking. Jordan identified the two as Chandler and Carter. Chandler tried to sell Jordan an old model rifle, but Jordan was not interested. The two left the store around 12:00 noon.

Homer Wright identified the defendant and Carter as the men he saw knocking on the door of Ben Stroup's store on 2 August 1974 between 11:45 and 12:00 noon. A red Vega was parked out front at that time.

On 2 August 1974 at around 12:30 p.m., Patricia Bingham saw two men hurriedly leaving the side door of Ben Stroup's store. She identified the defendant as the one of these two men who got into the passenger side of the automobile.

Around 2:30 or 3:00 o'clock on 2 August 1974, Roy Franklin McGinnis saw Carter and the defendant at the Smyre Gang Clubhouse. The defendant promised McGinnis a six-pack of beer if he would drive him to the bank. Defendant had several checks which he finally was able to cash after being driven around to several banks by McGinnis. While driving around, defendant showed McGinnis a roll of money.

When Joel Brent Plainer entered Stroup's store on 2 August 1974 at about 3:45, he found Stroup lying in a puddle of his own blood.

Stroup was dead when he was examined by the coroner at about 4:25 that same day.

In the opinion of Dr. E. M. Kelman, Stroup died from a .32 caliber bullet wound.

After the voir dire hearing during which police officers J. G. Berrier, Larry Hardin, and Doyle Trull testified, the court made findings of fact from which he concluded as a matter of law the following:

> "1. That the defendant was adequately and properly advised of his constitutional rights in accordance with the decision of the United States Supreme Court in the case of MIRANDA v. ARIZONA;
>
> 2. That the defendant understood his constitutional rights and knowingly and understandingly waived his rights at the time of each interrogation; that the defendant also affirmatively waived his right to a lawyer at the time of each and every interrogation;
>
> 3. That the defendant's statement is not a result of any improper or unlawful promises or improper threats or coercion on the part of any of the questioning officers.
>
> 4. That the State, if it so desires, will be permitted to offer in evidence in the trial of this case the statement made by the defendant to Agent Berrier on Saturday night, August 3, 1974, and reduced to writing on the early morning of Sunday, August 3 [sic], 1974."

In the statement made by defendant to Officer Berrier after waiving his rights, the defendant admitted that he and Carter entered Stroup's store to buy some magazines between 11:30 and 12:00 noon on 2 August 1974 after taking the drug, MDA, for several days and after having consumed about six or seven beers each. Carter asked Stroup for a pack of cigarettes. Stroup and Carter began arguing about whether Carter had paid for the cigarettes. Stroup pulled out his revolver from his right hip pocket and pointed it at Carter. As Stroup cocked the gun, the defendant grabbed Stroup's hand and pointed the gun toward Stroup. The gun went off and the shot struck Stroup in the upper right portion of his chest. Stroup moved to the back of the store and raised the gun at both the defendant and Carter. The defendant kicked the gun from Stroup's hand and shot Stroup in the shoulder. The defendant threw the gun on Stroup's body, and grabbed up some payroll checks. The two left Stroup's store, but returned a short while later to look for

some money. The defendant found $50 to $60, and the two returned to the Smyre Gang Clubhouse after purchasing a case of beer. The defendant then had a man named Roy drive him around to several banks in order to cash the checks which were stolen from Stroup's store.

The police officers did not find Stroup's gun in his store. Stroup's gun was turned over to the police by Paul Bledsoe. Bledsoe took Stroup's gun, intending to steal it, from a place where Carter had hidden it. Bledsoe never saw the gun in the defendant's possession. Stroup's gun was labeled State's Exhibit No. 11. The court found Frederick Mark Hurst, Jr., to be an expert in the field of firearms and tool mark identification. Hurst testified that in his opinion, neither State's Exhibit No. 9 nor No. 10, (the bullets from Stroup's body), was fired in State's Exhibit No. 11. He was unable to determine conclusively whether State's Exhibit No. 10 was fired from State's Exhibit No. 1, (the gun borrowed from Milious Holland). However, Hurst did testify that in his opinion, State's Exhibit No. 9 was fired from State's Exhibit No. 1.

Defendant testified in his own behalf. He testified that he was in Stroup's store with Carter on 2 August 1974, but that he was in the car when the shooting occurred. He testified that Carter came out of the store and got into the car after the shooting saying that Stroup had tried to kill him and therefore he (Carter) had to shoot Stroup. Carter then laid State's Exhibit No. 1 on the seat of the car. According to defendant, this was the first time he saw the gun. Further, he said that the money and the checks were taken by Carter alone. He said that he went back to the store a short while later to see if Stroup was dead. After checking his pulse, he took Stroup's gun from his right hand, and then left the store a second time. Because he was afraid of Carter, he attempted to cash the checks Carter stole from Stroup. The defendant identified State's Exhibit No. 11 as the gun he removed from Stroup's hand. He said that at the time he made his statement to the officers, that he " . . . was messed up on M.D.A."

The jury found the defendant not guilty of murder in the first degree. From a verdict of guilty of the charge of armed robbery, defendant appealed.

Attorney General Edmisten, by Associate Attorney Archie W. Anders and Associate Attorney Wilton E. Ragland, Jr., for the State.

Harris and Bumgardner, by Tim L. Harris and Don H. Bumgardner, for defendant appellant.

MARTIN, Judge.

[1] Defendant contends that the court committed error by denying defendant's motion to strike the statement made by Officer Trull concerning a radio call he received. The officer testified that he went to Mr. Stroup's store on 2 August 1974 as a result of a call he received. He said, "I received a call on the radio at 3:20 that there had been a robbery-shooting at Ben Stroup's. . . . " Defendant contends that this statement constituted hearsay and prejudicial error. We disagree. The statement was not made to prove the truth of the matter asserted, that is, that there had been a robbery shooting, but rather to explain his presence and time of arrival on the scene. Thus, the statement is not objectionable as hearsay. *State v. Crump*, 277 N.C. 573, 178 S.E. 2d 366 (1971). This assignment of error is overruled.

[2] Defendant further contends that the court erred in refusing to grant nonsuit at the close of all the evidence as to the armed robbery charge. Upon a motion being made for nonsuit by defendant, the trial judge must consider the evidence in the light most favorable to the State, take it as true, and give the State the benefit of every reasonable inference to be drawn therefrom. *State v. Vincent*, 278 N.C. 63, 178 S.E. 2d 608 (1971). "Regardless of whether the evidence is direct, circumstantial, or both, if there is evidence from which a jury could find that the offense charged has been committed and that defendant committed it, the motion to nonsuit should be overruled." *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968). In the present case, there was evidence from which the jury could find that the offense charged had been committed in that the defendant admitted, in his statement to Officer Berrier, removing some checks from the premises immediately after shooting Stroup. Further, the State's evidence shows that defendant and Carter were at Holland's house a few days before the shooting when Carter borrowed a .32 caliber pistol from Holland which was identified as the one with which Stroup was shot. The court is not concerned in a motion to nonsuit with

the weight of the testimony, but only with its sufficiency to carry the case to the jury and to sustain the indictment. *State v. Primes,* 275 N.C. 61, 165 S.E. 2d 225 (1969). When tested by these principles there is abundant evidence to carry the case to the jury. The motion for compulsory nonsuit was properly denied.

[3] Defendant also contends that the court erred in its charge to the jury as to conspiracy when defendant was not charged with conspiracy and when there was no evidence presented as to a conspiracy. The trial judge instructed the jury as follows:

> "Now, the defendant in this case is not charged with the offense of conspiracy, but I think in order for you to understand these instructions, it is necessary for me to tell you what is meant by the term 'conspiracy'."

While we deem any instruction on conspiracy in this case to be unnecessary, we find that no prejudicial error was committed by the trial judge since he very clearly instructed the jury that the defendant was charged with two separate criminal offenses, first degree murder and armed robbery. This assignment of error is overruled.

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

Defendant had a fair trial free from prejudicial error.

No error.

Judges MORRIS and PARKER concur.

RONALD W. LYON AND WIFE, JUDITH M. LYON, PLAINTIFFS v. JIM WARD, T/A JIM WARD CONSTRUCTION COMPANY, DEFENDANT AND THIRD PARTY PLAINTIFF v. BAINBRIDGE AND DANCE WELL DRILLING CONTRACTORS, INC., THIRD PARTY DEFENDANT

No. 7518DC717

(Filed 4 February 1976)

1. Sales § 6; Vendor and Purchaser § 6— initial sale of house — implied warranty as to water supply

The builder-vendor of a house impliedly warrants to the initial purchaser that, at the time of passing of the deed or the taking of

possession, a well constructed on the premises by the builder-vendor will provide an adequate and usable supply of water for the house under normal use and conditions.

2. **Sales § 6; Contracts § 12— driller of well — no guarantee of water quantity**

The trial court properly found that a contractor who drilled a well for a builder-vendor was under no legal duty to insure a water supply of any particular quantity or quality where there was no express contractual responsibility to provide an adequate supply of water and it was understood that the well was being drilled in a "high risk area" and there was no guarantee that the well would produce water at all.

APPEAL by defendant from *Kuykendall, Judge.* Judgment entered 20 May 1975 in District Court, GUILFORD County. Heard in the Court of Appeals 12 January 1976.

This is a civil action wherein the plaintiffs, Ronald W. Lyon and his wife, Judith M. Lyon (purchasers) seek to recover damages from the defendant, Jim Ward, (builder-vendor) for an alleged breach of an implied warranty with respect to the water supply in a house built and sold by defendant to the plaintiffs. The builder-vendor filed a cross-action against Bainbridge and Dance Well Drilling Contractors, Inc., (Bainbridge) who drilled the well supplying water to the house, for indemnification against any liability Ward might incur to the purchasers.

After trial before a judge without a jury, the court made findings which except where quoted are summarized as follows.

On 6 March 1973, plaintiffs purchased a pre-constructed house and lot from defendant located at 914 Cocoa Drive, Guilford County, for a purchase price of $31,000.00. Prior to the sale the defendant was the owner of the property and the general contractor for the house and other improvements. Shortly after plaintiffs took up residence on the premises, they discovered problems with the water supply. The defendant and his employees had used the water system prior to the sale and had not discovered anything wrong with it.

"4. Third party defendant contracted with defendant to drill the well, install the well casing, install the pump, and place the cap over the well. Third party defendant did not make any guarantee to defendant about the supply of water that would be obtained from the well.

5. The well and its components and the water system were sold by defendant to plaintiffs as an integral part of the dwelling house on the property acquired by plaintiffs.

6. The well on the property sold to plaintiffs was structurally defective and was not constructed in a workmanlike manner, in that only a very small quantity of water was provided by the well, and foreign particles were always present in the water. Plaintiffs and their family ran out of water under conditions of normal use on the average of two or three days per week. Plaintiffs were unable to use large amounts of water at any time, and could not wash their cars, water their lawn, or water their garden. Plaintiffs had to obtain disposable diapers for their baby, because there was not enough water in the system to wash diapers. Plaintiffs also encountered an abnormally bitter taste in the water.

* * *

8. The difference in value between the dwelling house and lot, as impiedly warranted by defendant to plaintiffs, and as delivered by defendant to plaintiffs, is $1500.00, by reason of the inadequate water supply."

Based on these findings, the court made the following conclusions of law.

"1. The well and water supply system in this case were fixtures of the dwelling house.

2. The inadequacy of the well constituted a major structural defect of one of the fixtures of the dwelling house, and the water system was not constructed in a workmanlike manner.

3. As the owner and contractor of a speculative house, defendant impliedly warranted to plaintiffs, at time title passed, that the house and its fixtures were constructed with ordinary skill, in a workmanlike manner, and were free from major structural defects.

4. Defendant's implied warranty to plaintiffs was breached by the insufficient quantity of water and the poor quality of the water.

5. Plaintiffs are entitled to recover of defendant their damages proximately caused by the breach of warranty,

consisting of the difference between the value of the property, as warranted, and its value, as delivered.

6. Third party defendant did not have a contract with defendant, and had no other legal duty to defendant, to insure a water supply of any particular quantity or quality.

7. Defendant has no right of recovery against third party defendant."

From a judgment that the plaintiffs recover $1500.00 from the defendant, Jim Ward, he appealed.

Smith, Patterson, Follin, Curtis & James by Norman B. Smith for plaintiff appellee.

Frassinetti & Shaw by Eugene G. Shaw, Jr., for defendant, Jim Ward, appellant.

No counsel for third party defendant, Bainbridge & Dance Well Drilling Contractors, Inc.

HEDRICK, Judge.

[1] The principal question presented by this appeal is whether the builder-vendor, Jim Ward, impliedly warranted to the initial purchasers that the well constructed on the premises by him and sold as an integral part of the house would provide an adequate, usable water supply for the house.

In *Hartley v. Ballou,* 286 N.C. 51, 209 S.E. 2d 776 (1974), Chief Justice Bobbitt said:

"[W]e hold that in every contract for the sale of a recently completed dwelling, and in every contract for the sale of a dwelling then under construction, the vendor, if he be in the business of building such dwellings, shall be held to impliedly warrant to the initial vendee that, at the time of the passing of the deed or the taking of possession by the initial vendee (whichever first occurs), the dwelling, together with all its fixtures, is sufficiently free from major structural defects, and is constructed in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction; and that this implied warranty in the contract of sale survives the passing of the deed or the taking of possession by the initial vendee." *Id.* at 62.

In *Hartley,* there was no evidence that any part of the house was not constructed in a workmanlike manner or that it was not free from major structural defects other than the evidence that water seeped into the basement floor during normal weather conditions. Thus, we interpret *Hartley* to stand for the proposition that a builder-vendor impliedly warrants to the initial purchaser that a house and all its fixtures will provide the service or protection for which it was intended under normal use and conditions.

Justice Copeland, speaking for the Supreme Court in *Hinson v. Jefferson,* 287 N.C. 422, 215 S.E. 2d 102 (1975), said: "The basic and underlying principle of *Hartley* is a recognition that in some situations the rigid common law maxim of *caveat emptor* is inequitable." *Id.* at 435. In relaxing the rule of *caveat emptor,* North Carolina has followed the developing trend in the United States which recognizes that there ought to be an implicit understanding of the parties when an agreed price is paid that the home is reasonably fit for the purpose for which it is to be used. *Tavares v. Horstman,* ____ P. 2d ____ (Wyo. Sup. Ct. 12/13/1975) ; *See also Humber v. Morton,* 426 S.W. 2d 554 (Tex. 1968) ; *Bethlahmy v. Bechtel,* 91 Ida. 55, 415 P. 2d 698 (1966) ; *Schipper v. Levitt & Son's, Inc.,* 44 N.J. 70, 207 A. 2d 314 (1965) ; *Carpenter v. Donohoe,* 154 Col. 78, 388 P. 2d 399 (1964) ; *McKeever v. Mercaldo,* 3 Pa. D & C 2d 188 (1954) ; *and see,* 25 A.L.R. 3d 383 (1969) and authorities cited therein. As said in *Humber v. Morton, supra* at 562, "The caveat emptor rule as applied to new houses is an anachronism patently out of harmony with modern home buying practices. It does a disservice not only to the ordinary prudent purchaser, but to the industry itself by lending encouragement to the unscrupulous, fly-by-night operator and purveyor of shoddy work."

Because an adequate supply of usable water is an absolute essential utility to a dwelling house, we believe that the initial purchaser of a house from the builder-vendor can reasonably expect that a well constructed on the premises by the builder-vendor will provide an adequate supply of usable water. We hold that at the time of the passing of the deed or the taking of possession the builder-vendor of a house impliedly warrants to the initial purchaser that a well constructed on the premises by him will provide water for the dwelling house which is adequate and usable. In the record before us, there is sufficient evidence to support the finding that the defendant owned the lot upon which he built the house and the well which he sold to the

plaintiffs and that the well did not provide an adequate and usable supply of water for the house under normal use and conditions. These findings support the conclusion that the defendant as a builder-vendor breached his implied warranty that the well would provide adequate water for the plaintiffs, and the plaintiffs are entitled to damages for such breach.

[2] The defendant also excepts to the court's conclusion that the "[t]hird party defendant did not have a contract with defendant, and had no other legal duty to defendant, to insure a water supply of any particular quantity or quality." The contract which was introduced into evidence shows clearly there was no *express* contractual responsibility for Bainbridge to provide an adequate supply of water. Indeed, as between Bainbridge and Ward, it was understood that the area was a "high risk area" and there was no guarantee that the well would produce water at all. The expectations of a builder-vendor who subcontracts the work of drilling a well are entirely different from the expectations of a prospective home purchaser. The court's finding of fact that there was no guarantee of water by Bainbridge to Ward is supported by the evidence in the record. Accordingly, this assignment of error is overruled.

Affirmed.

Judges PARKER and ARNOLD concur.

LETHA HOMANICH v. MARGARET L. MILLER

No. 7526DC629

(Filed 4 February 1976)

1. **Descent and Distribution § 6— spouse as slayer of other spouse — disposition of entirety property — constitutionality of statute**

The statute providing for the disposition of property held as tenants by the entirety when one spouse is the slayer of the other spouse, G.S. 31A-5, is not discriminatory against the wife-slayer and is constitutional.

2. **Descent and Distribution § 6— wife-slayer — entirety property — share of wife**

Where a husband and wife held property as tenants by the entirety, and the wife was found guilty of voluntary manslaughter of the husband and was thus a "slayer" of the husband, the wife-slayer

was entitled to a life estate in one-half of the entirety property under G.S. 31A-5, subject to pass upon her death to the estate of the husband.

APPEAL by plaintiff from *Robinson, Judge.* Judgment entered 2 June 1975 in District Court, MECKLENBURG County. Heard in the Court of Appeals 13 November 1975.

On 26 August 1969, defendant owned with her husband, Lester Burke Miller, certain real property in fee simple as tenants by the entirety. Defendant was charged with the murder of her husband and found guilty of voluntary manslaughter by a jury on 27 October 1969. Defendant is the "slayer" of Lester Burke Miller, as defined in Chapter 31A of the General Statutes.

Lester Burke Miller died intestate, leaving plaintiff and a sister, Mrs. Annie King, as his only two heirs-in-law. Mrs. King conveyed her interest in the real property to plaintiff by quitclaim deed, dated 15 December 1970. Plaintiff is now the sole owner of any and all inheritable interest previously owned by Lester Burke Miller in the real property. Plaintiff alleges that she owns the property in fee and that defendant has no right to the possession, occupation, custody, rents or any other beneficial interest in the property. Plaintiff further asserts that one-half of the property shall be held by the defendant during her life in constructive trust for the estate of Lester Burke Miller, subject to pass to Miller's estate on the death of defendant.

Defendant admitted that she and her husband had owned the property at issue as tenants by the entirety, and she admitted that she was the slayer of her husband as defined in G.S. 31A-3(3). She alleged that despite her status as his slayer, she was entitled to an interest in the property, and in an amended answer she alleged that G.S. 31A-5 is unconstitutional.

Both parties moved for summary judgment. The court granted summary judgment for defendant as to the plaintiff's claim, holding G.S. 31A-5 to be in violation of the Fourteenth Amendment of the U. S. Constitution. The court held that defendant had "a life estate in a one-half undivided interest in the property described in the Complaint, with a vested remainder in the plaintiff." The court further held that defendant was entitled to recover one-half the reasonable rental value of the

property for the time from Lester Burke Miller's death to the entry of summary judgment, and it ordered that a trial be held to determine the amount of this recovery. From this judgment, plaintiff appeals.

Frank B. Aycock II and L. Hunter Meacham, Jr., for plaintiff appellant.

William H. Ashendorf for defendant appellee.

CLARK, Judge.

This case presents the problem of rights to property held as tenants by the entirety by the slayer-wife and decedent-husband. The problem has been solved in a variety of ways in other states. See Anno., 42 A.L.R. 3d 1116; 2 Lee, N. C. Family Law, § 119. And it has been solved in North Carolina. See *In re Estate of Perry,* 256 N.C. 65, 123 S.E. 2d 99 (1961), which held that the wife-slayer was a constructive trustee, for their daughter, of the rents and profits of the tenancy by the entirety, *at least* during the full term of the husband's life expectancy, in accordance with the equitable principle that a person will not be permitted to benefit from his own wrong.

But *In re Estate of Perry, supra,* filed a few months after the enactment of G.S. 31A-5, effective 1 October 1961, was not affected by this statute.

G.S. 31A-5 provides as follows:

"Where the slayer and decedent hold property as tenants by the entirety:

(1) If the wife is the slayer, one half of the property shall pass upon the death of the husband to his estate, and the other one half shall be held by the wife during her life, subject to pass upon her death to the estate of the husband; and

(2) If the husband is the slayer, he shall hold all of the property during his life subject to pass upon his death to the estate of the wife."

[1] The different solutions depending upon whether husband or wife is the slayer is not discretionary against the wife-slayer. Such disposition was deemed necessary in order to prevent the slayer-husband from having his vested property right forfeited

for crime or taken without due process, because North Carolina is one of only three states that has retained the common law incident of tenancy by the entirety that "the husband has the control and use of the property and is entitled to the possession, income, and usufruct thereof during their joint lives. [Citations omitted.] [I]f the deceased wife were now living the appellant could not be deprived of his interest in the estate by an arbitrary judgment of the court." *Bryant v. Bryant,* 193 N.C. 372, 378, 137 S.E. 188, 191 (1927), holding that the property was held by the husband as a constructive trustee for the heirs of his wife, subject to the beneficial interest in the whole of the property for the slayer-husband.

So the disposition of the property in *Bryant* is the same as that provided for in G.S. 31A-5(2), except for the constructive trust fiction, where the husband is the slayer. See *Porth v. Porth,* 3 N.C. App. 485, 165 S.E. 2d 508 (1969).

But the disposition of the property in *In re Estate of Perry, supra,* is different from that provided for in G.S. 31A-5(1), where the wife is the slayer. In *Perry* the court gave no beneficial interest to the slayer-wife, but the statute provides that she shall receive a life estate in one-half of the property.

The policy that a slayer will not be permitted to benefit from his own wrong has controlled the disposition of tenancy by the entirety property in North Carolina. This policy is reiterated in G.S. 31A-15, which with G.S. 31A-5 is a part of the Chapter entitled "Acts Barring Property Rights," providing in part as follows: "This chapter shall not be considered penal in nature, but shall be construed broadly in order to effect the policy of this State that no person shall be allowed to profit by his own wrong. . . ."

In *Perry* the wife contended that she was entitled to a life estate in one-half of the property, but the court disposed of this contention with the following statement: "But in this respect, such rents and profits have the same status as other income and assets owned exclusively by the husband. It would be strange indeed if a wife who murders her husband could assert rights on the ground she thereby relieved him of his obligation to support her." 256 N.C. at 70.

[2] But G.S. 31A-5 provides that the wife-slayer have a life estate in one-half of the property. And when considered in the

light of the common law incident that the husband owns the rents and profits exclusively during his life, which the wife-slayer terminated by her criminal act, "she profits by her own wrong," contrary to the established policy of this State. Nevertheless, the language of the statute is clear. The intent of the legislature controls the interpretation of a statute. 7 Strong, N. C. Index 2d, Statutes, § 5. And it is the duty of the court to carry out this intent, irrespective of any opinion the court may have as to the wisdom of the statute. *Peele v. Finch,* 284 N.C. 375, 200 S.E. 2d 635 (1973). We must assume that the legislature knowingly subjected established policy to provide for a fair disposition of entirety property where the wife slays the husband.

We do not agree with the ruling of the trial court that G.S. 31A-5 is unconstitutional. Since tenancy by the entirety is a purely voluntary method of acquiring and retaining realty, we find no discriminatory state action in violation of the Fourteenth Amendment. *Shelley v. Kraemer,* 334 U.S. 1, 92 L.Ed. 1161 (1947).

The judgment of the trial court, except for the ruling that G.S. 31A-5 is unconstitutional, is

Affirmed.

Chief Judge BROCK and Judge HEDRICK concur.

LOUISE B. TUCKER v. WILLIAM G. BLACKBURN

No. 7523SC771

(Filed 4 February 1976)

Evidence § 39— medical history — doctor's testimony as hearsay

In an action to recover medical expenses for injuries sustained in an automobile accident plaintiff was not prejudiced where a doctor who first examined plaintiff almost 14 months after the collision testified that plaintiff told him about the collision and her injuries, and the court instructed the jury to consider this medical history for corroborative purposes only, since the declarations concerning plaintiff's past condition were hearsay and inadmissible.

APPEAL by plaintiff from *Wood, Judge.* Judgment entered 8 May 1975, Superior Court, WILKES County. Heard in the Court of Appeals 21 January 1976.

Plaintiff alleged, and offered evidence tending to show, that on 24 January 1973, in a collision between defendant's vehicle and a vehicle in which she was a guest passenger, she sustained a broken right hand, contusion of the left knee, and injury to her cervical spine which aggravated a pre-existing arthritic condition. She was confined to the hospital for three days and thereafter treated by an orthopedist. Medical expenses incurred for care and treatment of these injuries amounted to about $353.55.

Plaintiff returned to work on 9 April 1973; she had a heart attack on 17 August 1973, and thereafter suffered chest pains and shortness of breath; she returned to work in December 1973; she had another heart attack on 7 February 1974 and was in the hospital for five days. She first saw Dr. Earl Watts, a cardiologist at Baptist Memorial Hospital, on 7 March 1974; he committed her to the hospital the following day for a week. It was his diagnosis that she had angina pectoris, secondary to arteriosclerotic heart disease, and hypertension. He continued to treat her, and in late October 1974, confined her to the hospital for five days, and tests revealed she had a myocardial infarction, an area of tissue damage from lack of blood supply. To "rent out a left ventricular aneurysm" Dr. Watts performed open heart surgery on 9 December 1974, and she was in the hospital for eleven days thereafter. Medical expenses incurred in the treatment of plaintiff's heart condition amounted to about $8,500.00.

The jury found actionable negligence by defendant and awarded damages to plaintiff in the sum of $3,000.00. From judgment entered thereon, plaintiff appeals.

Finger and Park by Daniel J. Park and Raymond A. Parker II, for plaintiff appellant.

Moore and Willardson by Larry S. Moore and John S. Willardson for defendant appellee.

CLARK, Judge.

Plaintiff contended and sought to establish the causal connection between the injuries sustained in the collision of 24 January 1973 and her heart condition by the testimony of Dr. Earl Watts, who first saw and examined her on 7 March 1974, almost fourteen months after the collision. He testified that during her first visit to him, he asked her for her medical his-

tory, and she told him about the collision and her injuries. The trial court then instructed the jury to consider this medical history for corroborative purposes only, and plaintiff assigns as error this instruction.

Declarations concerning a past condition are no more trustworthy than any other hearsay statements, and hence are not admissible. 1 Stansbury, N. C. Evidence 2d, (Brandis rev. 1973), § 161. In *Moore v. Drug Co.*, 206 N.C. 711, 175 S.E. 96 (1934), the court approved, as an exception to the hearsay rule, the physician's testimony as to what the patient told him about present pain and *when the pain began.* But *Moore* is not authority for the admission of a patient's statement to the physician witness of his medical history in general. A person's statement of present pain and suffering, due to a high degree of trustworthiness, to either the physician or lay witness is admissible as substantive evidence. See, 13 N. C. L. Rev. 228 (1935). In our opinion, *Moore* extended this rule only to include a statement to the treating physician as to the time when symptoms now present (bodily feeling) began.

Neither could the hearsay statement of the plaintiff to the physician witness be admitted as substantive evidence as a basis for his expert opinion. *Todd v. Watts,* 269 N.C. 417, 152 S.E. 2d 448 (1967). When the facts are not within the knowledge of the witness himself, the opinion of the expert must be upon facts supported by the evidence, stated in a proper hypothetical question. If the expert witness has personal knowledge of some of the facts, but not all, a combination of these two methods may be employed. *Cogdill v. Highway Comm.,* 279 N.C. 313, 182 S.E. 2d 373 (1971). But see 46 N. C. L. Rev. 960 (1968), in which it is stated that other courts are beginning to adopt the view that a patient's statements to his treating physician of past symptoms is admissible as substantive evidence.

In this case, though the trial court instructed the jury to consider the evidence of plaintiff's statement of medical history to her physician for corroborative purposes only, Dr. Watts was permitted to testify that, based on plaintiff's statement of medical history and his examination, "In my opinion the myocardial infarction . . . could well have been precipitated as a result of the injuries sustained in the automobile accident . . . . " The admission of this evidence, not in response to a hypothetical question and objected to by defendant, was error, violating the rules stated in *Todd* and *Cogdill, supra.* This error,

beneficial to plaintiff, was negated by the jury. And if the hearsay statement of the patient to his physician had been admissible, it would have been admissible for the purpose of explaining the physician's opinion.

The plaintiff has no cause to complain. The hearsay statement of the plaintiff to her physician as to past symptoms was erroneously admitted in evidence as a basis for the physician's opinion that there was a causal connection between her heart condition and the collision. But the jury was not compelled to find, and apparently did not find, from this evidence and by its greater weight that plaintiff's heart condition, with the medical expenses incurred in the treatment thereof, was proximately caused by the collision.

We have carefully examined plaintiff's other assignments of error and find them to be without merit. The judgment is

Affirmed.

Judges VAUGHN and MARTIN concur.

J. A. PRITCHETT, EXECUTOR OF THE WILL OF LEWIS W. THOMPSON, JR. v. WILLIAM C. THOMPSON, BURGESS U. WHITEHEAD, LEWIS WHITEHEAD, JOSEPH GREENE WHITEHEAD, THOMAS WHITMEL GRIFFIN, MARGARET URQUHART GRIFFIN, CHARLES B. GRIFFIN, JR., MARY BOND GRIFFIN JACKSON, BURGESS U. GRIFFIN, BURGESS URQUHART, JR., THOMAS M. URQUHART, EMILY M. URQUHART AYSCUE, RICHARD A. URQUHART, JR., KATE FENNER URQUHART, WILLIAM E. URQUHART, MARY LOCKHART J. McMURRAN, JAMES P. JOHNSON, ANNE JANET JOHNSON SHEPHERD, THOMAS GRIFFIN JOHNSON, JOHN S. JOHNSON, JOHN GRIFFIN MARSHALL, CHARLES M. MARSHALL, JAMES DAVID MARSHALL, ROBERT LEE MARSHALL, JOHN SCOTT BRITTON, TEMPERANCE G. BRITTON, THELMA LEWIS BRITTON, MARY DOE (A DAUGHTER OF HUNTER GRIFFIN, CORRECT NAME UNKNOWN), ELIZABETH HARRELL BAZEMORE, JEAN WHITEHEAD CURRY, P. E. WALTERS, ELEANOR VIRGINIA OLIVER GOODWIN, SALLIE CORA EASON NORFLEET, THOMAS B. SLADE III, RICHARD G. SLADE, MARY WARD SLADE PURVIS

No. 756SC761

(Filed 4 February 1976)

Wills § 46— gift to nearest of kin — no representation

Where testator's will left all of testator's real and personal property to a named uncle for life and provided that at his death "½ of

my estate shall be given to my nearest of kin on my father's side, and the other ½ to the nearest of kin on my mother's side, and this shall include the children of my Two deceased uncles," and the named uncle was the testator's nearest surviving relative on his father's side, it was testator's intent that, following the death of the life tenant, one-half of the estate would go to testator's nearest kin on his father's side without application of the doctrine of representation, and the other half would go to testator's nearest of kin on his mother's side, but the doctrine of representation would apply to the children of the two deceased maternal uncles; therefore, a person within the fifth degree of kinship on the father's side takes that portion of the estate to the exclusion of cousins on the father's side who were related to testator in the sixth degree.

APPEAL by defendants Burgess U. Whitehead, Lewis Whitehead, Joseph Greene Whitehead, Thomas Whitmel Griffin, Margaret Urquhart Griffin, Charles B. Griffin, Jr., Mary Bond Griffin Jackson, Burgess U. Griffin, Burgess Urquhart, Jr., Thomas M. Urquhart, Emily M. Urquhart Ayscue, Richard A. Urquhart, Jr., Kate Fenner Urquhart, William E. Urquhart, Thomas B. Slade III, Richard G. Slade and Mary Ward Slade Purvis from *Tillery, Judge.* Judgment entered 12 August 1975 in Superior Court, BERTIE County. Heard in the Court of Appeals 20 January 1976.

In this action under the Declaratory Judgment Act, plaintiff executor seeks instructions from the court " . . . as to the persons who are entitled as beneficiaries to the estate of Lewis W. Thompson, Jr., on his father's side . . . " under his last will and testament. The will in question, dated 23 April 1973, provides as follows:

"I, L W Thompson, Jr. do make this my last will:

"I want my debts and all expenses paid. Then, I give to my uncle W. C. Thompson for his life all my real estate and the income from my personal property for life. At his death, ½ of my estate shall be given to my nearest next of kin on my father's side, and the other ½ to the nearest of kin on my mother's side, and this shall include the children of my Two deceased uncles. I do hereby appoint J A Pritchett as my executor and revoke all wills I have made before."

At the time of his death on 13 May 1973, testator's nearest surviving kin on his father's side was his uncle, W. C. Thompson, the life tenant under the will. This action was instituted on 19 March 1974, and on 21 May 1974 a judgment was entered

in superior court dismissing the cause on the ground that no determination could be made with respect to the persons entitled to the remainder interests until after the death of the life tenant.

An appeal was taken to this court and, while that appeal was pending, the life tenant died on 4 October 1974. In an opinion reported in 23 N.C. App. 728, 209 S.E. 2d 823 (1974), this court, without passing on the merits of the appeal, reversed the judgment of dismissal and remanded the cause to superior court for a determination of the rights of the parties.

Thereafter, defendant Sallie Cora Eason Norfleet (Mrs. Norfleet) filed a motion for summary judgment under G.S. 1A-1, Rule 56. At the hearing on the motion, in addition to those above stated, the following undisputed pertinent facts were established by admissions in the pleadings, affidavits and other materials:

(1) Excluding W. C. Thompson, the uncle and life tenant, Mrs. Norfleet was, both at the date of testator's death and at the date of the life tenant's death, the nearest blood relative of the testator on his father's side, being related to him in the fifth degree of kinship as determined pursuant to G.S. 104A-1.

(2) Excluding W. C. Thompson and Mrs. Norfleet, the nearest blood relatives on his father's side surviving testator were a large number of cousins who were related to him in the sixth degree. This group includes the sixteen appellants.

(3) On his mother's side, testator left surviving two aunts and several children of two deceased uncles.

Following the hearing, the trial court concluded that there is no genuine issue as to any material fact and that Mrs. Norfleet is entitled to summary judgment. The court adjudged her to be the "nearest of kin on my father's side" as that term is used in the will, and that, subject to the life estate of W. C. Thompson, she was devised and bequeathed a one-half undivided interest in the entire net estate, both real and personal. The court instructed plaintiff to distribute assets of the estate accordingly.

White, Hall, Mullen & Brumsey, by Gerald F. White, and Griffin & Martin, by Hugh M. Martin, for defendant appellants.

Gillam & Gillam, by M. B. Gillam, Jr., for defendant appellee.

BRITT, Judge.

Did the court err in entering summary judgment in favor of Mrs. Norfleet? We hold that it did not.

It is obvious that W. C. Thompson was testator's nearest surviving relative on his father's side. However, the trial court properly concluded that by leaving the uncle his real and personal property for life and disposing of the remainder "at his death," testator manifested a clear intent to limit the interest received by the uncle to a life estate. This conclusion is fully supported by *Central Carolina Bank & Trust Company v. Bass*, 265 N.C. 218, 143 S.E. 2d 689 (1965), and cases therein cited.

In the case of *In re Will of Cobb*, 271 N.C. 307, 309, 156 S.E. 2d 285, 287 (1967), in an opinion by Justice (now Chief Justice) Sharp, we find: "The words *next of kin* have a well defined legal significance. Unless the terms of the instrument show a contrary intent, in the construction of deeds and wills *next of kin* means *nearest of kin*—the nearest blood relations of the person designated. Without more, the term *does not permit a representation.* (Citations.)" (Emphasis added.)

While appellants recognize the rule quoted from *Cobb*, they contend that in the will under consideration here, "the terms of the instrument show a contrary intent." They argue that the provision in the will for representation on the mother's side—children of two deceased uncles—manifests the testator's intent that there should be representation on the father's side as well. Appellants insist that they are entitled to a trial of the cause at which attendant circumstances could be shown and a jury allowed to determine the intent of the testator. We reject appellants' contentions.

The materials presented at the hearing show without question that at the time testator made his will, his nearest relative on his father's side was his uncle, W. C. Thompson; there were living no other paternal uncles or aunts or descendants of paternal uncles or aunts. However, living on his mother's side were two aunts and several children of two deceased uncles. In that setting, the intent of the will is clear; following the death of W. C. Thompson, one-half of the estate would go to the testator's nearest kin on his father's side, *whoever* that might be; and the other half would go to testator's nearest kin

on his mother's side, *but* the doctrine of representation would apply to the children of the two deceased maternal uncles.

For the reasons stated, the judgment appealed from is

Affirmed.

Chief Judge BROCK and Judge MORRIS concur.

IN THE MATTER OF MICHAEL ANGELO WILLIAMS

No. 7519DC713

(Filed 4 February 1976)

1. **Infants § 10— delinquent minor — incarceration for 10 days — findings of fact required**

The trial court erred in ordering respondent, a thirteen year old, incarcerated for ten days without finding facts justifying detention. G.S. 7A-286(3).

2. **Infants § 10— second determination of delinquency — no denial of counsel — disposition at same time as adjudicatory hearing**

The trial court did not enter a judgment in a prior action against respondent in which prayer for judgment had been continued on condition, without notice to respondent that the court's action was contemplated as respondent contended, but instead made a second determination of delinquency resulting from a shoplifting charge which was an entirely separate and distinct offense from that resulting in the first finding of delinquency and the earlier continued judgment; nor was respondent denied the right to counsel where he and his mother intelligently and understandingly waived counsel; moreover, respondent and his mother had notice that the hearing could result not only in a second determination of deliquency but in the disposition of the case as well. G.S. 7A-285.

APPEAL by respondent from *Montgomery, Judge.* Judgment entered 23 July 1975 in District Court, CABARRUS County. Heard in the Court of Appeals 13 January 1976.

In a juvenile petition, dated 31 January 1975, respondent, age thirteen, was alleged to be a delinquent child for the reason that he had broken into and entered a cafe in Kannapolis and stolen a quantity of merchandise. A juvenile summons was served on respondent and his mother ordering them to appear at an adjudicatory hearing.

Respondent was represented at the hearing by court appointed counsel. On 12 February 1975, Judge Warren entered an order finding respondent a delinquent child defined by G.S. 7A-278(2) in that he had broken into and entered the cafe and stolen merchandise therefrom as alleged in the petition. The court continued the matter for disposition pending a home investigation by the family court counselor.

On 12 March 1975, following a report of the investigation by the court counselor, respondent and his mother were summoned to appear for a dispositional hearing. Following a hearing at which respondent was represented by court appointed counsel, Judge Montgomery entered an order continuing prayer for judgment "from month to month for a period of one year" upon certain conditions. The conditions included requirements that respondent attend school and apply himself to his schoolwork, that he not violate any laws of this or any other state, that he not be out any night later than 10:00 p.m. and that he not associate with one Judy Williams at whose direction he was alleged to have acted.

In a second juvenile petition, dated 10 July 1975, respondent was alleged to be a delinquent child for the reason that he committed the offense of "shoplifting" on 29 June 1975. Pursuant to that petition, respondent, his mother and her husband were summoned to appear at an adjudication hearing. At that hearing, after being apprised of their right to counsel, respondent and his mother waived the right, and the court found that the waiver was voluntarily and understandingly made. Respondent admitted in open court that he was guilty of the shoplifting alleged in the petition.

The court entered judgment finding as a fact that respondent had committed the shoplifting act complained of and, based on that finding, determined respondent to a delinquent child. The judgment ordered that respondent be committed to the custody of the Sheriff of Cabarrus County and placed in quarters provided for juveniles in the county jail for a period of ten days, following which he would be released on probation for a period of two years under the supervision of the family court counselor subject to certain specified conditions. Respondent appealed from the judgment and counsel was appointed to represent him on appeal.

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

Davis, Koontz & Horton, by Clarence E. Horton, Jr., for respondent appellant.

BRITT, Judge.

[1] By his first assignment of error, respondent contends the court erred in ordering him incarcerated for ten days without finding facts justifying detention. The assignment has merit.

G.S. 7A-286(3) in pertinent part provides: " . . . No child shall be held in any juvenile detention home or jail for more than five calendar days without a hearing to determine the need for continued detention under the special procedures established by this Article. If the judge orders that the child continue in the detention home or jail after such a hearing to determine the need for continued detention, the court order shall be in writing with appropriate findings of fact."

It is clear that the quoted portion of G.S. 7A-286(3) governs respondent's appeal. Therefore, that portion of the judgment providing for ten days' confinement is vacated and the cause will be remanded to the district court for entry of judgment in compliance with the statute.

[2] In his second assignment of error, respondent contends the court erred "in entering a judgment in a prior action against [him] in which prayer for judgment had been continued on condition, without notice to [him] that the court's action was contemplated, and without affording him an opportunity to be represented in that matter by his court appointed attorney of record." In his third assignment of error, he contends the court erred in entering a dispositional order immediately after the adjudicatory hearing in which respondent was adjudged delinquent when the summons gave notice only of an adjudication hearing. We find no merit in either of these assignments and since they are interrelated, we will discuss them together.

While the conditions upon which the earlier judgment was continued were considered by the court in rendering the judgment appealed from, at the time the latter judgment was entered, respondent was before the court for an entirely separate and distinct offense. We conclude that the latter judgment was

based on the court's second determination of delinquency resulting from the shoplifting charge.

At the hearing on that charge, respondent and his mother waived the right to counsel and the court found that the waivers were intelligently and understandably made. *State v. Boyd,* 287 N.C. 131, 214 S.E. 2d 14 (1975); *State v. Silver,* 286 N.C. 709, 213 S.E. 2d 247 (1975); *See, e.g., McKeiver v. Pennsylvania,* 403 U.S. 528, 29 L.Ed. 2d 647, 91 S.Ct. 1976 (1971); *In re Gault,* 387 U.S. 1, 18 L.Ed. 2d 527, 87 S.Ct. 1428 (1967).

With respect to notice, we think respondent and his mother were sufficiently informed that the hearing on 23 July 1975 could result not only in a second determination that respondent was delinquent, but in the disposition of his case as well. G.S. 7A-285 provides that a juvenile hearing "shall be a simple judicial process" and further provides as follows: " . . . At the conclusion of the adjudicatory part of the hearing, the court may proceed to the disposition part of the hearing, or the court may continue the case for disposition after the juvenile probation officer or family counselor or other personnel available to the court has secured such social, medical, psychiatric, psychological or other information as may be needed for the court to develop a disposition related to the needs of the child or in the best interest of the State. . . . " We hold that respondent was afforded due process during the 23 July 1975 hearing before Judge Montgomery.

Except for the ten days' confinement provision, the judgment appealed from is affirmed.

Judgment vacated in part and cause remanded.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. JERRY DALE HUNTER

No. 7524SC642

(Filed 4 February 1976)

1. Criminal Law § 102— improper argument of prosecutor — absence of prejudice

Defendant was not prejudiced by the argument of the private prosecutor that "if you let him go free, then law and order in this

country might as well go, too," where the court sustained defendant's objection to the argument, although the court did not go further and instruct the jury to disregard this line of argument.

2. **Homicide § 24— absence of malice — self-defense — instructions — burden of proof — Mullaney decision — nonretroactivity**

In this second degree murder prosecution, defendant is not entitled to a new trial under the decision of *Mullaney v. Wilbur*, 421 U.S. 684, because of the court's instructions placing on defendant the burden of showing to the satisfaction of the jury that there was no malice on defendant's part or that the elements of self-defense existed and excused the killing since the *Mullaney* decision is not retroactive and does not apply to defendant's trial which was held before the date of that decision.

APPEAL by defendant from *Martin, Judge.* Judgment entered 28 February 1975 in Superior Court, MADISON County. Heard in the Court of Appeals 13 November 1975.

Defendant was charged in a bill of indictment with first degree murder of Jonah Massey. He was tried for second degree murder, having pleaded not guilty to the charge.

At the trial the State's evidence tended to show: On 22 December 1973 Jonah Massey was eighty-five years old, was in good health and was active. His son, Cordell, drove him to a restaurant at about 7:00 p.m. on that day. As Cordell was parking his car, the defendant arrived and struck Cordell and attacked both Cordell and Massey when they got out of the car. The defendant knocked Massey to the pavement with a section of pipe, and Cordell stabbed defendant in self-defense. Massey was treated in the hospital emergency room and released that night. Massey was thereafter bedridden and incoherent until 26 December 1973 when he was admitted to a hospital. Massey died on 1 January 1974. The immediate cause of death was a combination of pneumonia, meningitis, and pericarditis. The blows received on 22 December could have initiated the chain of events which produced death.

Defendant presented evidence that both Cordell and Massey attacked him without provocation as he walked by their car in the restaurant parking lot; that both of the Masseys had knives and cut him; that he struck back and tried to get away from them and that he used the pipe in self-defense.

The jury returned a verdict of guilty of the offense of voluntary manslaughter and from judgment imposing a prison sentence, defendant appealed.

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

Swain & Leake, by A. E. Leake, for defendant appellant.

MARTIN, Judge.

[1] Defendant contends that the court erred in failing to instruct the jury that the argument of the attorney for the private prosecution was improper, and not to consider it. The full argument of the attorney does not appear in the record. The only portion from the argument excepted to is shown in the record as follows:

"Mr. Howell: . . . If you let him go free, then law and order in this country might as well go, too.

OBJECTION SUSTAINED. *Defendant excepts.*

Exception No. 54"

Defendant now contends that he suffered prejudicial error in that the trial judge, after sustaining the objection, failed to go further and to instruct the jury that this line of argument was improper and not to be considered, although the prompt objection gave him ample opportunity for such an instruction.

Defendant cites and relies upon *State v. Little,* 228 N.C. 417, 45 S.E. 2d 542 (1947), and *State v. Hawley,* 229 N.C. 167, 48 S.E. 2d 35 (1948). These cases are distinguishable from the instant case.

The language of the attorney for the private prosecution exceeded the bounds of propriety. However, the record shows that the trial judge sustained defendant's objection, thereby avoiding the evil of approving or sanctioning the language of the attorney.

In 2 Strong, N. C. Index 2d, Criminal Law, § 102, at p. 642, we find: "The control of the argument of the solicitor and counsel must be left largely to the discretion of the trial court, and an impropriety must be sufficiently grave to be prejudicial in order to entitle defendant to a new trial. It is only in extreme cases of abuse of the privilege of counsel, and when the trial court does not intervene or correct an impropriety, that a new trial may be allowed."

We do not deem the impropriety here sufficiently grave to entitle defendant to a new trial.

[2] Defendant contends the trial court deprived him of due process by charging the jury that he must show to the jury's satisfaction that there was no malice on the defendant's part or that the elements of self-defense existed and rendered the killing excusable. This contention is based on the case of *Mullaney v. Wilbur,* 421 U.S. 684, which examined and found unconstitutional a Maine requirement that a defendant charged with murder must prove, "by a fair preponderance of the evidence," that he acted "in the heat of passion on sudden provocation" in order to reduce the homicide to manslaughter.

In the recent case of *State v. Hankerson,* 288 N.C. 632, 220 S.E. 2d 575 (1975), our Supreme Court held that " . . . by reason of the decision in *Mullaney* the Due Process Clause of the Fourteenth Amendment prohibits the use of our long-standing rules in homicide cases that a defendant in order to rebut the presumption of malice must prove to the satisfaction of the jury that he killed in the heat of a sudden passion and to rebut the presumption of unlawfulness, that he killed in self-defense. The instructions given here insofar as they placed these burdens of proof on the defendant violate the concept of due process announced for the first time in *Mullaney.* We decline, however, for reasons hereinafter stated, to give *Mullaney* retroactive effect in North Carolina. We hold that because the trial judge instructed the jury in accordance with our law of homicide as it stood, and in a trial conducted, before the *Mullaney* decision, the defendant is not entitled to the benefit of the *Mullaney* doctrine. We will, however, apply the decision to all trials conducted on or after June 9, 1975."

The instant case was tried at the 24 February 1975 Regular Criminal Session of Madison County Superior Court. The trial judge instructed the jury in accordance with our law of homicide as it stood at the time. Therefore, the defendant is not entitled to the benefit of the *Mullaney* doctrine.

For the reasons given, in the trial we find

No error.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. CHARLES IRA BURKE

No. 7512SC615

(Filed 4 February 1976)

1. **Criminal Law §§ 91, 92— motions for consolidation and continuance**

The trial court did not abuse its discretion in denying defendant's motion for consolidation of his trial with that of another who participated in the crime with him, nor was it error to deny defendant's motion for continuance so that the case involving defendant's partner in crime might be called prior to the defendant's case.

2. **Homicide § 24— killing in heat of passion — burden of proof — jury instructions**

Defendant who was tried prior to 9 June 1975 was not entitled to the benefit of the principles of *Mullaney v. Wilbur*, 421 U.S. 684, and therefore was not denied due process by the trial court's instructions that the defendant must prove, not beyond a reasonable doubt but only to the jury's satisfaction, that he killed in the heat of passion upon sudden provocation in order to reduce second degree murder to manslaughter.

APPEAL by defendant from *Long, Judge*. Judgment entered 11 November 1974 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 24 October 1975.

Defendant pled not guilty to an indictment charging him with the first degree murder of Lawrence Jerry Stone. The jury returned a verdict of guilty of second degree murder.

Evidence presented at the trial tended to establish that on the evening of 1 May 1974 the defendant, along with his father, Charles Burke, and Richard Lynn Marshall, visited a topless bar in the City of Fayetteville. They were all intoxicated.

Defendant and his party became unruly and they were approached by Jerry Stone, assistant manager of the bar, and two "bouncers." After some discussion defendant refused to leave voluntarily and a "free for all" fight started. Defendant finally pulled a handgun and forced his adversary to back off. Marshall and Stone fought their way out through the back door. Defendant followed them out the door, and Marshall and defendant were both seen in the parking lot beating Stone. Stone was shot to death.

Defendant was given an active sentence and he appealed to this Court.

Attorney General Edmisten, by Senior Deputy Attorney General R. Bruce White, Jr., and Assistant Attorney General Zoro J. Guice, Jr., for the State.

H. Gerald Beaver, Assistant Public Defender, Twelfth Judicial District, for defendant appellant.

ARNOLD, Judge.

[1] Defendant's argument that the trial judge erred in denying his motion to consolidate for trial the cases of *State v. Charles Ira Burke* and *State v. Richard Lynn Marshall* is rejected. It is within the discretion of the trial court to consolidate for trial homicide cases against two defendants where both defendants are indicted for an offense of the same class arising out of the same killing. *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384 (1972); *State v. Feimster,* 21 N.C. App. 602, 205 S.E. 2d 602 (1974); G.S. 15-152 (Repealed effective 1 September 1975). The exercise of that discretion will not be disturbed absent a showing of abuse. *State v. Feimster, supra.* Defendant's case was not prejudiced by the trial judge's denial of defendant's motion to consolidate the cases for trial. The trial judge did not abuse his discretion in denying defendant's motion.

Defendant next contends that the trial court erred in denying his motion that the case of *State v. Richard Lynn Marshall* be called for trial prior to the defendant's case. Defendant's motion was made to the trial court in chambers on the day that defendant's case was called for trial. We cannot say that the trial judge abused his discretion in denying the defendant's motion for a continuance. *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1972); *State v. Morrison,* 19 N.C. App. 717, 200 S.E. 2d 341 (1973).

[2] Finally, arguing *Mullaney v. Wilbur,* 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508 (1975), defendant assigns error to the trial court's instructions to the jury that the defendant must prove, not beyond a reasonable doubt but only to the jury's satisfaction, that he killed in the heat of passion or sudden provocation in order to reduce second degree murder to manslaughter. The assignment has no merit.

The North Carolina Supreme Court has recently held that "by reason of the decision in *Mullaney* the Due Process Clause

of the Fourteenth Amendment prohibits the use of our long-standing rules in homicide cases that a defendant in order to rebut the presumption of malice must prove to the satisfaction of the jury that he killed in the heat of a sudden passion and to rebut the presumption of unlawfulness, that he killed in self-defense. The instructions given here insofar as they placed these burdens of proof on the defendant violate the concept of due process announced for the first time in *Mullaney*. We decline, however, for reasons hereinafter stated, to give *Mullaney* retroactive effect in North Carolina. We hold that because the trial judge instructed the jury in accordance with our law of homicide as it stood, and in a trial conducted, before the *Mullaney* decision, the defendant is not entitled to the benefit of the *Mullaney* doctrine. We will however apply the decision to all trials conducted on or after June 9, 1975." *State v. Hankerson,* 288 N.C. 632, 220 S.E. 2d 575 (1975).

Since the trial in this case against defendant was concluded prior to 9 June 1975 the *Mullaney* holding does not apply. *State v. Hankerson, supra.*

Defendant's remaining assignments of error have been reviewed and are found to have no merit.

No error.

Judges BRITT and VAUGHN concur.

IN THE MATTER OF THE IMPRISONMENT OF WALTER LEWIS STEVENS, JR.

No. 7510SC731

(Filed 4 February 1976)

1. Habeas Corpus § 1— questions determinable upon petition for writ

The only questions open to inquiry upon a petition for a writ of habeas corpus are whether on the record the court which imposed the sentence had jurisdiction of the matter or had exceeded its powers; furthermore, the Legislature has clarified the scope of a court's habeas corpus jurisdiction to include those instances where, though the original imprisonment was lawful, yet by some act, omission or event, which has taken place afterwards, the party has become entitled to be discharged. G.S. 17-33(2).

2. Convicts and Prisoners § 2; Habeas Corpus § 1— disciplinary proceeding of Corrections Department — writ of habeas corpus improper remedy

The problems of when a person should be released from prison and under what circumstances turn on analysis of internal correctional policy, and rightfully lie within the sole administrative jurisdiction of State governmental departments, and are not, barring a clear instance of constitutional infirmity, subjects appropriate for judicial scrutiny; therefore, where respondent, a committed youthful offender, attained an honor grade status and was recommended for conditional release but became involved in an altercation before his release which resulted in disciplinary proceedings by the Corrections Department and a recalculation of his correctional status from honor grade to "A" grade, the Superior Court incorrectly applied the law with respect to habeas corpus in finding that the Department of Corrections' actions were without justification and in ordering that the disciplinary proceeding against respondent and its results be stricken from respondent's record and not be taken into account in further recommendations for parole or conditional release.

ON *certiorari* to review the order of *Bailey, Judge.* Order, pursuant to a writ of habeas corpus, entered in Superior Court, WAKE County, 5 June 1975. Heard in the Court of Appeals 13 January 1976.

On 25 October 1972, Stevens was sentenced to a term of imprisonment as a committed youthful offender upon entry of a judgment upon a conviction on charges in Guilford County of breaking and entering and larceny and receiving. Stevens attained an honor grade status during the course of his imprisonment and, on 1 March 1974, was recommended for conditional release.

However, no action was taken on the recommendation, because of Stevens's alleged involvement in a 26 March 1974 altercation in which a fellow inmate was burned, purportedly deliberately. Defendant was charged with assault, and the district court found no probable cause. Notwithstanding the district court's determination, a Corrections Department disciplinary hearing committee on 22 April 1974 found Stevens "guilty" of the 26 March 1974 "offense" and sanctioned him by disciplinary segregation for seven to fifteen days, suspended for six months, and by recalculation of his correctional status from honor grade to "A" grade.

Stevens moved in the Superior Court by way of a writ of habeas corpus on 15 October 1974 and charged *inter alia,* that due to the " . . . arbitrary action of officials of the State De-

partment of Correction, your applicant was denied further consideration for a conditional release for which he had previously been recommended."

The Superior Court, on 5 June 1975, found that the Department of Corrections' actions were "without justification" and ordered that "[t]he disciplinary action arising out of the alleged burning incident occurring on March 26, 1974 in Montgomery County, North Carolina and which diciplinary action resulted in a reduction from honor grade to A grade, be stricken from the State Department of Corrections offense and disciplinary reports and all records of transactions. . . . The results of disciplinary proceedings arising out of that incident [should] not be taken into account in further disciplinary proceedings, recommendations for parole and/or conditional release."

The State filed a petition for a writ of certiorari. We granted the petition and issued the writ.

Attorney General Edmisten, by Special Deputy Attorney General Jacob L. Safron, and Associate Attorney Jack Cozart, for the State appellant.

George R. Barrett for respondent appellee.

MORRIS, Judge.

The State contends that the Superior Court did not have jurisdiction over the matters raised in the petitioner's writ of habeas corpus. We agree.

The writ of habeas corpus is critically significant to American jurisprudence and as such must be considered a " . . . precious safeguard of personal liberty. . . . " 39 C.J.S., Habeas Corpus, § 1, p. 424. Moreover, in view of its importance historically and legally, the writ has been designed as an effective means of obtaining " . . . a speedy release of persons who are illegally deprived of their liberty or illegally detained. . . . " 39 Am. Jur. 2d, Habeas Corpus, § 1, p. 179.

[1] Though obviously essential to the maintenance of civil liberty, the writ is not unlimited in its jurisdictional scope, utility and function. "It is essentially a writ of inquiry, and is granted to test the right under which a person is detained." 39 Am. Jur. 2d, Habeas Corpus, § 1, p. 179. However, the writ is not appropriately " . . . a substitute for appeal." *In re Burton,*

257 N.C. 534, 541, 126 S.E. 2d 581 (1962). Rather, the writ is considered an extraordinary process and jurisdictional mechanism under which " . . . the sole question for determination . . . is whether [the] petitioner is then being unlawfully restrained of his liberty. . . . The only questions open to inquiry are whether on the record the court which imposed the sentence had jurisdiction of the matter or had exceeded its powers." *Id.* at 540. Also see G.S. 17-4(2) and G.S. 17-33. Our Legislature, furthermore, has clarified the scope of a court's habeas corpus jurisdiction to include those instances "[w]here, though the original imprisonment was lawful, yet by some act, omission or event, which has taken place afterwards, the party has become entitled to be discharged." G.S. 17-33(2).

[2] Here, defendant is unsatisfied with an essentially administrative determination whereby his correctional status was affected adversely. Without doubt, this revision of his status from an honor grade to the lesser "A" grade, diminished his prospect for an early release; but this, standing by itself, raises no habeas corpus question. As Justice Sharp (now C.J.) has stated, "[t]he writ [of habeas corpus] is not available to test a prisoner's right to be released at some future time." *Jernigan v. State,* 279 N.C. 556, 559, 184 S.E. 2d 259 (1971). In practical terms, the questions of grade of conduct, privileges, disciplinary action and commendations " . . . are strictly administrative and not judicial [matters]." *State v. Garris,* 265 N.C. 711, 712, 144 S.E. 2d 901 (1965). Thus, the difficult problems of when a person should be released and under what circumstances turn on analysis of internal correctional policy, and rightfully lie within the sole administrative jurisdiction of our State governmental departments, and are not, barring a clear instance of constitutional infirmity, subjects appropriate for judicial scrutiny. *Goble v. Bounds,* 281 N.C. 307, 312, 188 S.E. 2d 347 (1972). In this case, the Superior Court incorrectly applied the law with respect to habeas corpus, and its decision is, therefore, without binding effect.

Reversed.

Chief Judge BROCK and Judge BRITT concur.

STATE OF NORTH CAROLINA v. NORRIS WAYNE HORNE, ALIAS NORRIS WAYNE BENSON

No. 7512SC705

(Filed 4 February 1976)

1. **Perjury § 5— establishment of perjury — evidence required**

In a prosecution for perjury, the falsity of the oath must be established by the testimony of two witnesses, or by the testimony of one witness and corroborating circumstances.

2. **Perjury § 5— indirect and circumstantial evidence — insufficiency**

In a prosecution of defendant for perjury by falsely testifying in the trial of another that such other person did not assist defendant when defendant broke into four houses and stole property therefrom, the State's evidence was insufficient for the jury where all of the evidence at defendant's perjury trial that the other person assisted defendant in the crimes was indirect and circumstantial and there was no direct testimony that the other person did assist defendant in the crimes.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 29 May 1975 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 12 January 1976.

The defendant, Norris Wayne Horne, was charged in a bill of indictment, proper in form, with four counts of perjury. The jury found the defendant not guilty on the first count, guilty on the second count, and the court allowed the defendant's motions for judgment as of nonsuit as to the third and fourth counts. On the second count in the bill of indictment, the defendant was charged with having perjured himself at the trial of Johnny Jordan by testifying "falsely . . . on oath that Johnny Jordan was not present and did not assist him on March 7, 1972" when the defendant broke into and entered four different houses in Fayetteville, North Carolina. From a judgment entered on the verdict that the defendant be imprisoned for ten (10) years, he appealed.

Attorney General Edmisten by Associate Attorney Jack Cozort for the State.

Sol G. Cherry for the defendant appellant.

HEDRICK, Judge.

The defendant assigns as error the denial of his motion for judgment as of nonsuit on the second count of the bill of

indictment. When the evidence offered at trial is considered in the light most favorable to the State, it tends to show the following.

Johnny Jordan was charged in four bills of indictment with breaking, entering, larceny, and receiving stolen goods from four different homes on 7 March 1972. He pleaded not guilty but was found guilty of felonious larceny on all four counts and guilty of breaking or entering on one count. At Jordan's trial, the defendant testified that he broke into the four homes named in the indictments and that Bradley Wellard was present and assisted him in the breaking and entering and larceny of the houses. He also testified that Johnny Jordan was not present and did not assist him on 7 March 1972 in the breaking and entering and larceny of the four houses.

At the defendant's trial for perjury in the Jordan case, Bradley Wellard testified that he was in Idaho at the time of the break-ins. This testimony was corroborated by the testimony of three members of his family from Idaho.

Sergeant Poole of the Cumberland County Sheriff's Department testified that he received a call on 7 March 1972 that a breaking and entering was occurring at Hilda Gray's home. Between 12:15 and 12:45, he observed a car towing a U-Haul-It trailer proceeding along U. S. 301 which matched the description of the one allegedly used in the crime. Poole followed the car and trailer and caught up with it at a Gulf station where it had been stopped by two city police officers. Johnny Jordan and the defendant were the only persons present other than the officers. Property belonging to Gray was found in the trailer along with other property later identified as stolen.

Sergeant Poole also testified that after arresting Jordan and defendant, he talked with the defendant at the Cumberland County jail. The defendant told him orally that Jordan was with him when he committed the break-ins. He also told Poole, though, that he would not sign a written statement, "the reason for it that he was scared to death of Johnny Jordan . . . Johnny Jordan would have killed him or would have had him killed . . . if he told on him."

The State also introduced portions of the transcript from the trial of Johnny Jordan where the defendant testified that the car was Jordan's. He also testified that he and Wellard had borrowed the car from Jordan to use in the crimes. He stated

that Jordan knew nothing of the break-ins when he and Wellard returned the car but that Jordan and the defendant were together when the police stopped them only because Jordan had just given Wellard a ride to his own car and was returning to town.

The defendant did not testify at his trial for perjury.

Perjury is defined as "a false statement under oath, knowingly, wilfully and designedly made, in a proceeding in a court of competent jurisdiction . . . as to some matter material to the issue or point in question." *State v. Smith,* 230 N.C. 198, 201, 52 S.E. 2d 348, 349 (1949).

[1] In a prosecution for perjury, North Carolina requires that the falsity of the oath be established by the testimony of at least two witnesses, or from the testimony of one witness, along with corroborating circumstances. *State v. King,* 267 N.C. 631, 148 S.E. 2d 647 (1966); *State v. Arthur,* 244 N.C. 582, 94 S.E. 2d 646 (1956); *State v. Hill,* 223 N.C. 711, 28 S.E. 2d 100 (1943); *State v. Rhinehart,* 209 N.C. 150, 183 S.E. 388 (1936). Circumstantial evidence alone is not sufficient. Annot., 111 A.L.R. 825 (1937). "The law was intended to afford the defendant a greater protection against the chance of unjust conviction than is ordinarily afforded in prosecuting for crime." *State v. Hill, supra,* at 716. "If you weigh the oath of one man against another, the presumption always made in favor of innocence shall turn the scale in favor of the accused." *State v. Molier,* 12 N.C. 263, 265 (1827). To sustain a conviction for perjury, the falsity of the oath must be *directly* proved by one witness and there must be corroborating evidence of independent and supplemental character, sufficient to resolve "the dilemma of weighing [one] oath against [another]." *State v. Molier, id.* at 265.

[2] Applying the foregoing principles of law to the evidence in this case, we are of the opinion that defendant's motion for judgment as of nonsuit as to the second count of the bill of indictment should have been allowed. While there is plenary circumstantial and indirect evidence that Jordan did in fact participate in the breaking or entering and larceny cases and that the defendant swore falsely when he testified at Jordan's trial that Jordan did not assist him in the crimes, there is no direct evidence in this record that Jordan did in fact assist the defendant in the commission of the crimes. All of the evidence

introduced at the defendant's trial for perjury that Jordan assisted the defendant in the commission of the several crimes, wherein the defendant allegedly perjured himself, is clearly indirect and circumstantial and as such would be sufficient to corroborate the direct testimony of one witness if there was one witness to prove the falsity of the defendant's testimony. The requirement that the perjury be proved by two witnesses or at least one witness and corroborating circumstances is simply not satisfied in this case.

Reversed.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. JOHNNY FRANK HURLEY, JR.

No. 7519SC766

(Filed 4 February 1976)

Automobiles § 126; Criminal Law § 64— breathalyzer results — necessity for voir dire

It is not necessary for the trial court in a drunken driving case to conduct a *voir dire* hearing and find that a breathalyzer operator followed each and every procedural step prescribed by the Division of Health Services before the breathalyzer results can be admitted in evidence, the operator's testimony that he held a valid permit issued by the Department of Human Resources and that he followed the prescribed techniques as set out by the Division of Health Services being sufficient for the admission of the breathalyzer results. G.S. 20-139.1(b).

APPEAL by defendant from *Rousseau, Judge.* Judgments entered 10 April 1975 in Superior Court, MONTGOMERY County. Heard in the Court of Appeals 20 January 1976.

In case No. 75CR157 under a warrant, proper in form, defendant was convicted in District Court of a violation of G.S. 20-138(b); i.e., operating a motor vehicle upon a highway within this State when the amount of alcohol in his blood was 0.10 percent or more by weight. Upon his appeal to the Superior Court, defendant was tried *de novo* by a jury.

The State's evidence tended to show that on 17 January 1975, after dark, defendant entered and drove along highway

220 with only the vehicle parking lights on. Trooper Coble of the State Highway Patrol stopped defendant and advised him that the vehicle's headlights were not in operation. Upon checking defendant's driver's license, the trooper observed that defendant appeared to be intoxicated. Defendant was arrested and transported to the Highway Patrol office in Troy. The defendant was given a breathalyzer test which indicated an alcoholic content of 0.15 percent in his blood.

Defendant's evidence tended to show that just prior to his arrest he was observed by two persons, and shortly after his arrest he was observed by another and that none of the three observed anything to cause them to think he was intoxicated. Defendant did not testify.

The jury found defendant guilty of operating a motor vehicle upon a highway within this State when the amount of alcohol in his blood was 0.10 percent or more by weight. A suspended sentence was imposed, and defendant appealed.

Following the foregoing conviction, the probation officer reported defendant for the violation of terms of probation specified in a judgment entered in case No. 71CR2314 in Superior Court on 26 October 1972. The specific condition of probation alleged to have been violated was that defendant not operate a motor vehicle "when he has consumed any alcoholic beverage." The evidence offered at the probation revocation hearing was the record of the conviction in case No. 75CR157. Upon appropriate findings of fact, the trial judge revoked the probation and ordered the twelve-month probationary sentence into effect. Defendant appealed from the revocation of probation.

Attorney General Edmisten, by Assistant Attorney General Thomas B. Wood, for the State.

Gerald R. Chandler, for the defendant.

BROCK, Chief Judge.

Defendant concedes that if there is no error in his trial and conviction in case No. 75CR157, there is likewise no error in the revocation of his probation in case No. 71CR2314.

The primary thrust of defendant's appeal is that the trial court committed error in allowing the breathalyzer test results in evidence. Defendant sought and was denied a *voir dire* hearing upon whether the breathalyzer operator followed each and

every procedural step prescribed by the Commission for Health Services. It seems to be defendant's contention that the trial judge was obligated to permit the *voir dire;* that the State was obligated to prove that the operator had followed each and every procedural step prescribed; that the defendent was entitled, on *voir dire,* to cross-examine the operator upon the manner in which he followed each and every procedural step; and that the trial judge, before allowing the test results in evidence, must find that the operator followed each and every procedural step prescribed. We reject the argument that such a *voir dire* and findings are required.

We have reviewed the records, the arguments, and opinions in *State v. Powell,* 10 N.C. App. 726, 179 S.E. 2d 785 (1971), and in *State v. Powell,* 279 N.C. 608, 184 S.E. 2d 243 (1971). It appears that the present appeal is merely "that same old raccoon with nothing new except another ring around its tail."

The operator in this case testified that he held a valid permit issued by the Department of Human Resources and that he followed the prescribed techniques as set out by the Division of Health Services. This evidence satisfied the requirements of G.S. 20-139.1 and entitled the test results to be admitted into evidence. Obviously defendant was not bound by this testimony and, in the presence of the jury, was entitled to cross-examine the operator within reasonable limits and to impeach his testimony if possible. Actually, in this case, defense counsel was allowed wide latitude in cross-examination of the operator, and such cross-examination was conducted at length. It appears the jury was not impressed that the operator's testimony had been impeached.

Defendant's argument that he was entitled to have the alternate issue of reckless driving submitted to the jury is not supported by the evidence.

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

No error in case No. 75CR157.

Affirmed in case No. 71CR2314.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. BOBBY RAY WRIGHT

No. 7520SC773

(Filed 4 February 1976)

Assault and Battery § 15— failure to charge on accident or misadventure

The trial court in a felonious assault case erred in failing to declare and explain the law of accident or misadventure as it applied to the evidence in the case where defendant's evidence tended to show that he did not intend to shoot the victim but that his gun fired accidentally as defendant was attempting to make the victim leave his house.

APPEAL by defendant from *Chess, Judge.* Judgment entered 6 June 1975 in Superior Court, STANLY County. Heard in the Court of Appeals 20 January 1976.

The defendant, Bobby Ray Wright, was charged in a bill of indictment, proper in form, with assault on James Bennett with a deadly weapon with intent to kill inflicting serious injury. The defendant pleaded not guilty and the State offered evidence tending to show the following.

On 7 March 1975, James Bennett, a neighbor and brother-in-law of the defendant, stopped his car in front of the defendant's house and went to the door to tell him that the lights on his camper were on. Just prior to Bennett's stopping at the defendant's house, the defendant had refused to sell him some snuff on credit. When the defendant came to the door, he began cursing Bennett. The defendant then came out on the porch and pushed Bennett against the banister. A "tussle" ensued but no blows were struck. The two men separated and Bennett said, "Bobby, what are we fighting for?" Bennett had followed the defendant into the house and the defendant told him to leave. Bennett lingered repeating the question, then saw the defendant pick up a shotgun from inside the bedroom door. Bennett said he was leaving, but the defendant shot him in the thigh and abdomen with the gun as he stood facing him on the front porch.

The defendant testified that Bennett came onto the porch to tell him the camper lights were on. However, when the defendant told him that he knew the lights were on, Bennett began cursing him. The defendant told Bennett, "If you have to come to my house cursing, raising hell, I'd rather for you to stay away." The defendant went back into the house, closed the door and sat down. Bennett opened the door and came into the

house, but the defendant pushed him out with his arm. When they were on the porch again, Bennett grabbed the defendant, and they tussled until the defendant pinned him on the floor. When the defendant got up, he went back into the house. Bennett barged into the house again, and the defendant reached into the bedroom and got his shotgun. He told Bennett to get out of the house. Using the barrel of the gun, he pushed him back onto the porch. As they stood on the porch, the defendant held the gun down by his side. He raised the gun to point it at Bennett, "figuring it would frighten him away." Bennett grabbed the barrel of the gun with both hands causing it to discharge. It was never the intention of the defendant to shoot Bennett; he only wanted "to frighten him off away from [his] house."

Carol Wilson, who testified for the defendant, corroborated his testimony that the gun discharged when Bennett grabbed the barrel with his hands.

Roger Lowder, a deputy sheriff in Stanly County who testified in rebuttal for the State, testified to a statement made by the defendant which likewise corroborated his testimony that the gun went off when Bennett grabbed the barrel.

From a verdict of guilty of assault with a deadly weapon inflicting serious injury and judgment imposing a prison sentence of three to five years, defendant appealed.

Attorney General Edmisten by Associate Attorney Cynthia Jean Zeliff for the State.

Coble, Morton, Grigg and Odom by Ernest H. Morton, Jr., for defendant appellant.

HEDRICK, Judge.

The defendant assigns as error the failure of the trial court to instruct the jury "on the law of a shooting by accident or misadventure" and the failure of the court "to state the defendant's evidence on a shooting by accident or misadventure to an extent necessary to explain the application of the law thereto."

Every "substantial feature" of the case arising on the evidence must be presented to the jury even without a special request for instructions on the issue. *State v. Dooley,* 285 N.C. 158, 203 S.E. 2d 815 (1974); *State v. Hickman,* 21 N.C. App.

421, 204 S.E. 2d 718 (1974). It is the statutory duty of the trial judge to "declare and explain the law arising on the evidence given in the case." N.C. G.S. 1-180.

The defendant contends and the defendant's evidence tends to show that he never intended to shoot Bennett but that the gun fired accidentally as the defendant was attempting to make Bennett leave his house.

A review of the judge's charge to the jury shows that although the court in reviewing the evidence for the defendant stated,

> " . . . The victim grabbed the barrel and in the tussle made the gun fire. That he didn't intend to shoot the victim.
>
> That he had no intention of shooting him. That the gun was fired by accident or misadventure,"

there is nowhere in the charge any explanation of the law arising from a shooting by accident or misadventure nor is there any attempt to explain accident or misadventure as it would apply to the evidence of this case.

The defendant's evidence of accident or misadventure is a substantial feature of the case. *See, State v. Floyd,* 241 N.C. 298, 84 S.E. 2d 915 (1954); *State v. Moore,* 26 N.C. App. 193, 215 S.E. 2d 171 (1975); *State v. Douglas,* 16 N.C. App. 597, 192 S.E. 2d 643 (1972); *cert. denied,* 282 N.C. 583, 193 S.E. 2d 746 (1973). The failure of the trial judge to declare and explain the law of accident or misadventure as it applies to this case, even in the absence of a request for such instructions is prejudicial error for which the defendant is entitled to a new trial.

We do not discuss defendant's other assignment of error since it is not likely to occur at a new trial.

New trial.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. BENJAMIN GARDNER

No. 7526SC744

(Filed 4 February 1976)

Criminal Law § 75— incriminating statements — absence of custodial interrogation — no necessity for waiver of counsel

Incriminating statements made by defendant at the scene of a killing in response to a question by officers as to "what had happened" were not the result of custodial interrogation and were admissible in evidence even if defendant did not expressly waive his right to counsel prior to making the statements.

APPEAL by defendant from *Briggs, Judge.* Judgment entered 17 April 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 16 January 1976.

Defendant was tried on a charge of second degree murder. The evidence tended to establish the following:

Defendant was the owner and operator of the Copra Restaurant and Lounge. On or about March 4, 1974, about 4:15 a.m., defendant and James Poe, while at the restaurant, had a dispute concerning a debt Poe owed defendant. Poe, an employee of the defendant, operated the lounge part of the business. Defendant drew a gun and he and Poe wrestled across the room. Shots were fired, and Poe died from bullet wounds inflicted by defendant.

When the police arrived, after being called, the defendant, defendant's wife, and two other women were present in addition to the deceased. Defendant was interrogated, and admitted that he had killed Poe.

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 Claude W. Harris, for the State.

Lacy W. Blue for defendant appellant.

ARNOLD, Judge.

The primary assignment of error by defendant is that the trial court erred in allowing into evidence defendant's incrimi-

nating statements made to police officers at the scene of the alleged crime. Defendant argues *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123 (1971), and asserts that he never expressly waived his right to remain silent and his right to counsel after being given the *Miranda* warnings.

The State asserts that the interrogation by the police officers was investigatory as opposed to custodial.

As stated in *State v. Lawson,* 285 N.C. 320, 204 S.E. 2d 843 (1974), the *Miranda* warnings and waiver of counsel are required only where a defendant is subjected to "custodial interrogations." Where a defendant makes a voluntary statement, or where he is not in custody during interrogation, there is no waiver requirement. *State v. Blackmon,* 284 N.C. 1, 199 S.E. 2d 431 (1973).

"Custodial interrogation" is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona,* 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed. 2d 694, 706 (1966).

The circumstances surrounding the interrogation were as follows:

The officers arrived at the Copra Restaurant in response to a call concerning an assault and personal injury. Upon their arrival the defendant was talking on the telephone and the officers asked for the location of the injured party. One of the women present indicated that Poe was in the lounge area.

Tables in the lounge were found overturned, and the victim was found on the floor next to the wall. The officers went back to defendant and asked him to step into the lounge with them. The officers then asked defendant "what had happened." Before defendant could answer he was given full *Miranda* warnings. Following his statements defendant was placed under arrest.

The questions by the officers were part of a routine on-the-scene investigation. There was no custodial interrogation. *State v. Archible,* 25 N.C. App. 95, 212 S.E. 2d 44 (1975); *State v. Thomas,* 22 N.C. App. 206, 206 S.E. 2d 390 (1974). Defendant, as the owner of the restaurant, was a logical person for the investigating officers to ask concerning the killing that had just taken place. He was questioned at his place of employment, and at the scene. He was not under arrest, and we do not believe

that defendant was in custody or deprived of his freedom in a significant way within the meaning of *Miranda*.

We hold that there was no custodial interrogation, and hence there is no need for us to reach the question of whether there was an affirmative waiver of the right to counsel.

No error.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. BENJAMIN T. HUNT

No. 7514SC498

(Filed 4 February 1976)

Homicide § 28— instructions — final mandate — possible verdicts — not guilty by reason of self-defense

Defendant is entitled to a new trial since the trial court failed to include not guilty by reason of self-defense in its final mandate to the jury.

ON *writ of certiorari* to review proceedings before *Braswell, Judge*. Judgment entered 5 December 1974 in Superior Court, DURHAM County. Heard in the Court of Appeals 25 September 1975.

Defendant was tried on a bill of indictment charging the first degree murder of Lonnie D. Leonard. The following is what the evidence tends to reveal.

On 15 January 1973, the defendant operated an automobile repair business in a garage behind his home. Between 8:00 and 8:30 p.m. Tony Walker, Steve Walker, Charles Leonard, Lonnie D. Leonard and Debra Stone came by defendant's home to pick up Walker's car which was being repaired by defendant. Defendant had retired for the evening but went outside in response to Walker's knock at the door.

An argument then ensued that attracted the attention of defendant's wife inside the house as well as the next door neighbor. Mrs. Hunt observed her husband attempting to free himself from Walker and his group as they were holding defendant and physically threatening him.

Mrs. Hunt screamed for her daughter to call the sheriff, and she obtained a .22 caliber pistol and ran to the doorway. Defendant had retreated back onto the porch, and he took the pistol from Mrs. Hunt.

Defendant fired towards the ground and ordered everyone to leave. More cursing and "fussing" followed from the Walker party, and one of the men ran up onto the porch towards defendant. Several shots were fired. Walker stated that he was not afraid of defendant's "pop gun" because he had something "better" and "bigger."

Following more threats and curses the group left. It was discovered that Lonnie D. Leonard had been shot. An autopsy revealed that Leonard was under the influence of alcohol at the time of his death.

The jury returned a verdict of guilty of voluntary manslaughter, and defendant was given an active sentence.

Attorney General Edmisten, by Associate Attorney Jerry J. Rutledge and Assistant Attorney General Robert P. Gruber, for the State.

Alwood B. Warren for defendant appellant.

ARNOLD, Judge.

Defendant assigns as error the failure of the trial court, in its final mandate, to instruct the jury to return a verdict of not guilty if they should find that defendant acted in self-defense. Defendant contends that under *State v. Dooley,* 285 N.C. 158, 203 S.E. 2d 815 (1974), this is reversible error.

The trial judge is required to instruct the jury as to the law based on the evidence presented. G.S. 1-180. The judge is to charge on all substantial features of the case which arise from the evidence, and all defenses presented by the evidence are substantial features of the case. *State v. Faust,* 254 N.C. 101, 118 S.E. 2d 769 (1961). If there is evidence that defendant acted in self-defense the judge must charge on self-defense even though there is contradictory evidence by the State or discrepancies in defendant's evidence. *State v. Dooley, supra; State v. Hipp,* 245 N.C. 205, 95 S.E. 2d 452 (1956).

It is argued by the State that under the circumstances, a defense of self-defense was not raised, and that it was only

out of abundant caution that self-defense was charged. The charge included a general statement concerning the law of self-defense and the things of which defendant must satisfy the jury in order to excuse the killing on grounds of self-defense.

In his final mandate the judge described each of the possible offenses and stated that the State must prove beyond a reasonable doubt that defendant "without justification or excuse" shot the deceased. He further instructed that "if you have a reasonable doubt as to any one or more of these things, it is your duty to return a verdict of not guilty." The State asserts that based on these instructions, considered as a whole, it could not be assumed by the jury that a verdict of not guilty by reason of self-defense was not a permissible verdict.

While the State makes a logical argument *Dooley* nevertheless does require the trial judge to include not guilty by reason of self-defense as a possible verdict in his final mandate where the defense has been raised by the evidence. A failure to do so is not cured by an instruction on the law of self-defense in the body of the charge. *State v. Dooley, supra,* at 165, 166.

Defendant is entitled to a new trial for omission in the judge's final mandate to the jury that self-defense was a possibility of acquittal.

A discussion of defendant's remaining assignments of error is deemed unnecessary.

New trial.

Judges MORRIS and HEDRICK concur.

COY E. BECK, ADMINISTRATOR OF THE ESTATE OF BLANCHE K. BECK, AND COY E. BECK, INDIVIDUALLY v. PAUL C. BECK, PEGGY B. MANESS, POLLY B. DOBY, BOBBY RAY BECK, AND THOMASVILLE CITY BOARD OF EDUCATION

No. 7522SC790

(Filed 4 February 1976)

Appeal and Error § 6; Rules of Civil Procedure § 54— order not adjudicating all claims — premature appeal

Purported appeal from an order which adjudicates the rights and liabilities of fewer than all the parties and contains no determina-

tion that there is no just reason for delay is premature and must be dismissed. G.S. 1A-1, Rule 54(b).

APPEAL by plaintiff from *Godwin, Judge.* Judgment entered 16 July 1975 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 22 January 1976.

In his complaint, plaintiff alleges that he was the husband of decedent, Blanche K. Beck, who died 8 June 1969 and he was named administrator of her estate. He had paid certain expenses of the estate with his own funds and was entitled to reimbursement from the estate.

On the 8th day of April 1965, the Thomasville City Board of Education executed a note payable to plaintiff and his wife for the purchase of real estate, with payment to be made in the years 1969 through 1973. After decedent's death, plaintiff and his children, the individual defendants herein, entered into a purported family settlement agreement, which provided that he would receive only a portion of the payments made by the Board of Education, while the children would receive the other portion. Plaintiff alleged this agreement was void because plaintiff was not represented by counsel when he signed the agreement and he did not realize its legal significance.

Plaintiff's children denied that plaintiff had paid any estate expenses with his own funds. They allege that when the family settlement agreement was signed, plaintiff was represented by counsel and fully understood its legal effect.

Plaintiff's children moved for summary judgment and motion for judgment on the pleadings on the ground that the complaint failed to state a claim for relief. The court granted the motion and plaintiff appeals to this Court.

Ottway Burton, for plaintiff appellant.

Hoyle, Hoyle & Boone, by John T. Weigel, Jr., for defendant appellees.

MARTIN, Judge.

Although the parties have raised no question concerning the matter, we note that the judgment from which the plaintiff purports to appeal adjudicates the "rights and liabilities of fewer than all the parties" and that it contains no determination that "there is no just reason for delay" within the meaning of

the language of Rule 54(b) of the North Carolina Rules of Civil Procedure. Plaintiff's action against defendant Board of Education is still pending.

"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 the . . . parties, 'only if there is no just reason for delay *and it is so determined in the judgment.*' (Emphasis added.) By making the express determination in the judgment that there is 'no just reason for delay,' the trial judge in effect certifies that the judgment is a final judgment and subject to immediate appeal." *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, Rule 54(b) of the North Carolina Rules of Civil Procedure makes "any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties," interlocutory and not final. *Leasing, Inc. v. Dan-Cleve Corp.,* 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.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. CHANCY JUNIOR SAWYER

No. 752SC750

(Filed 4 February 1976)

Assault and Battery § 14— simple assault — attempt to run vehicle off road

The State's evidence was sufficient to support defendant's conviction for simple assault under either the common law rule or the "show of violence" rule where it tended to show that defendant repeatedly pulled his car alongside the truck in which the victims were riding while both vehicles were traveling at high rates of speed and attempted to run the victims' truck off the road, and that the victims were "scared" while defendant chased them.

State v. Sawyer

APPEAL by defendant from *Lanier, Judge.* Judgment entered 22 May 1975 in Superior Court, HYDE County. Heard in the Court of Appeals 16 January 1976.

The defendant, Chancy Junior Sawyer, was charged in separate warrants, proper in form, with assault with a deadly weapon on Ricky Sexton and Buddy Williams. The defendant was tried in Superior Court before a jury and was found guilty in each case of simple assault. From judgments imposing a prison sentence of thirty days in each case, suspended on condition the defendant pay a fine of $25.00 and costs, he appealed.

Attorney General Edmisten by Associate Attorney William H. Guy for the State.

G. Irvin Aldridge for defendant appellant.

HEDRICK, Judge.

The defendant assigns as error the failure of the trial court to grant his motion for judgment as of nonsuit made at the close of the State's evidence and at the close of all the evidence. The evidence when considered in the light most favorable to the State tends to show the following.

Ricky Sexton, Buddy Williams, and George Sawyer were riding around in Sexton's truck at about 8:30 p.m. on 10 December 1974. Soon after passing the defendant's house, they stopped to turn around and noticed the headlights of an automobile approaching. They headed up River Shore Road in Hyde County, near Sladesville, North Carolina; and the car that they had seen began following them. When the car came up on Sexton's bumper, they recognized the defendant as the driver. Sexton speeded up, but Sawyer pulled up beside him and "started to swerve right back into" Sexton's truck. Sexton "ran off the road a little bit and continued to speed up to get away from him." The defendant repeated the maneuver three or four times as both vehicles traveled at speeds up to eighty miles per hour. Finally, as the road narrowed and the pavement ended, Sexton applied the brakes and skidded onto the dirt portion of the road. Sawyer drove past him, and Sexton proceeded back up River Shore Road toward Deputy Sheriff Carrowan's house, eight to ten miles away. The defendant began following him again, "on his bumper." As both vehicles were traveling at a high rate of speed, the defendant repeatedly pulled alongside Sexton and tried to run him off the road. Sexton and Williams

both testified that while Sawyer chased them they were "scared."

Prior to 10 December, the defendant had warned Sexton not to drive up the River Shore Road. The defendant was caretaker for a hunting club which leased some of the land fronting the road. On 9 December, the defendant had stopped Sexton, Williams, and George Sawyer in a field along the road. Sexton claimed the land was not leased to the hunting club and that he had permission to hunt on it. Sexton quoted the defendant as saying: "Well, the next time I catch you up here I'm going to beat your eyes out of the back of your head."

A criminal assault may be committed with an automobile. *State v. Eason,* 242 N.C. 59, 86 S.E. 2d 774 (1955); *State v. Agnew,* 202 N.C. 755, 164 S.E. 578 (1932). Under the common law, the test for simple assault requires an overt act or an attempt with force and violence to do some immediate physical injury to the person of another. More recently, in some cases of assault, North Carolina has adopted as an alternative the "show of violence" rule which requires a reasonable apprehension on the part of the assailed witness of immediate bodily harm or injury which caused him to engage in a course of conduct he would not have otherwise followed. In this case, under either rule, the evidence is sufficient to require submission of the case to the jury. Although the defendant testified that he only tried to pass Sexton's truck, that he never tried to run Sexton off the road, and that it was Sexton who tried to run him off the road, the evidence presented a factual question for the jury. These assignments of error are overruled.

The defendant contends finally that the court committed prejudicial error in sustaining the State's objection to a question asked Deputy Sheriff Carrowan on cross-examination intended to show the bias of the State's witness. Regardless of whether the question as asked was objectionable, there is nothing in the record to indicate what the answer would have been had the witness been allowed to answer. From the record as presented, we are unable to determine that any prejudice resulted from the court's ruling. This assignment of error is overruled.

We conclude the defendant had a fair trial free from prejudicial error.

No error.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. THEODORE McMILLAN ALIAS THEODORE RICHARDSON

No. 7512SC783

(Filed 4 February 1976)

Criminal Law § 102— jury argument of defense counsel — limitation — prejudicial error

The trial court erred in refusing to allow defense counsel to argue to the jury various facts concerning the robbery victim's photographic identification of defendant, since those facts had been brought out in cross-examination of the victim and since the State's case rested entirely upon the identification testimony of the victim.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 21 April 1975 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 21 January 1976.

Defendant appeals from judgment imposing a prison sentence on his conviction for armed robbery.

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

Cherry and Grimes by Donald W. Grimes for defendant appellant.

PARKER, Judge.

Defendant contends the trial court erred in unduly limiting certain portions of defense counsel's argument to the jury. We agree.

During argument to the jury and while summarizing defendant's contentions, defense counsel attempted to argue that the robbery victim, Marie McPherson, had mistakenly identified 2 photographic exhibits (S-1 and S-2) as being photographs of the same person. These exhibits had been shown to the witness, along with other photographs, prior to defendant's arrest. In sustaining the State's objection to this argument, the trial judge said:

"I do not recall there was any evidence that anybody said these particular photographs were of the same person."

The record, however, shows the following from the cross-examination of Mrs. McPherson:

"Q. Are these two photographs here marked for identification as S-1 and S-2 the ones which you identified as being the same person?

A. Yes, sir."

Later in his argument to the jury defense counsel contended that the State's witness, Mrs. McPherson, had testified that the person pictured in photographic exhibit D-4 "looked like the defendant" or "might be the defendant." The court also sustained the State's objection to this argument. The record shows that on cross-examination Mrs. McPherson had testified, with reference to the picture marked D-4, that "it could be Theodore," that "[t]here is a little resemblance," and "Yes, it looks like Theodore off a little."

The State's case rested entirely upon the identification testimony of Mrs. McPherson, the victim of the robbery. No other evidence connected defendant with the crime. The robbery occurred on 25 September 1974. At that time Mrs. McPherson told the police that the robber was clean shaven. Approximately three weeks later she picked out defendant's photograph from a number of photographs shown her by the police and identified the picture as being that of the robber. The photograph was taken 18 October 1974 and showed defendant with a beard. Defendant testified and denied any connection with the robbery. He also testified and presented testimony of others that on the date of the robbery and for sometime prior thereto and thereafter he wore a beard. Thus, the credibility of Mrs. McPherson's identification testimony was at issue and was all important in this case. Indeed, it presented the only real issue for the jury to resolve. Defendant was entitled to present any competent evidence relevant to that issue and by cross-examination of the State's witness to bring to the jury's attention any matter which might tend to weaken her identification testimony. He was also entitled to have his counsel argue the significance of that evidence to the jury. By unduly restricting defense counsel's argument to the jury, the court committed error for which defendant is entitled to a

New trial.

Chief Judge BROCK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. AL JEROME THOMAS, JR.

No. 758SC728

(Filed 4 February 1976)

1. **Disorderly Conduct § 2— failure to disperse — elements of offense**

In order to sustain a conviction under G.S. 14-288.5(b) for failing to disperse when commanded by a police officer, the State must show that defendant failed to disperse on command to do so and that the officer had reasonable ground to believe that disorderly conduct was occurring by an assemblage of three or more persons.

2. **Disorderly Conduct § 2— failure to disperse — sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for failing to disperse when commanded by a police officer where it tended to show that a bottle was thrown at a car, an officer went to the scene and saw an intoxicated person preparing to throw a beer bottle at a passing motorist, the officer arrested such person for public drunkenness, defendant and several other persons thereupon surrounded the officer and arrestee and told the officer he wasn't going to take the arrestee, the officer commanded the group to disperse, and the group pushed the officer away from the arrestee and grabbed the arrestee and fled as other police units arrived.

3. **Disorderly Conduct § 2— failure to disperse — instructions — failure to define "command" and "disperse"**

In a prosecution for failing to disperse when commanded by a police officer, the trial court did not err in failing to define "command" and "disperse" since defendant made no request for special instructions and it is not necessary for the court to define and explain words of common usage and meaning.

APPEAL by defendant from *Webb, Judge.* Judgment entered 21 April 1975 in Superior Court, WAYNE County. Heard in the Court of Appeals 15 January 1976.

Defendant was tried in district court on a warrant charging him with failing to disperse when commanded by a police officer, in violation of G.S. 14-288.5(b). He was found guilty and appealed to superior court where he was tried *de novo*. A jury found him guilty as charged and from judgment imposing prison sentence of six months, he appeals.

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

Louis Jordon for defendant appellant.

BRITT, Judge.

By his first assignment of error, defendant contends the trial court erred in not granting his motion for nonsuit. We find no merit in this assignment. Evidence presented by the State tended to show:

On 22 February 1975, at around 7:30 p.m., Officer J. E. Barnes of the Goldsboro Police Department, responded to a complaint that a bottle had been thrown at a car in the vicinity of Slocumb and Wayne Avenue in Goldsboro. When he arrived at the scene, he found Richard Fennell in an intoxicated state, standing near the corner of Olivia Lane and Slocumb Street preparing to throw an empty beer bottle at a passing motorist. Officer Barnes ordered Fennell not to throw the bottle, subdued him and placed him under arrest for public drunkenness.

Thereupon, defendant, Tomarcus Swift, Clifton Battle and several other persons converged on the officer, surrounding him and Fennell. They told him that he " . . . wasn't going to take him [Fennell] and to let those damn white folks take a Warrant on him." Officer Barnes commanded the group to disperse. Instead, they began shoving and pushed the officer away from Fennell. They then grabbed Fennell and fled the area as backup police units arrived.

Officer Barnes returned to the police station and procured warrants for defendant, Battle and Swift, they being members of the group that he knew personally. Accompanied by Officer C. N. Bennett, he returned to the area of Wayne Avenue where they stopped a late model Ford in which defendant and Swift were riding. The officers served the warrants on defendant and Swift and arrested them for failing to disperse upon command.

[1, 2] To survive a motion for nonsuit and sustain a conviction under G.S. 14-288.5, the State must prove the essential elements of the offense charged. *State v. Orange,* 22 N.C. App. 220, 206 S.E. 2d 377 (1974), *appeal dismissed,* 285 N.C. 762, 208 S.E. 2d 380 (1974), *cert. denied,* 420 U.S. 996, 43 L.Ed. 2d 675, 95 S.Ct. 1431 (1975). Here, it was necessary for the State to present evidence of defendant's failure to disperse on command to do so and that the officer had reasonable ground to believe that disorderly conduct was occurring by an assemblage of three or more persons. *State v. Clark,* 22 N.C. App. 81, 206 S.E. 2d 252 (1974), *appeal dismissed,* 285 N.C. 760, 208 S.E. 2d 380 (1974), *cert. denied,* 420 U.S. 977, 43 L.Ed. 2d

658, 95 S.Ct. 1403 (1975). Considering the evidence in the light most favorable to the State, as we are required to do on motion for nonsuit, we hold that the evidence established each and every element of the offense charged. *State v. Jones,* 23 N.C. App. 162, 208 S.E. 2d 419 (1974), *aff'd,* 287 N.C. 84, 214 S.E. 2d 24 (1975).

[3] By his second and third assignments of error, defendant contends the trial judge erred in refusing to give a special instruction on the precise meaning of "command" and "disperse." We find no merit in this contention.

Under G.S. 1-181, a request for special instructions, aptly made, tendered in writing before argument and signed by counsel, has been held to impose a duty on the court to give the instructions in substance where relevant to the case. *State v. Boyd,* 278 N.C. 682, 180 S.E. 2d 794 (1971). The stated rule does not apply here. Not only did defendant fail to request specific instructions but the charge as given was clear and unambiguous. It is not error for the court to fail to define and explain words of common usage and meaning to the general public. *See State v. Withers,* 2 N.C. App. 201, 162 S.E. 2d 638 (1968), and cases cited therein. This rule applies equally to essential elements of the crime charged as well as to other legal terms contained in the charge. *See State v. Godwin,* 267 N.C. 216, 147 S.E. 2d 890 (1966); *State v. Jones,* 227 N.C. 402, 42 S.E. 2d 465 (1947).

After a careful review of the entire record, we conclude defendant received a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. MAXIE RAY BOLTON

No. 755SC768

(Filed 4 February 1976)

1. Criminal Law § 117— testimony by minors — requested instruction on credibility

In a robbery case in which two minor girls, nine and ten years of age, testified for the State, the trial court did not err in failing to

give defendant's requested instruction that minor children "are legally competent so to testify, but you should in determining the credibility and weight to be given their testimony, consider their age and maturity."

2. **Criminal Law § 122— additional instructions after deliberations begun**

The court's supplementary instructions to the jury after they had deliberated for approximately four hours without reaching a verdict were proper.

APPEAL by defendant from *Fountain, Judge.* Judgment entered 9 April 1975 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 20 January 1976.

In a bill of indictment proper in form, defendant was charged with the armed robbery of Vickie Autry, employee of Zip Mart, Inc., a convenience store on Wrightsville Avenue, in the City of Wilmington. He pled not guilty.

The State presented evidence tending to show:

On 27 January 1975, Ms. Autry was working as assistant manager of the store referred to in the indictment. Shortly after 5:30 p.m. on that day, a man, later identified by Ms. Autry as defendant, entered the store and thereafter brought a pair of gloves to the checkout counter. He then asked for a carton of cigarettes; as Ms. Autry turned to get the cigarettes, the man pointed a pistol at her and demanded the money in the cash drawer. Ms. Autry gave him the money and, pursuant to his order, proceeded to lie on the floor while the robber left. Ms. Autry had seen the man in the store earlier that afternoon.

Very soon after the robbery, two little girls, ages 9 and 10, entered the store and found Ms. Autry lying on the floor. The girls testified that as they were approaching the store, a car occupied by two men sped away from the store parking lot. They identified defendant as the driver of that car.

Defendant presented evidence tending to establish an alibi.

The jury found defendant guilty as charged and from judgment imposing prison sentence of not less than five nor more than seven years, he appealed.

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

James J. Wall for defendant appellant.

BRITT, Judge.

[1] Defendant first assigns as error the failure of the court to give the jury the following requested instruction: "Minor children have testified for the prosecution during this trial. The Court instructs you that they are legally competent so to testify, but you should, in determining the credibility and weight to be given their testimony, consider their age and maturity." We find no merit in the assignment.

It appears to be settled in this jurisdiction that if a specifically requested jury instruction is proper and supported by the evidence, the trial court must give the instruction, at least in substance. *State v. Boyd,* 278 N.C. 682, 180 S.E. 2d 794 (1971); *cf. State v. Hooker,* 243 N.C. 429, 90 S.E. 2d 690 (1956). The question then arises, was the requested instruction "proper" under the evidence in this case?

Defendant does not cite, and our research fails to disclose, any authority from this jurisdiction in support of his contention. He submits that while some states require the instruction when requested, citing *State v. Anderson,* 152 Conn. 196, 205 A. 2d 488 (1964), and *Rosche v. McCoy,* 397 Pa. 615, 156 A. 2d 307 (1959), other states have taken a different view, *Marks v. State,* 63 Wis. 2d 769, 218 N.W. 2d 328 (1974); *Overton v. State,* 230 Ga. 830, 199 S.E. 2d 205 (1973); and *People v. Norred,* 110 Cal. App. 2d 492, 243 P. 2d 126 (1952), *cert. denied,* 344 U.S. 869, 97 L.Ed. 674, 73 S.Ct. 113 (1952).

We think the better reasoning supports our holding—that the requested instruction was not *required* under the evidence in this case. If the instruction were definitely required for a person nine or ten years old, would it be required for one twelve or thirteen years old? If the instruction were required for persons in the early years of life, would it not be necessary to set an arbitrary age in the later years of life when a similar instruction would likewise be required? We feel that the trial judge can more accurately determine those instances when the instruction would be appropriate. It is noted that in this case the trial judge gave the substance of the requested instruction as a contention of defendant.

[2] Defendant's other assignment of error relates to the court's supplementary instructions to the jury after they had deliberated for approximately four hours without reaching a verdict. We find no merit in this assignment.

The record reveals that the jury deliberated one hour and fifteen minutes before the lunch recess, after which they resumed their deliberations. At 5:10 p.m. they had not agreed upon a verdict, being divided eleven to one. At that point, the trial judge gave the challenged additional instructions, ordered a recess for the night, and the jury resumed its deliberations the next morning at 9:30 a.m. They returned a verdict at 10:20 a.m. following which all jurors were polled and each assented to the verdict of guilty as charged.

Defendant argues that the additional instructions were coercive. While he concedes that the instructions were similar to those approved in *State v. Accor,* 13 N.C. App. 10, 185 S.E. 2d 261 (1971), *aff'd,* 281 N.C. 287, 188 S.E. 2d 332 (1972), he urges that we reconsider our holding in that case. We are not persuaded that *Accor* is other than sound law, therefore, we adhere to its holding.

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

No error.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. HOWARD D. GRAVES

No. 7517SC846

(Filed 4 February 1976)

Homicide § 30— involuntary manslaughter — failure to submit issue to jury — error

The trial court in a murder prosecution erred in failing to instruct the jury on involuntary manslaughter as a possible verdict where defendant's testimony was explicit that he did not know that his gun had even fired, and there was evidence in the case to support the theory that after defendant was shot his shotgun discharged accidentally.

APPEAL by defendant from *Winner, Judge.* Judgment entered 4 June 1975 in Superior Court, CASWELL County. Heard in the Court of Appeals 23 January 1976.

Defendant was indicted on a charge of first degree murder. The State announced at trial that it would proceed on a charge no greater than second degree murder. Prior to the State's presentment of its case, the district attorney announced that the parties agreed and stipulated that the deceased was killed by a shotgun wound to the face and that the laboratory test for blood alcohol revealed 190 milligrams of blood alcohol in the deceased when he died. It was further stipulated that the defendant had been shot twice in the abdomen.

The State's evidence at trial tended to establish that the deceased and his wife visited Flo's Truckstop on 9 November 1974 to drink beer with some friends. A fight erupted at the truck stop involving several men and their female escorts. The deceased's wife testified that she saw her husband with his hands in the air facing the defendant who was armed with a shotgun and pointing it at the deceased. Two pistol shots were fired, and defendant shot the deceased in the face with the shotgun. The defendant himself was shot with a .25 caliber pistol and the deceased's wife admitted that the deceased owned such a pistol. However, she stated that the weapon involved in the shooting of the defendant was not her husband's.

Evidence for the defense was that defendant went to the rescue of his brother who was assaulted by several people at the truck stop. Defendant testified that he was armed with a shotgun but had no intention of shooting anyone, and that he did not know the deceased or anyone else present except for his brother and members of his own party. Defendant also testified that after he was shot he was conscious for just a second and saw the deceased with a gun in his hand, and that he immediately lost consciousness and remembered nothing more until sometime the following day when he regained consciousness at the hospital. Defendant stated that he did not recall firing his shotgun and in fact did not know that it had been discharged or that deceased had been shot until the following day.

The jury returned a verdict of guilty of manslaughter and defendant appealed to this Court.

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

Gwyn, Gwyn and Morgan, by Melzer A. Morgan, Jr., for defendant appellant.

ARNOLD, Judge.

Defendant assigns as error the failure of the court to instruct the jury on involuntary manslaughter as a possible verdict. He contends that the evidence raised the offense of involuntary manslaughter. There is merit in this contention.

Involuntary manslaughter has been defined as "the unlawful killing . . . without malice, without premeditation and deliberation, and without intention to kill or inflict serious bodily injury." See *State v. Wrenn,* 279 N.C. 676, 682, 185 S.E. 2d 129 (1971). Defendant's testimony is explicit that he did not intentionally shoot anyone, and in fact did not know that his gun had even fired. There is evidence in this case to support the theory that after defendant was shot his shotgun discharged accidentally. Evidence is sufficient to support a verdict of involuntary manslaughter. *State v. Stimpson,* 279 N.C. 716, 185 S.E. 2d 168 (1971); *State v. Davis,* 15 N.C. App. 395, 190 S.E. 2d 434 (1972).

Although not raised by this appeal the evidence, as contained in this record, presents the question of whether there should have been an instruction to the jury concerning a possible verdict of not guilty if the jury believed the defendant to have been completely unconscious at the time of the shooting. See *State v. Caddell,* 287 N.C. 266, 215 S.E. 2d 348 (1975); and *State v. Mercer,* 275 N.C. 108, 165 S.E. 2d 328 (1969).

Since defendant is entitled to a new trial there is no need to discuss the remaining assignments of error.

New trial.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. JOHN C. PREINE

No. 753SC774

(Filed 4 February 1976)

Obscenity; Indictment and Warrant § 9— operating massage parlor without license — sufficiency of warrant

Warrant was sufficient to charge defendant with operating a massage parlor without a license in violation of the Code of the City of Havelock, and the trial court erred in quashing the warrant.

State v. Preine

APPEAL by the State from *Rouse, Judge.* Judgment entered 21 July 1975 in Superior Court, CRAVEN County. Heard in the Court of Appeals 20 January 1976.

Defendant was charged with operating a massage parlor without a license in violation of law Code of the City of Havelock, Chapter 9-16; 9-1, 1-6(A). Defendant was fined $50 and given a suspended sentence by the District Court, but appealed the District Court's judgment to Superior Court.

Defendant made a motion in Superior Court to quash the warrant and the motion was granted. The State appealed the Superior Court's judgment quashing the warrant to this Court.

Attorney General Edmisten, by Special Deputy Attorney General Edwin M. Speas, Jr., for the State.

No brief filed for defendant appellee.

ARNOLD, Judge.

The State assigns error to the trial court's granting the defendant's motion to quash the warrant.

In a criminal prosecution for a statutory offense, including the violation of a municipal ordinance, the warrant is sufficient if it charges each essential element of the offense in a plain, intelligible, and explicit manner. *State v. Dorsett* and *State v. Yow,* 272 N.C. 227, 158 S.E. 2d 15 (1967).

The warrant states that the defendant "did unlawfully, wilfully, and engage in the operation and ownership of a massage parlor, doing business as the American Health Spa, which facility is covered and regulated under the provisions of Chapter 9 of the Code of the City of Havelock, N. C., without first having obtained regulated facility license from the Board of Commissioners of the City of Havelock, N. C., and which massage parlor is located within the Corporate limits of Havelock, N. C.

The offense charged here was committed against the peace and dignity of the State and in violation of law Code of the City of Havelock, N. C., Chapter 9-16; 9-1, 1-6(A)."

The warrant is sufficient to give defendant notice of the charge against him, to enable him to prepare his defense, and to raise the bar of double jeopardy in the event he is again

brought to trial for the same offense. *State v. Ingram,* 20 N.C. App. 464, 201 S.E. 2d 532 (1974).

Reversed.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. MICHAEL ANTHONY MILLER

No. 758SC752

(Filed 4 February 1976)

Criminal Law § 145.1— probation conditions — breach no laws, gainful employment — insufficiency of findings for revocation

Findings that defendant was unruly and misbehaved in school and that he did not attend school in lieu of working were insufficient to support revocation of his probation for breach of probation conditions (1) that defendant violate no penal laws and be of good general behavior, and (2) that defendant work faithfully at suitable gainful employment.

APPEAL by defendant from *Webb, Judge.* Judgment entered 25 April 1975 in Superior Court, WAYNE County. Heard in the Court of Appeals 16 January 1976.

On 13 November 1974, defendant pled guilty to misdemeanor larceny and received a suspended sentence and probation. At a later revocation hearing an order was entered, in pertinent part, as follows:

> "The Court finds as a fact that the defendant has wilfully and without lawful excuse violated the conditions of the probation judgment as hereinafter set out:
>
> (A) The Court finds as a fact that the defendant was unruly in school, threatened the school teachers, refused to attend classes, interfered with the discipline of other students; and, on February 11, 1975, was suspended from school which is in violation of the condition of probation that he shall 'violate no penal law of any state or the Federal Government and be of general good behavior.' The Court further finds that the defendant did not work and did not attend school in lieu of working which is in violation of the condition of probation that he shall 'work faith-

fully at suitable, gainful employment as far as possible and save his earnings above his reasonably necessary expenses.'

IT IS THEREFORE ORDERED in the discretion of the Court that the probation be REVOKED and the sentence to the Wayne County Jail as a Committed Youthful Offender for a period of Six (6) months, heretofore suspended, is hereby ordered into immediate effect and commitment shall be issued by the Clerk of the Court."

Defendant appealed to this Court.

Attorney General Edmisten, by Associate Attorney Claudette Hardaway, for the State.

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

ARNOLD, Judge.

Defendant contends that the court erred in finding that he violated his probation. We agree. The conditions found to be violated are (1) that defendant violate no penal laws and be of good general behavior, and (2) that defendant work faithfully at suitable gainful employment. These two conclusions are supported by findings that defendant was a disciplinary problem in school and that he did not attend school in lieu of working.

There is no condition in defendant's probation requiring that he attend school, and there is no evidence in the record that defendant did not work. Moreover, the finding that defendant was unruly and misbehaved in school does not constitute a violation of his condition to violate no penal laws and to be of general good behavior. Conduct amounting to a breach of the "good behavior" condition must be such as would constitute a violation of the criminal law of the State. *State v. Seagraves*, 266 N.C. 112, 145 S.E. 2d 327 (1965); *State v. Millner*, 240 N.C. 602, 83 S.E. 2d 546 (1954).

The findings of the trial court do not constitute grounds for revocation of the probation. The order is vacated.

Vacated and remanded.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. ELIAS PROSSER GRAY

No. 7527SC770

(Filed 4 February 1976)

Automobiles § 126— breathalyzer test — method of administration — failure of State to show

Defendant charged with driving under the influence is entitled to a new trial since the trial court erred in admitting evidence of a breathalyzer test over defendant's objection where the State failed to carry its burden of proving that the statutorily prescribed methods were followed in administering the test. G.S. 20-139.1(b).

APPEAL by defendant from *Falls, Judge.* Judgment entered 14 July 1975 in Superior Court, GASTON County. Heard in the Court of Appeals 20 January 1976.

Defendant was tried in the District Court upon a warrant charging him with driving while under the influence of intoxicating liquor. Defendant entered a plea of not guilty and was convicted. On appeal to the Superior Court and upon his plea of not guilty, the jury returned a verdict of guilty. From judgment sentencing him to a term of imprisonment, defendant appealed.

Attorney General Edmisten, by Associate Attorneys T. Lawrence Pollard and Joan H. Byers, for the State.

Harris and Bumgardner, by Don H. Bumgardner, for defendant appellant.

MORRIS, Judge.

Defendant contends, *inter alia,* that the trial court erred in admitting evidence of the breathalyzer test over his objection in view of the State's failure to establish as a foundational requirement that the test, as performed, met the operational standards prescribed by statute. We agree. The failure of the State to produce evidence of the test operator's compliance with G.S. 20-139.1(b) must be deemed prejudicial error.

During the course of the trial, W. P. Thomas, a qualified operator of the breathalyzer machine, testified on voir dire that he administered the test to defendant after advising him of his "rights." The record, however, does not indicate whether Mr. Thomas followed the statutorily prescribed methods of ad-

ministering the test. Under G.S. 20-139.1(b), "[c]hemical analyses of the person's breath or blood, to be considered valid under the provisions of this section, shall have been performed according to methods approved by the Commission for Health Services and by an individual possessing a valid permit issued by the Commission for Health Services for this purpose." The burden of proving compliance with G.S. 20-139.1(b) lies with the State and " . . . the failure to offer any proof is not sanctioned by the courts. . . . " *State v. Warf,* 16 N.C. App. 431, 432, 192 S.E. 2d 37 (1972). The State's failure to lay the proper foundation for the admission of evidence of the results of the breathalyzer test entitles defendant to a new trial.

We deem it unnecessary to address the other contentions raised by the defendant.

New trial.

Chief Judge BROCK and Judge BRITT concur.

STATE OF NORTH CAROLINA v. ROBERT LOUIS PORTEE

No. 7514SC712

(Filed 4 February 1976)

1. **Criminal Law § 117— accomplice testimony — instruction not required**

An instruction to the jury upon how it should view the testimony of an accomplice may be given in the discretion of the trial judge, but such is not required in the absence of a timely request.

2. **Criminal Law § 119— requested instruction given in substance — no error**

The trial court's instruction on accomplice testimony, though not in the exact words of defendant's tendered instruction, was in substantial conformity therewith and was proper.

3. **Criminal Law § 113— instructions — reasonable doubt — reason and common sense**

An instruction that reasonable doubt is "based on reason and common sense" did not require that a juror be able to articulate a reason for his or her doubt and was proper.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 20 May 1975 in Superior Court, DURHAM County. Heard in the Court of Appeals 13 January 1976.

Defendant was charged and convicted of robbery with a firearm in violation of G.S. 14-87. He appealed.

Attorney General Edmisten, by Associate Attorney Daniel C. Oakley, for the State.

Traylor T. Mercer, for the defendant.

BROCK, Chief Judge.

The evidence against defendant consisted primarily of the testimony of an accomplice. The defendant argues that the accomplice's testimony is uncorroborated and therefore requires a different instruction to the jury than where the accomplice's testimony is corroborated. The State argues that the accomplice's testimony is corroborated, and therefore the instruction given is correct. We will not trouble ourselves to settle the argument as to whether it is corroborated. In either event a correct instruction is the same. *State v. Bailey,* 254 N.C. 380, 119 S.E. 2d 165 (1961).

[1] An instruction to the jury upon how it should view the testimony of an accomplice may be given in the discretion of the trial judge, but such is not required in the absence of a timely request. *State v. Roux,* 266 N.C. 555, 146 S.E. 2d 654 (1966); 1 Stansbury's North Carolina Evidence, Brandis Revision, § 21.

[2] In this case counsel timely tendered an instruction concerning the testimony of an accomplice. Although the trial judge did not give the tendered instruction verbatim, he gave an instruction in substantial conformity therewith. The instruction given by the trial judge was N. C. Pattern Jury Instructions—Crim. 104.25, which we hold to be in conformity with the case law in this State. This assignment of error is overruled.

[3] Finally defendant argues that the trial judge committed error in defining reasonable doubt. The trial judge added the following to N. C. Pattern Jury Instructions—Crim. 101.10: "It is a doubt based on reason and common sense arising out of some or all of the evidence that you have heard or lack or insufficiency of the evidence as the case may be." It is defendant's contention that requiring the doubt to be "based on reason" constituted a requirement that a juror be able to articulate a reason for his or her doubt. The argument is not persuasive. Although

His Honor could have well omitted the above-quoted sentence, we find no prejudice to defendant. This assignment of error is overruled.

No error.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. IRVIN KENNETH SCALES

No. 7521SC787

(Filed 18 February 1976)

1. **Criminal Law §§ 6, 119— defendant under influence of drugs — requested instruction**

In a prosecution for breaking and entering and larceny where the evidence tended to show that defendant broke into his neighbor's apartment and took therefrom stereo speakers and a receiver and a portable television, the trial court did not err in refusing to give requested jury instructions to the effect that "if, as a result of a drugged condition, the defendant did not have the required specific intent," or "did not have the physical capability or motor skills to engage in" the alleged crime, the jury should find him not guilty, since being under the influence of intoxicants or drugs is an affirmative defense, and to require the court to explain and apply the law with respect thereto, there must be threshold evidence tending to show that defendant's mental processes were so overcome that he had, at least temporarily, lost the capacity to think and plan, but there was no such evidence in this case.

2. **Criminal Law § 139— committed youthful offender — no minimum term of imprisonment**

The trial court properly entered judgment imposing prison sentence upon defendant as a committed youthful offender for a maximum term of four years without a set minimum term. G.S. 148-49.4.

APPEAL by defendant from *Albright, Judge.* Judgment entered 20 May 1975 in Superior Court, FORSYTH County. Heard in the Court of Appeals 22 January 1976.

By indictment proper in form, defendant was charged with (1) breaking and entering a dwelling apartment occupied by Gregory Squires, (2) larceny pursuant to the breaking and entering, and (3) receiving stolen property. He pled not guilty.

Evidence presented by the State is summarized in pertinent part as follows:

On the morning of 22 October 1974, Squires left his apartment on Fifth Street in Winston-Salem around 9:00 a.m. Shortly after 1:30 p.m., he returned home to find his apartment ransacked. The front windows, which had been locked shut when he left for work, were standing open. The storm door at the rear of the apartment had been broken, leaving shattered glass strewn across the floor. Drops of blood were found near the storm door and on the doorsill.

Squires called the Winston-Salem Police Department, reported the break-in, and Officer Gary L. Rose was dispatched to the scene. An inventory of the items missing revealed the theft of two stereo speakers, a stereo receiver, a portable television, two shirts and a towel, with an estimated value of around $400.00. Squires had given no one permission to enter the apartment or to remove any of the missing items.

On the balcony at the rear of the apartment, Officer Rose found broken glass from the smashed storm door. Mingled with the glass were blood spots leading out the door and onto the balcony. A stereo cord trailed across a wrought iron railing onto the common balcony joining the rear of Squires' apartment with the apartment next door where defendant lived with his mother. Over the defendant's balcony, Officer Rose recovered a gray turtleneck sweater freshly stained with blood. Both the sweater and the stereo cord were identified by Squires as two of the items missing from his apartment.

After Officer Rose left, Squires went across the street to see if a friend, who had been at home all day, had noticed anything going on over at his apartment. While at his friend's apartment, Squires observed defendant on the long balcony in the front of the building. Defendant stopped in front of Squires' apartment, tried the door, and then moved away. As Squires returned home, he saw defendant again, this time sitting on the railing of the front balcony with a fresh bandage on his forearm. Remembering the blood spots around the broken window, Squires again called police.

Officer Gurney Myers arrived on the scene around 7:30 p.m. Squires recounted the details of the burglary and how he had seen defendant, with a fresh bandage, moving suspiciously near the door of his apartment. Armed with this information,

Officer Myers went next door to defendant's mother's apartment where he was met at the door by defendant's mother, Mrs. Ruth Scales. She admitted the officer and began telling him about her son's drug problem. Mrs. Scales explained that at the time defendant was "high" on something and had just returned from the hospital for treatment of a cut on his arm.

She told Officer Myers she wanted to show him a tablet like the one she thought her son had taken. He accompanied Mrs. Scales to the rear of the apartment to see the tablet and to talk with defendant. As they passed one of the bedrooms, which was determined to be defendant's, the officer observed in plain view two stereo speakers meeting the description of those taken from the Squires' apartment. When they reached Mrs. Scales' bedroom, she produced a tablet like the one she thought defendant had taken. At this point, defendant came into the room and fell on the bed.

The officer told her about the break-in at Squires' apartment and what had been taken. Mrs. Scales then exclaimed, "The items are in my son's bedroom." Officer Myers entered defendant's bedroom and observed several portable television sets, and various items taken from Squires' apartment. Defendant was then placed under arrest and taken to police headquarters.

Defendant took the stand and presented other evidence, summarized as follows:

On the morning of 22 October 1974 he took a barbiturate tablet of unknown dosage prior to leaving for school. He recounted the progressive effect of the pill on him during his morning classes. He became sleepy and his speech became slurred. During his third period biology class his teacher reported defendant's behavior to school officials. Defendant was called out of class and questioned by school officials, who determined that he should be taken home. Assistant Principal Henry Jones took defendant home around 10:00 a.m. Jones testified that although defendant moved slowly, his speech was slurred and he had some difficulty in getting his key into the lock and opening the door of his apartment, he was still able to move about under his own power and appeared to know what was happening to him and what he was doing.

After Jones left, defendant prepared a can of spaghetti for his lunch around 11:30 a.m. He opened the can with a manual

can opener and heated the spaghetti in a pan. In the process of preparing the meal he reached across a dishrack, cutting his arm on the exposed edge of a kitchen knife. After he finished eating, defendant lay down on the floor in the kitchen and went to sleep.

Later he was interrupted by a knock at the front door of the apartment. He stumbled to his feet, and went to the door. Two men, unknown to him except on sight, wanted to use defendant's room to store some merchandise. He let them in and showed them which room was his. They put some things in the room and left. Defendant then returned to the kitchen and went back to sleep.

Defendant slept until around 1:30 p.m. when he was awakened by his mother's arrival. Alarmed at the cut on defendant's arm, she rushed him to a hospital where he was examined and treated by Dr. James Byrum, Jr. Dr. Byrum testified that he found defendant clearly under the influence of some type of drug, belligerent and difficult to manage. Although he noted that defendant's neurological and motor faculties were affected to some extent by the drug, he felt defendant still was able to know and comprehend the situation around him.

The jury found defendant guilty of breaking and entering and larceny. From judgment imposing prison sentence as a committed youthful offender, he appeals.

Attorney General Edmisten, by Associate Attorney Elizabeth R. Cochrane, for the State.

David B. Hough for defendant appellant.

BRITT, Judge.

Defendant assigns as error the denial of his timely made motion for nonsuit. We hold that the evidence was more than sufficient to survive the motion, therefore, the assignment is overruled.

[1] Defendant assigns as errors the failure of the court to give requested jury instructions to the effect that "[i]f, as a result of a drugged condition, the defendant did not have the required specific intent," or "did not have the physical capability or motor skills to engage in" the alleged breaking and entering or the larceny, the jury should find him not guilty. We find no merit in the assignments.

To be entitled to a special instruction, the request must be in writing, signed by counsel, and tendered to the court prior to the beginning of argument to the jury. G.S. 1-181. The proffered instruction must also contain a correct legal request and be pertinent to the evidence and the issues of the case. *Calhoun v. Highway Comm'n,* 208 N.C. 424, 181 S.E. 2d 271 (1935). Here, the requested instruction not only failed to contain a correct legal request but was not sufficiently pertinent to the evidence and the issues in the case.

Decisions from the appellate division of this jurisdiction relating to the ability of a defendant to form a specific intent for the reason that he was under the influence of drugs are few; however, decisions relating to the inability to form an intent due to being under the influence of intoxicants are numerous, and we think the rules applicable to the latter apply to the former.

In order to vitiate criminal responsibility, drug usage must present something more than mere voluntary intoxication. Our cases have long held voluntary intoxication an insufficient basis to excuse criminal conduct. *State v. Tillman,* 22 N.C. App. 688, 207 S.E. 2d 316 (1974). To excuse criminality the additional element of mental defect or disease must be present or the accused must show that his faculties were so overcome by drug or drink that he was "virtually unable" to form the requisite level of intent. *State v. Bronson,* 10 N.C. App. 638, 179 S.E. 2d 823 (1971). North Carolina strictly adheres to the McNaughten or right-wrong test of criminal responsibility. *State v. Humphrey,* 283 N.C. 570, 196 S.E. 2d 516 (1973), *cert. denied,* 414 U.S. 1042, 38 L.Ed. 2d 334, 94 S.Ct. 546 (1973).

In *State v. Cureton,* 218 N.C. 491, 495, 11 S.E. 2d 469, 471 (1940), we find:

> "While intoxication is an affirmative defense no special plea is required. 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.* As to this, he is not relegated to his own testimony. It is sufficient if the testimony of any witness tends to establish the fact. But it must be made to appear affirmatively in

some manner that this defense is relied upon to rebut the presumption of sanity before the doctrine becomes a part of the law of the case which the judge must explain and apply to the evidence." (Emphasis ours.)

Defendant's argument under the facts in the instant case is somewhat novel. Our Reports reveal many cases in which an intoxicated defendant broke into and entered a dwelling or other building and was found therein, but there was no evidence that he committed a felony after entry. In such case, there is a real issue as to whether the defendant entered the premises with the intent to commit a felony therein. Here, the evidence tended to show not only a breaking and entering but the commission of a felony following the entry.

Assuming, *arguendo,* that the instructions requested by defendant would ever be appropriate where the breaking and entering is followed by the commission of a felony after entry, we do not think the instructions were required under the evidence in this case. As stated above, being under the influence of intoxicants or drugs is an affirmative defense, and to require the court to explain and apply the law with respect thereto, there must be threshold evidence tending to show that defendant's mental processes were so overcome that he had, at least temporarily, "lost the capacity to think and plan." *State v. Cureton, supra.*

While there was evidence tending to show that defendant was not acting normally at school, that he was unsteady on his feet, that he appeared to be very sleepy and his speech was impaired, there was no evidence that he did not have the capacity to think and plan. His own testimony was to the effect that he prepared his lunch and did other things requiring both thought and execution. Other testimony fully justified a jury finding that after he got home from school, defendant devised and executed a plan to enter the Squires' apartment by crossing the rail on the balcony separating the Squires' premises from the Scales' premises, breaking the glass in the door, entering the apartment, disconnecting the television and stereo equipment, removing it and other property onto the balcony, across the rail, and into his room in his mother's apartment.

We hold that defendant was not entitled to the requested instructions.

When the State presented evidence showing that on the same day of the alleged offenses the stolen property was found in defendant's bedroom, there arose a presumption of fact that defendant was guilty of both the larceny and the breaking and entering. *State v. Blackmon,* 6 N.C. App. 66, 169 S.E. 2d 472 (1969), and cases therein cited. Defendant then had the burden of rebutting the presumption. This he failed to do.

[2] Finally, defendant contends that the trial court erred by entering judgment imposing prison sentence on him as a committed youthful offender for a maximum term of four years without a set minimum term. On this contention, defendant relies on G.S. 148-42. We find no merit in the contention.

Defendant was sentenced pursuant to G.S. 148-49.4 as a committed youthful offender. This statute specifically provides for incarceration without a set minimum term. *State v. Jones,* 26 N.C. App. 63, 214 S.E. 2d 779 (1975). The precise duration of the term is to be determined by the Parole Commission on an individualized basis consistent with the goals of the juvenile justice system. *State v. Mitchell,* 24 N.C. App. 484, 211 S.E. 2d 645 (1975).

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

No error.

Judges HEDRICK and MARTIN concur.

MATTIE B. BYNUM v. NORTH CAROLINA BLUE CROSS AND BLUE SHIELD, INC.

No. 7528SC670

(Filed 18 February 1976)

1. Insurance § 8— limitation in policy — waiver by employee — no binding effect on insurer

In an action to recover for sums spent for medical services allegedly covered by a health benefit plan administered by defendant, limitations which exclude coverage for plaintiff's child because her hospitalization began prior to the date plaintiff's enrollment in the plan became effective and was continuous, notwithstanding the fact that the daughter was discharged from the hospital one day and

readmitted the next, could not be waived by the alleged representation of one of defendant's employees that the daughter's discharge and readmission would satisfy the requirements of the policy, since, by the terms of the policy itself, no agent or other person had authority to change the insurance contract or waive any of its provisions without approval of duly authorized officers.

2. **Insurance §§ 8, 43.1— limitation in policy — time for asserting — waiver — denial of claim on specific ground — waiver of other grounds**

Plaintiff could not claim that failure of defendant to assert a limitation of the insurance policy in question until the lawsuit was instituted constituted a waiver, since plaintiff was made aware of the limitation by letter from the Insurance Commissioner's office more than six months prior to institution of the action; moreover, in order for the denial of a claim on a specified ground to work a waiver of all other grounds for denial, it is necessary at the time of such denial that the company be in possession of all the facts upon which it could have specified all the grounds then existing for denial, and defendant in this case was not given such facts.

APPEAL by plaintiff from *Grist, Judge.* Judgment entered 12 May 1975 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 18 November 1975.

On 6 May 1974 plaintiff filed this action to recover $21,716.22. Plaintiff alleged that she was a government employee participating in a federal health benefit plan administered by defendant and that from 2 April 1972 until 28 February 1973 her daughter incurred said indebtedness for medical services covered by the plan.

Defendant answered and denied liability on two grounds. First, it asserted that the plan denied benefits for "Milieu therapy." Second, it asserted that the plan denied benefits to one who was confined in a hospital on the date that the plan became effective "so long as the person is continuously confined." The plan further provided that successive hospital confinements were deemed continuous "unless separated by at least 90 days."

Plaintiff and her husband testified at the trial that in the summer of 1969 their daughter Barbara, 12 years old, weighed 155 pounds and was advised by a physician to go on a diet. As a result of the dieting she lost weight and developed a fear of food. Because of this fear of food, she became quite belligerent and began assaulting her parents viciously. She was treated by several psychiatrists before being admitted to Highland Hospital on 16 August 1971. In February 1972 plaintiff

became a federal employee and enrolled in the Federal Employees Program, (hereinafter referred to as "F.E.P."). Plaintiff and husband made inquiries as to whether F.E.P. would cover their daughter's expenses at Highland. They spoke with someone at defendant's office in Fayetteville and, as a result of that conversation, went to see Mrs. Armfield, who was in charge of insurance claims at Highland. Mrs. Armfield telephoned defendant's Chapel Hill office, and, as a result of that conference, they had Barbara discharged from Highland on 1 April 1972 and re-admitted on 2 April 1972. Claims for Barbara's treatment after 2 April 1972 were submitted to defendant and were denied by defendant on the basis that Barbara was receiving milieu therapy which did not necessitate her being an inpatient. They further testified that the 90-day discharge requirement was never mentioned as a basis for the denial.

Mrs. Armfield testified that she handled insurance claims for patients at Highland; that in March 1972 she spoke with the Bynums about their daughter's expenses; that she called defendant's Chapel Hill office and spoke with Sarah Lindley who was supervisor of federal employee's claims, and that Sarah Lindley assured her that even though Barbara had been hospitalized since 16 August 1971, she would nonetheless be eligible for benefits under F.E.P. if she were discharged for one day and re-admitted the next. Plaintiff offered other evidence from Barbara's psychiatrists and teachers tending to show that her treatment at Highland was not milieu therapy.

At the conclusion of plaintiff's evidence the court directed a verdict in favor of defendant on the grounds that Barbara had been continuously confined since before the effective date of F.E.P. benefits and that the 90-day discharge requirement of F.E.P. had not been effectively waived.

Judgment was entered accordingly and plaintiff appealed.

Pope & Brown, P.A., by Ronald C. Brown, for plaintiff appellant.

Claude V. Jones, for defendant appellee.

MARTIN, Judge.

Plaintiff argues that defendant waived the 90-day discharge requirement by Lindley's assurances to Armfield. Alternatively, plaintiff argues that the 90-day discharge requirement

was waived by defendant's failure to assert it as a basis for denial of the claims until the lawsuit was instituted. Plaintiff contends that the defendant is a general agent for the National Blue Cross Blue Shield Corporation in the administration of F.E.P. within this area having power to waive provisions of the contract.

The basic Federal Employee Plan is contained in the Agreement between the Blue Cross Association, the National Association of Blue Shield Plans, and the United States Civil Service Commission.

The defendant agreed to provide benefits in accordance with certain parts of the base agreement including basic hospital benefits. Under the heading, "Definition of Terms" it is provided, in part that:

> "Hospital Confinement means the period from entry into a hospital as a registered bed patient until discharge. Successive hospital confinements shall be deemed to be one confinement unless separated by at least 90 days."

The certificate, or service benefit plan held by the plaintiff under the provisions of the basic agreement provides that:

> "Hospital confinement is the period from admission into a hospital as a bed patient until discharge. Successive hospital admissions are deemed to be one confinement unless separated by at least 90 days . . . . "

The basic plan also provides that there are no hospital benefits on coverage under the following conditions:

> "Services and supplies furnished to a person who, on the effective date of enrollment under an option of this contract, is confined in a hospital, so long as the person is continuously confined therein. . . . "

The certificate, or service benefit plan, issued to plaintiff under the authority of the basic plan provides that no benefits will be furnished for:

> "Hospital services and in-hospital medical care rendered to a subscriber who, on the date his enrollment first becomes effective, is confined in a hospital as long as he is continuously confined therein."

It is further provided in the basic plan that:

"No agent, person, organization, or association has authority to change this contract or waive any of its provisions. No change in this contract shall be valid unless approved by duly authorized officers of the corporations and the Commission evidenced by amendment to this contract or by letter agreement relating thereto."

[1] Conceding arguendo, that an employee of defendant (Sarah Lindley) told a representative of Highland Hospital (Shirley Armfield) sometime in March 1972, after the certificate held by plaintiff had been issued and was in effect, that a discharge and readmission of Barbara from the hospital would satisfy the requirements of the certificate, could the limitations on coverage be thereby waived? We do not think so.

By the terms of the insurance policy itself, no agent, person, organization, or association had authority to change the insurance contract or waive any of its provisions without approval by duly authorized officers of the corporations and the Commission evidenced by amendment to the contract or by letter agreement relating thereto. There is no evidence or contention that any authorized officer of the Blue Cross Association, the National Association of Blue Shield Plans, or the U. S. Civil Service Commission has approved a change or waiver. Further, there is no evidence that Mrs. Lindley was expressly authorized by N. C. Blue Cross and Blue Shield, Inc. (her employer), the Blue Cross Association, the National Association of Blue Shield Plans, or the U. S. Civil Service Commission to change or to waive the requirement of the certificate in the manner in which the plaintiff contends she did.

"The authority of an agent with limited power to waive the terms and conditions of written policies of insurance in the absence of fraud or mistake or other compelling equitable principle is ordinarily restricted to negotiations connected with the inception of the contract and not to provisions of a written contract which has already taken effect and been in force for a period of time." *Foscue v. Insurance Company,* 196 N.C. 139, 144 S.E. 689 (1928).

The matter contended to have been waived in the present case was a provision of a written contract which had already taken effect and been in force for a period of time. The 90-day discharge requirement was a provision of both the F.E.P. con-

tract and the certificate issued thereunder which reflected the coverage of risk and a limitation of liability and not a forfeiture. See *McCabe v. Casualty Co.*, 209 N.C. 577, 183 S.E. 743 (1936). Such a provision is binding and any purported change as contended by the plaintiffs would require a formal rider or endorsement to be issued in writing upon proper consideration by duly authorized officials with the same dignity as the issuance of the basic certificate requires.

Applying these principles of the law to the facts disclosed by the record, we find no evidence tending to show that the defendant had either express or implied authority to waive the conditions plainly set forth in the policy.

[2] Plaintiff further contends the 90-day discharge requirement was waived by defendant's failure to assert it initially as a basis for denial of the claims until the lawsuit was instituted. This action was instituted on the 6th day of May, 1974. The record indicates that Mr. Bynum was made aware of the 90-day discharge requirement in a letter from the Insurance Commissioner's Office which was dated in September of 1973. Mr. Bynum had protested the matter to the Insurance Commissioner, and the Insurance Commissioner had requested an explanation from Blue Cross. Thus, plaintiff was aware of the 90-day discharge requirement as early as September of 1973.

Further, in order for the denial of a claim on a specified ground to work a waiver of all other grounds for denial, it is necessary at the time of such denial that the company be in possession of all the facts upon which it could have specified all the grounds then existing for the denial. See 43 Am. Jur. 2d, § 1146.

The record in the present case shows that defendant was misled in handling this claim. The claims filed by Highland Hospital state the date of admission as April 2, 1972. The letter of defendant to Mrs. Mattie Bynum dated December 6, 1972, refers to Barbara's admission to Highland Hospital as April 3, 1972. The letter of Mrs. Mattie Bynum to United States Civil Service Commission, dated January 8, 1973, requesting an impartial review of the claim, states that Barbara was admitted to Highland Hospital in April, 1972. The letter of Mrs. Mattie Bynum to United States Civil Service Commission dated January 16, 1973 contains the statement that Barbara was admitted to Highland Hospital in April, 1972. The letter of Dr.

Marie Baldwin to U. S. Civil Service Commission dated August 16, 1973 does not mention that the date of Barbara's admission was August 16, 1971, nor that there was a discharge April 1, 1972, and a readmission on the following day which was not for medical reasons. Accordingly, the U. S. Civil Service Commission was not given all the facts upon which it could have specified all the grounds then existing for the denial.

For the reasons stated, we are constrained to hold that the trial court was correct in sustaining defendant's motion for a directed verdict under Rule 50 and dismissing the action.

The judgment appealed from is

Affirmed.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. TERRY STEVEN LANKFORD & JOSEPH BENJAMIN BOUDREAU

No. 755SC757

(Filed 18 February 1976)

1. **Criminal Law § 66— in-court identification of defendants — observation at crime scene as basis**

A witness's in-court identification of defendants as the men who robbed her at gunpoint was not tainted by any out of court confrontation where the evidence tended to show that the witness observed defendants about ten minutes before the robbery when they came into the store to make a purchase, the store was well lighted at the time of the robbery, and the defendants were unmasked.

2. **Robbery § 4—armed robbery — sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for armed robbery where such evidence tended to show that both defendants were at the crime scene, both took money from the cashier, and both handled a gun which was used in perpetration of the crime.

3. **Criminal Law § 50— expert testimony — no finding of expertise — testimony proper**

The trial court did not err in allowing a State's witness to testify that silver nitrate turns black or gray upon coming in contact with moisture, though there was no express finding that the witness was an expert, since defendant made no request for such a finding.

4. **Criminal Law § 113— aiding and abetting — jury instructions proper**

The trial court's instructions on aiding and abetting were proper, though the court did not specifically instruct that the principal in the second degree and the principal perpetrator of the crime must have a "shared felonious intent."

5. **Criminal Law § 118— charge on contentions of parties — misstatement — consideration on appeal**

A misstatement of the contentions of the parties must be brought to the court's attention in apt time to afford opportunity for correction in order for an exception thereto to be considered on appeal, unless the misstatement was so gross that no objection at the trial was necessary.

APPEAL by defendants from *Fountain, Judge.* Judgment entered 18 April 1975 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 19 January 1976.

Defendants were charged with armed robbery and entered a plea of not guilty.

Evidence for the State tended to show the following facts: Carolyn Caton was working at the 7-11 Store, located on South College Road. She was the only employee working at the store on the night of 13 March 1975. Defendants entered the store when she was working about 10:00 p.m. on 13 March 1975, purchased an item and left. They returned in a few minutes and with the use of a pistol robbed her of $200.99 and locked her in a back room. A customer saw defendants leave, described their car to police and they were apprehended shortly after 10:30 p.m. When defendants were taken into custody, a pistol and knife were observed on the front seat of their car and rolls of money were observed in the open glove compartment and were seized by the police. Some of the bills had theretofore been covered with silver nitrate, a powder which turns dark upon exposure to moisture. These bills had been given to Caton in November 1974 and were the same bills that were found in defendant's car. The defendant Boudreau had a black substance on his hands when arrested.

Lankford presented evidence which tended to show that he knew nothing of the robbery before Boudreau demanded money from Caton; that he did not participate in the robbery; that he had borrowed the pistol from a friend earlier in the evening for protection at his apartment.

Boudreau offered no evidence.

The jury found defendants guilty of armed robbery and from judgments imposing prison sentences, defendants appealed.

Attorney General Edmisten by Assistant Attorney General Charles J. Murray, for the State.

Prickett & Scott, by Carlton S. Prickett, Jr., for defendant Lankford.

James A. MacDonald, for defendant Boudreau.

MARTIN, Judge.

[1] Defendants contend their in-court identification by Carolyn D. Caton was based on unnecessarily suggestive pretrial identification procedures which violated due process.

Our Court has generally held that an in-court identification of the accused by a witness who took part in such pretrial confrontation must be excluded unless it is first determined by the trial judge on voir dire that the in-court identification is of independent origin and thus not tainted by the illegal pretrial identification procedure. *State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10 (1974); *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384 (1972); *State v. Smith,* 278 N.C. 476, 180 S.E. 2d 7 (1971).

Although the practice of showing suspects singly for identification purposes has been recognized as suggestive and widely condemned, whether such a confrontation violates due process depends on the totality of the circumstances. *Neil v. Biggers,* 409 U.S. 188, 34 L.Ed. 2d 401, 93 S.Ct. 375; *State v. Shore,* 285 N.C. 328, 204 S.E. 2d 682 (1974). *State v. Henderson, supra.*

In *Neil v. Biggers, supra,* the United States Supreme Court considered the scope of due process protection against the admission of evidence derived from suggestive identification procedures and held that even if a pretrial confrontation procedure was suggestive, there is no violation of due process if examination of the "totality of the circumstances" indicates the identification was reliable. The factors set out by the Court " . . . to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confronta-

tion, and the length of time between the crime and the confrontation."

In the present case, the record discloses that the robbery took place in a well lighted store. The defendants were unmasked. Mrs. Caton had seen the defendants ten minutes prior to the robbery and had a casual conversation with one of the defendants concerning purchases. The defendants ordered Mrs. Caton not to tell the police, and if she did, they would come back. She had ample opportunity to observe the defendants prior to and during the robbery. The witness' curiosity had been aroused by the defendant Lankford's return to the store after a short interval and by the defendant Boudreau's honking of the horn. After seeing the pistol and being told it was not a joke, the victim realized that she was being robbed and from that point on would obviously be paying close attention to the events that were taking place. Mrs. Caton's description of the defendants was not placed in the record on appeal, and its accuracy cannot be determined. There was no equivocation by the witness when she identified the defendants. She testified as follows: "I just walked to the door and identified them," and "[w]hen I walked out I nodded my head and I told Walt Moser it was the two boys." There was approximately a one hour period between the crime and the identification.

Further, the trial court found and concluded that " . . . the witness can and does identify each of them independently of having seen them at the sheriff's office or at any place thereafter and can identify them based solely on observations of each defendant while in the store operated by her on the evening of March 13th and as to such identification of them while in her store the objection is overruled." Since this finding is supported by competent evidence, it alone renders the in-court identification competent even if it be conceded *arguendo* that the lineup or showup procedure was improper. *State v. Shore, supra.* The finding, supported by competent evidence, is conclusive on appeal and must be upheld. *State v. Shore, supra; State v. Tuggle,* 284 N.C. 515, 201 S.E. 2d 884 (1974).

Weighing all the factors, we find no substantial likelihood of misidentification. The totality of the circumstances indicates that the identification was reliable and hence no violation of due process was committed.

[2] The defendants next assign as error the court's denial of their motion for a directed verdict of not guilty at the con-

clusion of the State's evidence. Both defendants contend there was no evidence to support the elements of the offense of armed robbery and that only the lesser offense of common law robbery should have been submitted to the jury.

The State's evidence tended to show that both defendants were standing at the counter. When the door opened to the cash register, Boudreau told Mrs. Caton to give him the money. He pulled a pistol and pointed it toward the cash register. She put the money from both cash registers on the counter and both defendants picked it up. Lankford handed the money to Boudreau who was putting it in his pockets. Both defendants told her to go in the back room where Lankford told her to put her hands on the top shelf and turn her back to them. Boudreau threw the gun to Lankford and told him to hit her. Lankford told her to tell the police that two black men robbed her or they would return. They then locked the door and left.

The evidence thus adduced by the State tended to establish that Boudreau was armed with a pistol, that he took the money in question from Caton by the use and threatened use of such pistol, and that he thereby threatened, if he did not in fact, actually endanger the life of Caton, and that Lankford was present, actively participating and assisting Boudreau to do such acts. Consequently, the evidence is amply sufficient to support a finding that Boudreau actually committed the crime of robbery with firearm upon Caton within the meaning of the statute and that Lankford was present, aiding and abetting him in its perpetration.

[3] In his next assignment of error the defendant Lankford argues that it was error for the State's witness to testify that the substance silver nitrate turns black or gray upon coming in contact with moisture since there was no express finding that the witness was an expert.

Defendant made no request for a finding that the witness was qualified to give opinion testimony as an expert witness, and "[i]n the absence of a request by the appellant for a finding by the trial court as to the qualification of a witness as an expert, it is not essential that the record show an express finding on this matter, the finding, one way or the other, being deemed implicit in the ruling admitting or rejecting the opinion testimony of the witness." *State v. Perry*, 275 N.C. 565, 169 S.E. 2d 839 (1969). This assignment of error is overruled.

[4] We find no merit in defendant Lankford's assignment of error relating to the charge on aiding and abetting. Defendant contends that the judge did not "instruct the jury that a principal in the second degree must share the same criminal intent as the principal perpetrator of the crime."

The instructions clearly conveyed the concept of a shared felonious intent although those exact words were not used. There is no requirement that those words must be used. "No exact forms or words are required to properly instruct a jury upon 'aiding and abetting' or 'felonious intent'. See *State v. Mundy,* 265 N.C. 528, 144 S.E. 2d 572 (1965); *State v. Anderson,* 5 N.C. App. 492, 168 S.E. 2d 444 (1969). When the *entire* 'Charge of the Court' as it appears in the record on appeal is considered as a contextual whole, we hold that it is free from prejudicial error." *State v. Westry,* 15 N.C. App. 1, 189 S.E. 2d 618 (1972).

Defendant Boudreau contends that the trial court erred in its charge to the jury when it stated that both defendants contended that they were in the store when in fact, the defendant Boudreau did not testify. We find this contention to be without merit.

[5] A misstatement of the contentions of the parties must be brought to the court's attention in apt time to afford opportunity for correction in order for an exception thereto to be considered on appeal, unless the misstatement was so gross that no objection at the trial was necessary. *State v. Brown,* 280 N.C. 588, 187 S.E. 2d 85 (1972). Since the defendant did not object at the time of the charge, and since the remainder of the court's charge made it clear that the trial judge was referring to the contentions of the defendant Lankford and not to both of the defendants, any possible error committed by the court was harmless.

We have carefully considered defendant Boudreau's remaining assignment of error and conclude that if error was committed, it was not sufficiently prejudicial to warrant a new trial.

As to each defendant, we find

No error.

Judges VAUGHN and CLARK concur.

JOSEPH WADE PETERSON v. WILLIAM H. JOHNSON, EXECUTOR, ESTATE OF MAYBELLE JONES, DECEASED

No. 7510SC553

(Filed 18 February 1976)

1. **Automobiles § 53— crossing center line of highway — sufficiency of evidence of negligence**

In an action to recover for personal injuries sustained by plaintiff in an automobile collision with defendant's testatrix, the trial court properly submitted the case to the jury upon plaintiff's evidence that he was driving in his lane when defendant's testatrix, who was traveling in the opposite direction, pulled out into his lane and collided head-on with his vehicle, since a plaintiff makes out a *prima facie* case of actionable negligence when he offers evidence tending to show that the collision occurred when defendant was driving to his left of the center of the highway.

2. **Witnesses § 8— scope of cross-examination**

The trial court did not err in refusing to allow defendant to cross-examine the patrolman who investigated the accident regarding a statement made at the scene by an eyewitness to the collision, since the eyewitness had not yet testified, nor was it error for the court, after the eyewitness testified that he could not remember what he had told the patrolman, to require defendant to call the patrolman as his own witness if he desired to question him further.

3. **Rules of Civil Procedure § 26— doctor residing in another county — use of deposition proper**

The trial court in an action for personal injuries did not err in allowing the use of the deposition of a doctor who had treated plaintiff in lieu of the doctor's actual testimony, since the court found that the doctor resided outside the county where the trial was held. G.S. 1A-1, Rule 26(d)(3)(iii).

4. **Evidence § 50— expert medical opinions — use of deposition proper**

The trial court properly allowed into evidence opinions by a doctor who had treated plaintiff as those opinions were expressed in the doctor's deposition.

5. **Damages § 13; Evidence § 40— injured employee — earnings — testimony of employer proper**

In an action to recover for personal injuries sustained in an automobile accident, the trial court did not err in allowing plaintiff's employer to testify concerning amount of overtime put in by plaintiff, number of pay increases since the date of the accident for top truck drivers, comparison of plaintiff's pay with that of other truck drivers, his inability to use plaintiff as a truck driver since the accident, and the amount of salary plaintiff had lost since the accident due to his inability to drive a truck and make extra hours, since this information was obtained by the witness through compilation of work records, payroll records, and his own personal knowledge.

6. Evidence § 42— testimony that automobile tilted — shorthand statement of fact

The trial court in an action arising from an automobile accident did not err in allowing a witness to testify that "the car pulled to its left over the center line, went back in, tilted as if it had hit the shoulder," since the testimony was admissible as a "shorthand" statement of fact.

APPEAL by defendant from *Brewer, Judge.* Judgment entered 6 February 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 17 October 1975.

In this civil action plaintiff seeks damages for personal injuries sustained in a two vehicle collision in which plaintiff was injured and defendant's testatrix was killed. The collision occurred at about 11 a.m. on 26 May 1971 on U. S. Highway 264 at a point where the highway is laned for two-way traffic. Plaintiff, driving his employer's GMC truck, was traveling westwardly, and defendant's testatrix, driving her Buick automobile, was traveling eastwardly. Plaintiff alleged that defendant's testatrix negligently pulled her automobile to her left and into the westbound lane of the highway when she was in such close proximity to the truck driven by plaintiff that he had no opportunity to pull off the roadway and avoid a head-on collision. Defendant denied his testatrix was negligent and alleged contributory negligence on the part of the plaintiff.

Plaintiff's evidence indicated that he was traveling westwardly in his right-hand west-bound lane of the highway within the speed limit at about 45 miles per hour when he met a group of cars traveling eastwardly; that the last car in the line, driven by plaintiff's testatrix, pulled out to its left of the center of the highway when it was about 100 to 150 feet in front of him; that he slowed down and pulled to his right; that the car driven by defendant's testatrix again crossed the center line when it was about 50 feet from him; that he again pulled to his right, but the collision occurred nevertheless; and that the collision occurred in the westbound lane of the highway. Plaintiff also presented evidence as to his injuries and loss of earnings.

Defendant presented no evidence. Issues as to defendant's negligence and plaintiff's damages were submitted to the jury, which answered the issues in favor of the plaintiff. From judgment on the verdict, defendant appealed.

Nance, Collier, Singleton, Kirkman & Herndon by James R. Nance and Jordan, Morris and Hoke by John R. Jordan, Jr. for plaintiff appellee.

Bailey, Dixon, Wooten, McDonald & Fountain by Wright T. Dixon, Jr. and John N. Fountain for defendant appellant.

PARKER, Judge.

[1] Defendant assigns error to denial of his motions for directed verdict and for judgment notwithstanding the verdict, contending that plaintiff's evidence was insufficient to show negligence on the part of defendant's testatrix. We hold that the motions were properly denied. "When a plaintiff suing to recover damages for injuries sustained in a collision offers evidence tending to show that the collision occurred when the defendant was driving to his left of the center of the highway, such evidence makes out a *prima facie* case of actionable negligence." *Anderson v. Webb*, 267 N.C. 745, 749, 148 S.E. 2d 846, 849 (1966). The case was properly submitted to the jury.

[2] During testimony of Patrolman Rogers, who investigated the accident, defendant sought to cross-examine him regarding a statement made at the scene of the accident by one Patterson, who was an eyewitness to the collision but who had not yet testified. Plaintiff's objection was sustained. Later, Patterson was called and testified for the plaintiff. On cross-examination he testified that he had talked with the patrolman at the scene of the accident but he did not recall exactly what he had told him. At the conclusion of Patterson's testimony, defendant requested that he be permitted to further cross-examine Rogers. The Court denied the request and ruled that if defendant did further question Rogers, it would be as his own witness. Defendant did not call Rogers. Defendant now contends that in these rulings the Court committed error. We do not agree.

Statements made by the witness Patterson to the patrolman would not have been admissible as substantive evidence of the facts stated therein. Evidence concerning them would have been admissible only for the consideration of the jury in determining Patterson's credibility as a witness. 1 Stansbury's N. C. Evidence (Brandis Revision) § 46. Hence, testimony concerning them was not admissible until Patterson testified and the trial judge properly sustained plaintiff's objection when defendant first sought to cross-examine the patrolman concern-

ing them, since Patterson had not then testified. Later, after Patterson testified, evidence of any prior inconsistent statements made by him would have been admissible as bearing on his credibility. However, if defendant desired to present such evidence, the court's rulings merely required that he present Rogers as his own witness if he desired to use his testimony to show prior inconsistent statements made by Patterson. Defendant elected not to present any evidence, as was his right. He may not now justly complain that he was not permitted to offer evidence of his own, under the guise of cross-examination, in the midst of the presentation of plaintiff's case against him. See, *State v. Yoes*, 271 N.C. 616, 157 S.E. 2d 386 (1967).

[3] Defendant objected to the use of the deposition of Doctor Keranen at trial, in lieu of his actual testimony, since the deposition indicates that the last observation of plaintiff by the doctor was a full 18 months prior to its use at trial. G.S. 1A-1, Rule 26(d) (3) (iii), provides for use of deposition at trial if the court finds that the deponent is a physician who either resides or maintains his office outside the county where the trial or hearing is held. Upon plaintiff's motion to use this deposition at trial, the Court examined an affidavit of Dr. Keranen and allowed use of the deposition, having determined that the physician resides in Cumberland County. Furthermore, in the order on pre-trial conference filed 18 July 1974, plaintiff stated that Dr. Keranen had been deposed and his deposition would be offered at trial in the event he could not appear. We find the admission of this deposition to have been proper.

[4] Defendant also contends that opinions by Dr. Keranen as presented in his deposition should not have been read to the jury in the absence of his qualification as an expert witness. Upon ruling on the initial admissibility of the deposition the court stated: "Let the record show that the Court finds as a fact that Dr. Victor Keranen is a medical doctor specializing in neurological surgery and practices his profession in the City of Fayetteville." In his deposition Dr. Keranen testified: "I am a practicing physician in the city of Fayetteville. I got my M.D. degree at Duke. I interned at that hospital. My residency was at the University of Vermont in neurological surgery. I have practiced neurological surgery for the past 3½ years." Qualification of a witness to testify as an expert in the particular matter at issue is a matter primarily within the discretion of the trial judge whose determination is ordinarily conclusive unless based

upon insufficient evidence or unless an abuse of discretion is shown. 3 Strong, N. C. Index 2d, Evidence, § 48, p. 678. "In the absence of a request by the appellant for a finding by the trial court as to the qualification of a witness as an expert, it is not essential that the record show an express finding on this matter, the finding, one way or the other, being deemed implicit in the ruling admitting or rejecting the opinion testimony of the witness." *State v. Perry,* 275 N.C. 565, 572, 169 S.E. 2d 839, 844 (1969). We find the admission of this opinion testimony to have been proper.

Defendant assigns as error the action of the court in sustaining objection to the question, directed by defendant's counsel to plaintiff during cross-examination, "Were you ever convicted of failing to yield right of way resulting from an accident on March 18, 1968?" Although such a question may have been proper as seeking to elicit evidence tending to establish poor driving habits on the part of plaintiff, we can find no prejudicial error in the Court's sustaining the objection, since the question was nevertheless answered by the plaintiff, who testified that he did not recall having been in an accident on March 18, 1968.

[5] Defendant contends that plaintiff's employer, Perry, was allowed to give opinion evidence without being qualified as an expert. Mr. Perry testified as to the following: amount of overtime put in by plaintiff, the number of pay increases since May 1971 for top truck drivers, comparison of plaintiff's pay with other truck drivers, his inability to use plaintiff as a truck driver since 26 May 1971, and the amount of salary plaintiff had lost since 26 May 1971 due to his inability to drive a truck and make extra hours. This information was obtained by Perry through compilation of work records and payroll records and his own personal knowledge. A nonexpert witness may testify as to facts within his own knowledge and observation. 3 Strong, N. C. Index 2d, Evidence, § 40, p. 664. That Perry estimated plaintiff's loss in salary by comparison with the salary of another employed on the same basis, and not from official records and books, does not make such evidence inadmissible, especially in light of the fact that defendant was given ample opportunity to cross-examine. See, *Smith v. Corsat,* 260 N.C. 92, 131 S.E. 2d 894 (1963).

[6] Defendant contends the court erroneously admitted opinion evidence by a nonexpert witness in the testimony of Patter-

son. Patterson testified that "[t]he car pulled to its left over the center line, went back in, tilted as if it had hit the shoulder." A nonexpert witness is permitted to describe facts observed by him in the form of a "shorthand" statement; that is, he may give his opinion as to common appearances, facts, and conditions in such a manner to enable a person who is not an eyewitness to form an accurate judgment as to what actually occurred. *Morris v. Lambeth*, 203 N.C. 695, 166 S.E. 790 (1932). The word "tilted" as used by the witness was a descriptive term utilized to aid the jury's comprehension of the event which was observed and as used was competent.

Defendant assigns error to portions of the court's instructions to the jury. We have examined each of these, and find no prejudicial error.

In the trial and in the judgment appealed from, we find

No error.

Judges BRITT and CLARK concur.

NORTHSIDE PROPERTIES, INC. v. KO-KO MART, INC. AND GERALD E. STEPHEN

No. 751SC753

(Filed 18 February 1976)

1. **Rules of Civil Procedure § 15— motion to amend answer — counterclaims not compulsory — motion properly denied**

The trial court did not err in denying defendants' motion to amend their answer to include certain counterclaims where the court determined that the counterclaims were not compulsory and that they constituted proper subject matter to be heard in another action by defendants against plaintiff which was then pending. G.S. 1A-1, Rule 15(a).

2. **Uniform Commercial Code § 76— promissory note — insurance check for damage to collateral — transfer of collateral — no impairment of collateral**

In an action to recover on a promissory note which was executed by defendants to Peoples Bank and Trust Company and which the bank sold to plaintiff, defendants' answer and affidavit were insufficient to raise issues of fact with respect to impairment of collateral by the bank, though the bank required defendants to turn over to the bank for application on the note the proceeds of an insurance check

issued for damages to machinery rather than allowing defendants to use the proceeds to repair the machinery and though the bank refused to allow defendants to sell a part of the equipment, since the bank, relying on G.S. 25-9-306(2), had a right to require the proceeds of the insurance check to be applied to the amount due, and since the security agreement provided that defendants could not transfer the collateral.

3. **Attachment § 1— constitutionality of statute — no requirement of notice and hearing**

The N. C. attachment statute, G.S. 1-440.1 *et seq.*, is not unconstitutional and does not require notice and an opportunity of hearing prior to attachment.

4. **Attachment § 1— plaintiff entitled to attachment — sufficiency of answer to raise question**

In an action on a promissory note where plaintiff's affidavit in attachment stated that the grounds were that defendants, with intent to defraud their creditors, had, or were about to, dispose of or secrete the property, and defendants' inartfully drawn answer denied all "allegations of fraud in any manner" and averred that the process was not being handled by due process of law, the answer was sufficient to raise the question of whether plaintiff was entitled to attachment.

APPEAL by defendants from *Cowper, Judge.* Judgment entered 2 April 1975 in Superior Court, CHOWAN County. Heard in the Court of Appeals 15 January 1976.

On 12 December 1972, plaintiff filed its complaint seeking judgment for $38,472.38, "reasonable attorneys fees of 15% of said amount," and for costs. It alleged that on or about 4 October 1971, defendants executed a promissory note and security agreement obligating defendants to pay to Peoples Bank & Trust Company the sum of $44,884.56 in 84 consecutive monthly installments of $534.34; that plaintiff is assignee of the note and security agreement; that the loan was made to allow defendants to purchase the personal property described in the security agreement; that Peoples Bank & Trust Company perfected the security interest on 8 October 1971, by filing a financing statement in the office of the Register of Deeds of Chowan County; that defendants are in default and have been since 20 October 1972.

On the same day, plaintiff filed an affidavit in attachment averring that defendants, with intent to defraud their creditors, have "assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, property." Plaintiff filed a bond and obtained an order of attachment, and the sheriff levied on the

"entire stock and contents of KO-KO Mart, Inc. of Northside Shopping Center, Edenton, N. C."

On 26 January 1973, the individual defendant filed a handwritten answer in which he referred to a civil action No. 72CvD285. Although the answer is not artfully drawn, it does aver that defendants negotiated with Koretizing Corporation with the view of defendants' obtaining a koretizing franchise for a $20,000 franchise fee and with Koretizing as an endorser on a $40,000 note to Peoples Bank & Trust Company for the purchase of equipment. Negotiations also were had with Townson Lumber Company for the lease of a store building in Edenton with defendants as sublessees. Defendants entered into possession of a building in Northside Shopping Center, known as Koretizing Dry Cleaning and Laundromat. In September of 1971, the bank, plaintiff and defendants were informed that Koretizing had been sold and the corporation would be dissolved. Defendants aver that having lost the benefits as a franchisee, and the endorsement on the note, they contacted the Small Business Administration and, as a result of negotiations with the bank, the note was extended over seven years; that plaintiff was contacted in an effort to obtain relief from the existing high rent but plaintiff refused to reduce the rent; that plaintiff did agree to temporary relief by placing two months rent on the end of the original five-year lease; that lessor (which by then was Northside Properties, Inc. rather than Townson Lumber Company) subsequently threatened eviction unless default in rent was taken care of; that defendants requested a new lease but were refused; that plaintiff continuously harassed defendants and continuously informed the bank of its intention to sue "thereby forcing defendants' note to be highly insecure"; that in October 1972, defendants informed the bank that they no longer needed certain equipment and wished to sell it to apply on the note; that "by this act approximately $8,000 would be deducted from the note, placing the firm one year ahead on payments"; that defendants also informed plaintiff and the bank that they were going to place various amusement machines in the business on a 50% consignment basis; that plaintiff demanded that the machines be removed; that the bank advised that it would consider the sale of the machinery; that "with this litigation maneuvers, Peoples Bank and Trust were placed under heavy duress and with the note not having the policy of endorsement plus the plaintiffs refusal to grant the defendants a reasonable and feasible lease, they could see no alternative except

to place this note on the selling block"; that defendants deny any fraud; that they were not told of plaintiff's acquiring the note; that plaintiff is attempting to secure defendants' total assets of over $64,000 "of which over 50% of the original costs have been paid"; that defendants were not given a hearing prior to the "firms doors being locked"; that defendants were not allowed to witness the actual count of monies collected from vendors; that defendants' mobile home, shown as collateral on the face of the note, was transferred and retained by an employee of the bank and defendants had paid 50% of the cost of the home.

On 9 March 1973, plaintiff moved to strike all of the answer except the averment as to residence of the parties, as being irrelevant and immaterial to the matters alleged in the complaint and as presenting an insufficient defense. Plaintiff also moved for judgment on the pleadings and for summary judgment.

On 9 April 1973, defendants filed a document entitled "Request for Hearing on Motion to Strike by a Federal Judge or Court."

On 14 June 1973 defendants filed a document entitled "Request Notice of Public Sale be Enjoined on 14th June, 1973." On 17 July 1973, defendants filed a document entitled "Motion to Move File No. 72CvS286 to the Federal Courts and Request for Punity (sic) Damages," and on 25 July 1973, they filed a document entitled "Request for Release of Daily Cash Receipts, Business Records and Written Summary of Various Monies Confiscated and Collected After Unauthorized Seizure."

On 25 October 1973, plaintiff again moved for summary judgment and for judgment on the pleadings.

On 9 August 1974, defendants, through counsel, moved to be allowed to amend their answer. The motion stated, inter alia, that "Since defendants are without legal training these answers do not conform to standard legal practice; however, though the answers were not artistically drawn, they did set forth defendants' basic claims." The proposed answer was attached to the motion. It admitted the execution of the note and denied all other allegations. As counterclaim, it averred that defendants had no notice of the attachment; that the sale of the defendants' property without judicial order or other authorization was

in violation of law and defendants are entitled to $40,000 compensatory damages and $200,000 punitive damages; that plaintiff bought the property and began to operate a business using the Koretizing sign to which it was not entitled and defendants are entitled to $25,000 damages therefor; that the building leased to defendants by plaintiff was not in good condition and tar on the roof leaked through causing damages to machinery and clothing of customers causing loss of business and damages in amount of $25,000; that the electrical wiring was exposed and necessitated repair which plaintiff refused to have repaired and that defendants had to have it done and that because of damages to their machinery they were entitled to $15,000 in damages; that plaintiff had committed an unfair or deceptive act or practice in the conduct of its trade or business entitling defendants to $200,000 in damages.

Defendants then moved for consolidation for trial of this action and No. 74CvS206 for that both concerned common questions of fact and law.

On 4 November 1974 plaintiff filed an affidavit in support of its motion for summary judgment. The affidavit was given by W. D. Townson, Jr., President of plaintiff. The affidavit stated that defendants, during 1971 and 1972, were lessees of space in Northside Shopping Center for the operation of a dry cleaning business; that beginning in the latter part of 1971 they were continuously in arrears in rent and that in December of 1972, they were in arrears in the amount of $1882.13; that on 12 December 1972, plaintiff terminated the lease and instituted an action for the arrearage; that prior to that time defendants were in default on an obligation to Peoples Bank & Trust Company which was in the initial amount of $44,884.56; that defendants had assigned their interest in certain equipment used in the operation of their business as security for the loan under a security agreement of even date with the note; that on 11 December 1972, plaintiff purchased the note from the bank and took an assignment of the security agreement; that on 12 December 1972 plaintiff instituted another action against defendants for the past due balance on the note in the amount of $38,472.38; that plaintiff was informed and believed that defendants were about to dispose of the property subject to the security agreement with intent to defraud plaintiff and, through counsel, filed an affidavit in attachment; that on 12 December 1972 an order of attachment issued, and the sheriff

levied on the property on the same date; that the note continued in default and, rather than resorting to a sale under attachment, plaintiff exercised a general power of sale contained in the assigned security agreement, "which was superior in lien to the attachment, gave notice of public sale, and caused the collateral to be sold on June 14, 1973"; that plaintiff was the purchaser at the sale for the amount of $13,999.80; that the proceeds of sale were applied to the unpaid balance and accumulated interest on the assigned note; that the balance on the notes and accumulated interest remain unpaid.

The record contains an affidavit of the individual defendant indicating it was sworn to on the 27th day of March, 1975. It bears no filing date. This affidavit reiterates the averments of the proposed amended answer. Although the record does not indicate that the affidavit was filed, counsel for the parties agreed on oral argument that the court did consider the affidavit.

On 2 April 1975, Judge Cowper entered an order reciting that the matter was heard on "defendants' Motion to Amend Answer and plaintiff's Motion for Summary Judgment and upon consideration of the record and parties respective affidavits and brief of counsel." The court denied defendants' motion to amend answer and granted plaintiff's motion for summary judgment. The court further found that the counterclaims "raised herein and which defendants have sought to raise in their motion to amend answer" are not compulsory counterclaims and constitute proper subject matter to be heard in "another action now pending in this court, to wit: *Gerald E. Stephen and Ko-Ko Mart, Inc. v. Northside Properties, Inc.*, et al. (74-CVS-206)." Defendants appealed from the entry of the judgment.

Wolff, Harrell and Mann, by Andrew S. Martin, for plaintiff appellee.

Smith, Patterson, Follin, Curtis & James, by J. David James, for defendant appellants.

MORRIS, Judge.

[1] Defendants first contend that the court erred when it denied their motion to amend their answer.

Amendments to pleadings are governed by G.S. 1A-1, Rule 15(a):

> "A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within 30 days after service of the amended pleading, unless the court otherwise orders."

In this case, defendants were entitled to amend their answer only by leave of court. The motion to amend was addressed to Judge Cowper's discretion, "to be exercised as justice requires 'in view of the attendant circumstances' ". *Calloway v. Motor Co.*, 281 N.C. 496, 501, 189 S.E. 2d 484 (1972). (Citation omitted.)

Here the court considered the attendant circumstances. He had before him the proposed amendment, the original answer, the affidavit of the individual defendant which reiterated the averments contained in the original and proposed amended answer, and was obviously aware of a suit brought by defendants against plaintiff based upon the identical claims sought to be incorporated by answer in this suit. The court properly held that the counterclaims were not compulsory counterclaims and noted in his judgment that they constituted proper subject matter to be heard in the other action then pending, to wit: *Gerald E. Stephen and Ko-Ko Mart, Inc. v. Northside Properties, Inc.*, et al.

An order denying a motion to amend pleadings is an interlocutory order. We are unable to see anything in this record which would require review of the court's denial. Certainly there is no abuse of discretion, nor have defendants been deprived of a substantial right. This assignment of error is overruled.

[2] Defendants contend that even though the proposed amendment be not allowed, the original answer and affidavit of the individual defendant raise issues of fact with respect to impairment of collateral by the bank. First defendants take the posi-

tion that the bank had no right to require defendants to turn over to the bank for application on the note the proceeds of a check issued for damages to machinery rather than allowing defendants to use the proceeds to repair the machinery. This was raised by the affidavit appearing in the record but bearing no filing date. G.S. 25-9-306(2) provides that a " . . . security interest continues in collateral notwithstanding sale, exchange or other disposition thereof by the debtor unless his action was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor." It seems clear that the bank had a right to require the proceeds of the insurance check to be applied to the amount due. Defendants also take the position that the bank impaired the collateral when it refused to allow them to sell a part of the equipment. The security agreement provides that "Debtor is not to, and will not attempt to, transfer . . . the collateral." Any sale or transfer of collateral would have to be with the bank's consent. The decision must be the creditor's, applying its own business judgment. The risk is the bank's and its decision either way would not constitute an impairment of collateral.

[3, 4] We agree that the original answer is sufficient to aver that defendants had no notice or opportunity to be heard prior to the attachment. Although the answer is very inartfully drawn, we are of the opinion that it also raises the question of whether plaintiff was entitled to attachment. The answer denies all "allegations of fraud in any manner" and avers that "this process is not being handled by due process of law." The complaint contains no allegations of fraud. The affidavit in attachment does, however, state that the grounds are that defendants, with intent to defraud their creditors, have, or are about to, assign, dispose of or secrete the property. In *North Georgia Finishing v. Di-Chem,* 419 U.S. 601, 42 L.Ed. 2d 751, 95 S.Ct. 719 (1975), the Court, in a five-to-three decision, held the Georgia statutes under which plaintiff had garnished defendant's bank account unconstitutional. The Court reviewed *Fuentes v. Shevin,* 407 U.S. 67, 32 L.Ed. 2d 556, 92 S.Ct. 1983 (1972), and *Mitchell v. W. T. Grant Co.,* 416 U.S. 600, 40 L.Ed. 2d 406, 94 S.Ct. 1895 (1974). In *Fuentes* the Court held that the Florida and Pennsylvania replevin statutes were in violation of the Fourteenth Amendment, because seizure of the property could be had without notice and without the opportunity of a hearing or other safeguard against mistaken repossession. In

Mitchell, the Court upheld the Louisiana sequestration statute which permits the seller creditor holding a vendor's lien to secure a writ of sequestration and, having filed a bond, to cause the sheriff to take possession of the property. However, the writ was issuable only by a judge and upon an affidavit which must set out facts entitling the creditor to sequestration as opposed to mere conclusory allegations. The debtor is also entitled to an immediate hearing after seizure and to dissolution of the writ if creditor is not able to prove the grounds on which the writ was issued. However, the Court said the Georgia statute was vulnerable for some of the reasons the Florida and Pennsylvania replevin statutes were invalid and did not have the saving characteristics of the Louisiana statute. The Georgia statute provided that the clerk, without participation of a judge, could issue the order upon the affidavit of the creditor or his attorney and need contain only conclusory allegations. The Court said:

> "There is no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment. Indeed, it would appear that without the filing of a bond the defendant debtor's challenge to the garnishment will not be entertained, whatever the grounds may be." *North Georgia Finishing v. Di-Chem,* 42 L.Ed. 2d 751, at 757-758.

In his concurring opinion Mr. Justice Powell said:

> "In my view, procedural due process would be satisfied where state law requires that the garnishment be preceded by the garnishor's provision of adequate security and by his establishment before a neutral officer of a factual basis of the need to resort to the remedy as a means of preventing removal or dissipation of assets required to satisfy the claim. Due process further requires that the State afford an opportunity for a prompt post-garnishment judicial hearing in which the garnishor has the burden of showing probable cause to believe there is a need to continue the garnishment for a sufficient period of time to allow proof and satisfaction of the alleged debt. Since the garnished assets may bear no relation to the controversy giving rise to the alleged debt, the State also should provide the debtor an opportunity to free those assets by posting adequate security in their place." *Id.* at 760.

We are of the opinion that our attachment statute meets the tests set out by Mr. Justice Powell and does not suffer

the disability of the Florida, Pennsylvania and Georgia statutes held invalid. The order of attachment may be issued by the clerk of the superior court in which the main action has been commenced or by a judge of the appropriate trial division. G.S. 1-440.5. The issuance of the order by the clerk is consistent with due process since the clerk is a judicial officer and not a mere administrative functionary. *Hutchinson v. Bank of North Carolina,* 392 F. Supp. 888 (M.D.N.C. 1975). The order may be issued upon the affidavit of the plaintiff, or his agent or attorney in his behalf. The affidavit must contain a statement that plaintiff has instituted or is about to institute an action for a money judgment and the amount thereof, the nature of the action, and the grounds for attachment. G.S. 1-440.11. The grounds for attachment are set forth in G.S. 1-440.3 as follows:

> " . . . when the defendant is
>
> (1) A nonresident, or
>
> (2) A foreign corporation, or
>
> (3) A domestic corporation, whose president, vice-president, secretary or treasurer cannot be found in the State after due diligence, or
>
> (4) A resident of the State who, with intent to defraud his creditors or to avoid service of summons,
>
> a. Has departed, or is about to depart, from the State, or
>
> b. Keeps himself concealed therein, or
>
> (5) A person or domestic corporation which, with intent to defraud his or its creditors,
>
> a. Has removed, or is about to remove, property from this State, or
>
> b. Has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, property."

The defendant has the right, at any time before judgment in the principal action to appear specially or generally and move, either before the clerk or the judge, to dissolve the order of attachment. G.S. 1-440.36. When defendant contests the grounds upon which the writ was issued, he need not move for dissolution but, at his option, " . . . may make the necessary allega-

tions in his answer by way of defense and await the trial." *Whitaker v. Wade,* 229 N.C. 327, 328, 49 S.E. 2d 627 (1948). G.S. 1-440.39 provides for discharge of attachment upon giving bond. We do not interpret *North Georgia Finishing, Fuentes,* or *Mitchell* as requiring notice and opportunity of hearing prior to attachment as contended for by defendants.

In this case, we are of the opinion that defendants have followed the procedure suggested by *Whitaker v. Wade, supra,* and have, by way of their inartfully drawn answer, contested the grounds upon which the attachment was issued. We, therefore, hold that upon this issue of material fact, defendants are entitled to be heard. Plaintiff may well be able to prove the averments of its affidavit. Even if it cannot, defendants may not be able to show any damages. They are, nevertheless, entitled to be heard on that issue.

The summary judgment for the amount due upon the note will not be disturbed. A partial summary judgment is expressly provided for by G.S. 1A-1, Rule 56(d).

The cause must be remanded for a hearing in accordance with this opinion.

Affirmed in part and remanded.

Chief Judge BROCK and Judge BRITT concur.

HENDERSON COUNTY AND LINCOLN K. ANDREWS v. FRANK OSTEEN (NOW DECEASED), HARLEY OSTEEN (IN HIS CAPACITY AS ADMINISTRATOR OF THE ESTATE OF FRANK OSTEEN), AND ELLIE O. CHEATWOOD, UFAULA O. STEPP, HAZEL O. STEVENSON, BLANCHE O. KING, HARLEY OSTEEN, SYLVENE O. SPICKERMAN, GRETA O. ALLEN, JEAN O. HOLDEN, MITCHELL M. OSTEEN, CARL M. OSTEEN, MARTHA SUE O. BROWN, JAMES D. OSTEEN AND THELMA O. TAYLOR, AS ALL THE HEIRS AT LAW OF FRANK OSTEEN, DECEASED

No. 7529SC561

(Filed 18 February 1976)

1. Execution § 3— personal money judgment — execution after death of debtor barred

Execution on a personal money judgment after the death of the debtor is barred, and the holder of the judgment must look to the duly

appointed administrator for payment of the judgment according to the priorities prescribed by G.S. 28A-19-6.

2. Execution § 3— tax judgment — execution after death of taxpayer not barred

A tax judgment pursuant to former G.S. 105-392 is strictly *in rem,* a specific judgment against the property of the listed taxpayer, and tantamount to a judgment directing the sale of the property to satisfy the tax lien; therefore, the death of the taxpayer before execution of the judgment is immaterial, and the trial court erred in relying on the rule of *Flynn v. Rumley,* 212 N.C. 25, precluding the execution of an *in personam* money judgment after death of the debtor in this case involving an *in rem* tax judgment executed subsequent to the death of the taxpayer.

3. Taxation § 40— execution upon tax judgment — notice required

Execution sale of property under a docketed tax judgment pursuant to former G.S. 105-392 was not rendered void by failure of the taxing authority to give registered or certified mail notice to the listing taxpayer at his last known address prior to the execution sale as required by former G.S. 105-392(c), since the notice requirement of the statute is directory and not mandatory.

4. Taxation § 40— execution sale — death of taxpayer — notice to heirs — no due process requirement

Due process did not require that a county give notice of a tax judgment execution sale to the administrator or heirs of a listing taxpayer who died prior to issuance of execution since due process was satisfied when the listing taxpayer was notified under G.S. 105-392(a) that the judgment would be docketed and that execution would issue thereon in the manner provided by law.

5. Execution § 15; Taxation § 44— tax sale — attack on sale for lack of notice — one year statute of limitations

Though the notice requirement of former G.S. 105-392(c) is directory, failure to furnish this notice may expose the sale to attack, if coupled with any other inequitable element, provided such action is brought within the pertinent statute of limitations; therefore, defendants who filed a motion in the cause seeking to set aside a tax sale of property more than four years after the execution sale were barred by the one-year statute of limitations imposed by G.S. 105-393.

APPEAL by Lincoln K. Andrews from *Friday, Judge.* Judgments entered 12 March 1975 and 9 April 1975 in Superior Court, HENDERSON County. Heard in the Court of Appeals 20 October 1975.

This action had its inception in proceedings instituted in 1969 by Henderson County to collect delinquent taxes on the property of Frank Osteen for the year 1967. The proceedings to establish the lien and to sell the property are governed by former G.S. 105-392 (This statute was amended and recodified

by Chapter 806, Section 1 of the 1971 Session Laws effective 1 July 1971.). Judgment was entered 1 October 1969 in favor of Henderson County for the amount of taxes owed. Frank Osteen died on 17 July 1970. On 22 July 1970 the Clerk of Superior Court issued execution on the judgment, and in compliance therewith the foreclosure sale was conducted on 26 August 1970. Lincoln K. Andrews became the last and highest bidder. The sale was confirmed on 15 September 1970, and the sheriff executed his deed to Lincoln K. Andrews, who duly recorded the same on 15 September 1970.

On 7 October 1974 Harley Osteen, administrator of the estate of Frank Osteen, and James D. Osteen, an heir at law of Frank Osteen, purporting to act under the provisions of Rules 19, 20, 22, 25, and 60(b)6 of the Rules of Civil Procedure, filed a motion in the cause seeking, in substance, the following relief:

a. The joinder of Lincoln K. Andrews as a necessary party plaintiff to the action;

b. The joinder of Harley Osteen, administrator of the decedent's estate, as a necessary party defendant to the action;

c. The joinder of certain named individuals, including the movants, as proper party defendants to the action;

d. The issuance of an order setting aside the sale of the subject property to Lincoln K. Andrews on the grounds that (1) Henderson County failed to comply with statutory notice requirements resulting in irregularities in the execution and sale, and (2) attorneys advising the adminstrator of the estate of the decedent acted improperly; and

e. The issuance of an order compelling Lincoln K. Andrews to quitclaim his interest in the property to the decedent's heirs.

On 3 December 1975 Lincoln K. Andrews filed a response to the motion in the cause denying that movants were entitled to the relief prayed.

By order dated 19 December 1974 Lincoln K. Andrews was made a party plaintiff, and Harley Osteen, as administrator of Frank Osteen, and the remaining named defendants, as the heirs at law of Frank Osteen, were made parties defendant.

On 14 February 1975 plaintiff Andrews filed a Rule 12(b)6 motion to dismiss for failure of defendants' motion to state a claim upon which relief could be granted. In the alternative plaintiff sought summary judgment under Rule 56 upon the grounds that there was no genuine issue as to any material fact. By order entered 12 March 1975 both motions by plaintiff were denied.

On 19 March 1975 a hearing upon the merits of defendants' motion was held before Judge Friday without a jury. Upon the evidence presented, Judge Friday made findings of fact and entered judgment on 9 April 1975 as follows:

"1. That judgment was docketed in favor of Henderson County for nonpayment of real property taxes on October 1, 1969 covering Lots 67 through 75 and one unnumbered lot in Hillside Park Subdivision as recorded in Plat Book 1, page 162, Henderson County Registry, the property of Frank Osteen.

"2. That Frank Osteen died on July 17, 1970 in Henderson County, North Carolina.

"3. That execution on the docketed judgment in favor of Henderson County was issued on the 22nd day of July, 1970, five (5) days after the date of death of Frank Osteen.

"4. That Harley Osteen qualified as Administrator of the Estate of Frank Osteen on the 27th day of July, 1970.

"5. That the property was sold at Sheriff's sale on August 26th, 1970 to Lincoln K. Andrews, the last and highest bidder, for the sum of $21.42.

"6. That the sale was confirmed and the property was deeded to Lincoln K. Andrews by deed dated the 15th day of September, 1970 and recorded in Deed Book 478 at page 37, Henderson County Registry.

"7. That at the time the property was sold to Lincoln K. Andrews for $21.42, the property had a value of approximately $12,000.00.

"8. That no notice of the execution sale was given to the Administrator or the heirs at law of Frank Osteen.

"And the Court being of the opinion that the case of FLYNN v. RUMLEY, 212 N.C. 25 at page 27 is controlling in this cause;

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the sale of Lots 67 through 75 and one unnumbered lot in Hillside Park Subdivision as recorded in Plat Book 1 at page 162, Henderson County Registry, by the Sheriff of Henderson County to Lincoln K. Andrews is void and the sale is hereby set aside and cancelled as of record.

"IT IS FURTHER ORDERED that the Clerk of this Court certify a copy of this Order to the Register of Deeds of Henderson County so that the same may be recorded in the Office of the Register of Deeds and that the recordation thereof be a cancellation of the Deed of the Sheriff of Henderson County to Lincoln K. Andrews.

"IT IS FURTHER ORDERED that Harley Osteen as Administrator of the Estate of Frank Osteen pay to Lincoln K. Andrews the Henderson County real property taxes for the years 1967 through 1974 plus interest thereon and costs in accordance with G.S. 105-375(g).

"IT IS FURTHER ORDERED that upon receipt of the Henderson County real property taxes, interest and costs for the years 1967 through 1974, that Lincoln K. Andrews execute a Quitclaim Deed, for the property that is the subject of this action, in favor of Harley Osteen as Administrator of the Estate of Frank Osteen."

Plaintiff Andrews appealed.

Prince, Youngblood & Massagee, by James E. Creekman, for plaintiff.

James C. Coleman, for defendants.

BROCK, Chief Judge.

The first question presented by this appeal is whether the trial court properly relied upon *Flynn v. Rumley*, 212 N.C. 25, 192 S.E. 868 (1937), to invalidate the sale of Frank Osteen's property, after his death, pursuant to former G.S. 105-392 (now G.S. 105-375).

In the *Flynn* case the appellant obtained a valid *in personam* money judgment against one W. T. Latham; the judgment was duly docketed. Thereafter Latham conveyed all of his property to his sons and died intestate. After his death execution was issued upon the judgment, and appellant attempted to compel the sheriff to levy upon the land Latham had conveyed before his death. An action for *mandamus* was brought against the sheriff. The trial court dismissed the action and the Supreme Court affirmed: "The execution, having been issued after the death of the judgment debtor, was not warranted by law. A sale of the land made under the execution would be void." *Flynn v. Rumley, supra.* Thus *Flynn* prohibits execution of an *in personam* money judgment *after* the death of the judgment debtor.

[1] The prohibition against the execution of an *in personam* money judgment after the death of the judgment debtor is designed to facilitate the orderly administration of the decedent's estate. *See Sawyers v. Sawyers,* 93 N.C. 321 (1885); *Lee v. Eure,* 82 N.C. 428 (1880). General Statute 28A-19-6 (formerly G.S. 28-105) governs the order in which decedent's debts must be paid by the administrator from the personalty of the estate. The fifth class of debts to be paid consists of "judgments of any court of competent jurisdiction within this State, docketed and in force, to the extent to which they are a lien on the property of the deceased at his death." Therefore, execution on a personal money judgment after the death of the debtor is barred. The holder of the judgment must look to the duly appointed administrator for payment of the judgment according to the priorities prescribed by G.S. 28A-19-6.

[2] Unlike the *in personam* money judgment discussed above, this case involves the execution of a tax judgment pursuant to former G.S. 105-392. When a taxpayer neglects to pay local property taxes, the county acquires a lien against the real property listed for taxes and is authorized to sell these tax liens to private parties or units of government. *See* G.S. 105-369 (formerly G.S. 105-387). Normally the purchaser of the tax lien is issued a certificate of sale. At this juncture the holder of the certificate of sale can either (1) seek foreclosure on the tax lien by an action in the nature of an action to foreclose a mortgage as provided by G.S. 105-374 (formerly G.S. 105-391) or (2) if the holder is a unit of government, resort to the *in rem* method of foreclosure under G.S. 105-375 (formerly G.S. 105-392).

Former G.S. 105-392 was enacted to provide a simple and efficient alternative for a taxing unit to the foreclosure of tax liens provided by former G.S. 105-391.

> "§ 105-392. *Alternative method of foreclosure.*—(a) Docketing Taxes as a Judgment.—In lieu of following the procedure set forth in § 105-391, the governing body of any taxing unit may order the collecting official to file, not less than six months or more than two years (four years as to taxes of the principal amount of five dollars or less) following the collector's sale of certificates, with the clerk of superior court a certificate showing the name of the taxpayer listing the real estate on which such taxes are a lien, together with the amount of taxes, interest, penalties and costs which are a lien thereon, the year for which such taxes are due, and a description of such real property sufficient to permit its identification by parol testimony. The clerk of superior court shall enter said certificate in a special book entitled 'Tax Judgment Docket for Taxes for the Year _____' and shall index the same therein in the name of the listing taxpayer. . . . Immediately upon said docketing and indexing, said taxes, interest, penalties and costs shall constitute a valid judgment against said property, with the priority hereinbefore provided for tax liens, . . . "

Thus, in simple fashion, the certificate of sale in the hands of the taxing unit is converted into a docketed judgment. The peculiar nature and effect of this judgment is carefully defined:

> "[This tax judgment] shall have the same force and effect as a duly rendered judgment of the superior court directing sale of said property for the satisfaction of the tax lien, and which judgment shall bear interest at the rate of six per cent per annum." (G.S. 105-392[a]).

In other words, the tax judgment is strictly *in rem,* a specific judgment against the property of the listed taxpayer, and tantamount to a judgment directing the sale of the property to satisfy the tax lien. In contrast, the *in personam* judgment does not embody an order directing the sale of particular property of the debtor to satisfy the judgment. While the docketing of an *in personam* judgment does impose a general lien on the debtor's real property, the judgment is directed against the person of the debtor.

As a judgment against the property of the listed taxpayer, directing the sale of the property to satisfy the tax lien, the tax judgment established under former G.S. 105-392 (now G.S. 105-375) is not a "debt" within the meaning of G.S. 28A-19-6, nor does it affix a lien to the taxpayer's property. It represents a final order for the sale of the delinquent taxpayer's property. Once the tax judgment is docketed, the real property described in the judgment is subject to impending foreclosure, provided execution is properly issued. Given the unique nature of the judgment, the death of the taxpayer before execution of the judgment is immaterial. Once judgment against the land is rendered and docketed, the fate of the property described therein is inexorably set into motion. And unless the taxes due are paid before the actual sale of the property, the property can be sold upon execution whether the execution is issued before or after the death of the taxpayer.

In conclusion, the rule in *Flynn* which precludes execution of an *in personam* money judgment does not apply to the *in rem* method of foreclosure defined by former G.S. 105-392. We find error in the trial court's reliance upon *Flynn* to invalidate the foreclosure sale of property in this case.

Even if *Flynn* is inapplicable to the facts of this case, it is argued that the County's failure to comply with the notice requirement of former G.S. 105-392(c) renders the execution sale void and thus enables defendants to set aside the sale beyond the short statute of limitations imposed by former G.S. 105-393. Therefore, defendants argue the trial judge's finding "that no notice of the execution sale was given to the Administrator or the heirs at law of Frank Osteen" should suffice, by itself, to affirm the judgment entered in favor of the defendant heirs of Frank Osteen.

[3] Defendants' evidence tends to show that the County did not furnish "registered or certified mail notice . . . to the listing taxpayer, at his last known address" prior to the execution sale as prescribed by G.S. 105-392(c). At least, the County failed to produce receipt of the necessary registered mail notice to refute the defendants' evidence that no such letter notice had been mailed to the listing taxpayer either before or after his death. Assuming that the notice was not, in fact, mailed to Frank Osteen, we must decide whether the defective notice renders the execution sale void as a matter of law.

In considering the notice requirements of former G.S. 105-392, we are mindful of the overall purpose of the proceedings and the reasonable presumption of notice expressed in the statute (G.S. 105-392[a]):

> "It is . . . declared to be the intention of the section to provide a simple and inexpensive method of enforcing payment of taxes necessarily levied, to the knowledge of all, for the requirements of local governments in this State; and to recognize, in authorizing such proceeding, that all those owning interests in real property know, or should know, without special notice thereof, that such property may be seized and sold for failure to pay such lawful taxes."

This provision corresponds with G.S. 105-348 (formerly G.S. 105-377), which explicitly charges "all persons who have or may acquire any interest in any property" with notice "that such property is or should be listed for taxation, that taxes are or may become a lien thereon, and that if taxes are not paid the proceedings allowed by law may be taken against such property. *This notice shall be conclusively presumed, whether or not such persons have actual notice.*" (Emphasis added.)

According to G.S. 105-392(c), execution shall be issued "in the same manner as executions are issued upon other judgments of the superior court, and said property shall be sold by the sheriff in the same manner as other property is sold under execution: Provided, that no debtor's exemption shall be allowed; and provided, further, that in lieu of any personal service of notice on the owner of said property, registered or certified mail notice shall be mailed to the listing taxpayer, at his last known address, at least one week prior to the day fixed for said sale." The meaning and underlying intention of this provision is abundantly clear: The County must make a reasonable effort to apprise the listing taxpayer of the impending execution sale by mailing registered or certified notice to the taxpayer's last known address. Personal service of notice is clearly not required, nor is notice to the actual owner of the property at the time of the issuance of execution, in this case the heirs of Frank Osteen. Moreover, it is not necessary that the listing taxpayer be living at the time notice is due. We see no difference between the taxpayer who moves from the county without leaving a forwarding address, after the tax judgment has been docketed but before issuance of execution, and the taxpayer who dies during the same period. In either case "reg-

istered or certified mail notice . . . to the listing taxpayer, at his last known address," would suffice to meet the notice requirements of G.S. 105-392(c).

[4] Defendants argue that the lack of notice to the heirs of Frank Osteen, the owners of the property at the time execution issued, prior to the execution sale of the property constitutes a violation of due process embodied by the N. C. Const. art. 1, § 19. We disagree. The notice requirement of G.S. 105-392(c) is not constitutionally compelled. Due process of law imports notice and an opportunity to be heard or defend in a regular proceeding before a competent tribunal. *Eason v. Spence,* 232 N.C. 579, 61 S.E. 2d 717 (1950). In this situation due process was satisfied when the listing taxpayer was notified, at least two weeks prior to docketing the judgment, "that the judgment will be docketed and that execution will issue thereon in the manner provided by law." G.S. 105-392(a). There is no allegation or evidence in the record that the notice requirement of G.S. 105-392(a) was not fulfilled. The listing taxpayer, Frank Osteen, was notified of the action taken against his property for failure to pay taxes and had sufficient opportunity to resist the judgment or execution thereof. In view of the notice provided by G.S. 105-392(a), the notice requirement of G.S. 105-392(c) is not compelled by due process. Furthermore, due process having been satisfied by notice to the listing taxpayer as provided by G.S. 105-392(a), the County is not required to shoulder the intolerable burden of directly notifying the heirs of a listing taxpayer who died prior to issuance of execution.

The execution sale authorized by G.S. 105-392(c) is analogous to an execution sale conducted under the authority of G.S. 1-339.41. After all, G.S. 105-392(c) states that "execution shall be issued . . . in the same manner as executions are issued upon other judgments of the superior court, and said property shall be sold by the sheriff in the same manner as other property is sold under execution: . . . " The conduct of ordinary execution sales requires that personal notice be served upon the property owner before the sale or that registered or certified mail notice be sent to the property owner if personal notice cannot be served within the county. *See* G.S. 1-339.54. This notice requirement for execution sales is directory only, and failure to comply with the notice requirement prior to an execution sale does not render the sale invalid or void with respect to an innocent purchaser who lacks knowledge of the

irregularity. *Walston v. Applewhite & Co.*, 237 N.C. 419, 75 S.E. 2d 138 (1953).

[4] Likewise, the notice requirement of G.S. 105-392(c) is directory. However, the notice requirement of G.S. 105-392(c) is not a hollow gesture. Failure to furnish this notice may expose the sale to attack, provided such action is brought within the pertinent statute of limitations. For example, it is well established in this jurisdiction that " . . . gross inadequacy of consideration [for property purchased at the execution sale], when coupled with any other inequitable element, even though neither, standing alone, may be sufficient for the purpose, will induce a court of equity to interpose and do justice between the parties." *Weir v. Weir*, 196 N.C. 268, 145 S.E. 281 (1928). Failure to comply with the notice requirement of G.S. 105-392(c) or the current G.S. 105-375(i) could constitute such an inequitable element and open the door to a successful attack of the tax sale.

Even if the facts of this case were sufficient to invoke the principle espoused by *Weir*, it would be to no avail. Defendants' action to set aside the execution sale was instituted on 7 October 1974, more than four years after the execution sale. This action is clearly precluded by the one-year statute of limitations imposed by former G.S. 105-393. It is argued that the County's failure to provide notice according to G.S. 105-392(c) is a "jurisdictional defect" rendering the execution sale void. The mere absence of the registered mail notice to the taxpayer's last known address prior to execution, while irregular and potentially unfair to the taxpayer, does not impair the authority of the court to issue execution upon a valid tax judgment and direct the sale of the property to satisfy the judgment. *See* 5 A.L.R. 2d 1021.

In conclusion, due to the absence of any jurisdictional defect in the manner judgment was rendered against the property of Frank Osteen, execution was issued and the property was sold, defendants are bound by the one-year statute of limitations imposed by G.S. 105-393. Therefore, the defendants' motion in the trial court was barred as a matter of law and should have been dismissed.

The judgments entered 12 March 1975 and 9 April 1975 are reversed, and this cause is remanded for entry of judgment dismissing defendants' motion in the cause with prejudice.

Reversed and remanded.

Judges HEDRICK and CLARK concur.

R. W. WATKINS, CLAIMANT v. CITY OF WILMINGTON, EMPLOYER, AND THE TRAVELERS INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 755IC418

(Filed 18 February 1976)

1. **Master and Servant § 55— Workmen's Compensation Act — injuries compensable**

To be compensable under the Workmen's Compensation Act, an injury must be an injury by accident arising out of and in the course of the employment, the words "out of" referring to the origin or course of the accident and the words "in the course of" referring to the time, place, and circumstances under which it occurred.

2. **Master and Servant § 56— workmen's compensation — fireman on duty — repair of vehicle during lunch hour — "reasonable activity" — injury compensable**

Finding by the Industrial Commission that plaintiff's injury arose out of and in the course of his employment and that his activity during which he sustained his injury was "a reasonable activity" was supported by competent evidence where such evidence tended to show that plaintiff who was a fireman was required by his employer to be on a tour of active duty which lasted twenty-four hours, plaintiff had to remain at the fire station during his entire tour of duty, firemen often made minor repairs to their automobiles on the fire station premises during their lunch hours, this practice was well known to plaintiff's superiors, and while working on the car of a co-employee during his lunch hour plaintiff sustained burns as the result of an explosion.

Chief Judge BROCK dissenting.

APPEAL by defendants from opinion and award of the North Carolina Industrial Commission filed 4 March 1975. Heard in the Court of Appeals 15 September 1975.

Plaintiff seeks compensation from his employer, City of Wilmington, and The Travelers Insurance Company, the employer's compensation carrier, for alleged injury by accident arising out of and in the course of employment.

The jurisdictional facts were stipulated.

The facts found by the hearing commissioner are in substance as follows:

Plaintiff, age 26, was employed as a fireman for approximately five and one-half years. When on active tour of duty his hours were from 8:00 a.m. to 8:00 a.m., then he was off duty for the next twenty-four hours. He eats and sleeps at the fire station during his twenty-four hours tour of duty. When he is off duty he is on call if an emergency should arise. He drives his personal car to and from work and uses it to report to duty in an emergency at times when he is off duty.

On 18 October 1973 plaintiff was on his tour of duty at the No. 3 Fire Station in Wilmington. A fellow employee had taken the oil breather cap off the motor of his 1965 Chevrolet automobile and was attempting to clean it during lunch time. Plaintiff inspected the oil breather cap and found it to be dirty and clogged up. It was decided that they would put gasoline on the oil breather cap and set it on fire in order to clean it. The cap was placed on the ground and gasoline was put on the cap and set on fire. After the fire had gone out the cap did not appear to be clean and the plaintiff decided to put some more gasoline on the cap. There was an explosion as he started to pour gasoline on the cap and the plaintiff was burned about the face, hands, and arms. He was taken to the hospital where examinaton revealed first and second degree burns on the face and upper extremities and third degree burns on the left arm. He was under treatment from 18 October 1973 through 18 December 1973 and out of work from 18 October 1973 to 3 December 1973. He suffered bodily disfigurement such as would hamper him in his earnings and in seeking employment.

The hearing commissioner concluded that plaintiff sustained an injury by accident arising out of and in the course of his employment with the defendant and awarded compensation for temporary total disability, compensation for disfigurement, medical expenses, attorneys fees and costs.

Pursuant to defendants' notice of appeal and application for review, the case was heard by the Full Commission (Commission) as provided in G.S. 97-85. The Full Commission, Commissioner Vance and Commissioner Stephenson concurring, Chairman Robert S. Brown, dissenting, adopted as its own the opinion and award of Deputy Commissioner Delbridge and affirmed the results reached therein.

Addison Hewlett, Jr., for plaintiff appellee.

Marshall, Williams, Gorham and Brawley, by A. Dumay Gorham, Jr., for defendant appellants.

MARTIN, Judge.

[1] To be compensable under the Workmen's Compensation Act, an injury must be an " . . . injury by accident arising out of and in the course of the employment." G.S. 97-2(6). "The words 'out of' refer to the origin or cause of the accident and the words 'in the course of' to the time, place, and circumstances under which it occurred. (Citations omitted.) There must be some causal relation between the employment and the injury; but if the injury is one which, after the event, may be seen to have had its origin in the employment, it need not be shown that it is one which ought to have been foreseen or expected. (Citation omitted.)" *Conrad v. Foundry Company*, 198 N.C. 723, 153 S.E. 266 (1930).

Unquestionably, plaintiff's injury by accident occurred "in the course of" his employment. It occurred during his lunch hour on 18 October 1973, when, as required by the terms of his employment, he was on duty at the No. 3 Fire Station in Wilmington. Whether his injury arose "out of" his employment is the determining question. "Whether an accident arises out of the employment is a mixed question of fact and law, and the finding of the Commission is conclusive if supported by any competent evidence; otherwise, not." *Cole v. Guilford County*, 259 N.C. 724, 131 S.E. 2d 308 (1963).

"Specific findings of fact by the Industrial Commission are required. These must cover the crucial questions of fact upon which plaintiff's right to compensation depends. (Citations omitted.) Otherwise, this Court cannot determine whether an adequate basis exists, either in fact or in law, for the ultimate finding as to whether plaintiff was injured by accident arising out of and in the course of his employment. (Citation omitted.)" *Guest v. Iron & Metal Co.*, 241 N.C. 448, 85 S.E. 2d 596 (1955).

In general terms, the Industrial Commission found as a fact and concluded that plaintiff's injury arose out of and in the course of his employment. The Full Commission affirmed the opinion and award of the hearing commissioner, and stated that the Full Commission was of the opinion that " . . . this

was a reasonable activity and the risk inherent in such activity was a risk of the employment."

In construing Workmen's Compensation acts, "[t]his and other courts of the United States have held that the various compensation acts should be liberally construed so that the benefits thereof should not be denied upon technical, narrow and strict interpretation. The primary consideration is compensation for injured employees." *Barbour v. State Hospital,* 213 N.C. 515, 196 S.E. 812 (1938). Various tests have been applied by the courts in determining whether an injury arose out of and in the course of the employment in order to be compensable under such an act.

The North Carolina Supreme Court in *Lee v. Henderson,* 284 N.C. 126, 200 S.E. 2d 32 (1973), stated the rule applicable when the employee has been directed as part of his duties to remain in a particular place or locality until directed otherwise or for a specified length of time, as follows: " 'In those circumstances, the rule applied is simply that the employee is not expected to wait immobile, but may indulge in any *reasonable* activity at that place, and if he does so the risk inherent in such activity is an incident of his employment.' "

Briefly, the factual situation in the *Lee* case is as follows: Plaintiff, a salesman employed by a cabinet manufacturer, worked in his employer's shop during his training period and obtained permission from his superiors to build a doghouse for his own use from scrap material during working hours when he had nothing else to do. Each of the employer's salesmen was required to work in the shop every third Saturday. While on duty in the shop one Saturday plaintiff cut some cabinet parts and, during a lull, resumed work on his uncompleted doghouse and injured himself with an electric saw. A practice or custom had been established by the employer, allowing its employees to use its equipment for personal projects.

The Court held that plaintiff's use of the employer's electric saw was a reasonable activity and the risk inherent in such activity was a risk of the employment; therefore, plaintiff's injury arose out of his employment within the meaning of the Workmen's Compensation Act.

Defendants earnestly argue that the factual setting of the *Lee* decision had all the earmarks of the traditional North Carolina cases in which the concept of reasonableness was utilized

in arriving at the appropriate determination of a Workmen's Compensation claim. They further contend that, traditionally, the concept of reasonableness has been tied to the concept of work-related risks and that the *Lee* decision can best be explained by that approach. They argue that it is obvious from the facts in the *Lee* decision that the employee was engaged in an activity which the employee normally performed as a regular duty or service of his employment; that the employee had received the express consent of the employer to engage in the activity; that he had received assistance from his immediate supervisor or foreman; and, that it was against this factual background that the Supreme Court classified the activity as a reasonable activity.

Defendants' counsel discusses, in his well documented brief, the decisions cited and relied on by our Supreme Court in establishing the reasonable activity doctrine. He contends that with one exception, all of the decisions could easily have been decided by the traditional "work-related risk test." Further, he argues, that "since a true application of the 'reasonable activity' doctrine entirely disregards the work-related risk test, some clarification is needed with respect to whether or not the 'reasonable activity' doctrine was, in fact, adopted in its pure form by the North Carolina Supreme Court in the *Lee* decision."

In *Lee* the Court said: "On this appeal, we need not decide whether we should adopt a rule similar to that enunciated in the cited decisions of the Supreme Court of New Hampshire." However, it then went on to say that, "under the circumstances of the present case," plaintiff's use of employer's electric saw and 'scrap' material during the Saturday morning lull was a *reasonable* activity and that the risk inherent in such activity was a risk of the employment. Thus, the reasonable activity rule was adopted by our Supreme Court in the *Lee* decision, was applied to the factual situation, and was determinative of the holding therein.

[2] In the present case, there was competent evidence to support the hearing commissioner's findings that plaintiff was required by his employer to be on a tour of active duty which lasted twenty-four hours, from 8:00 a.m. until 8:00 a.m. the next day; that he had to remain at the fire station during this entire tour of duty; that firemen often made minor repairs to their automobiles on the fire station premises during their lunch hours, and this practice was well known to plaintiff's superiors;

and that while working on the car of a co-employee during his lunch hour on 18 October 1973, plaintiff was injured.

Further, there was competent evidence to support the Full Commission's specific finding of fact that: " . . .[t]his was a reasonable activity . . . . " Thus, the findings of the Industrial Commission are conclusive on this Court since they are supported by competent evidence and since the proper test in North Carolina, i.e., the "reasonable activity doctrine" was applied to those findings.

Under the circumstances of the present case, we hold that plaintiff's cleaning of the oil breather cap from a co-employee's car during his lunch period was a reasonable activity and that the risk inherent in such activity was a risk of the employment.

Affirmed.

Judge VAUGHN concurs in result.

Chief Judge BROCK dissenting:

I do not think the activity in this case fits either the "work-related risk test" or the "reasonable activity" doctrine if such doctrine was in fact adopted in *Lee v. Henderson,* 284 N.C. 126, 200 S.E. 2d 32 (1973).

KAREN ANN AMAKER, PETITIONER v. JAMES A. AMAKER, RESPONDENT

No. 754DC738

(Filed 18 February 1976)

1. **Parent and Child § 10— Uniform Reciprocal Enforcement of Support — jurisdiction of proceeding**

The district court had exclusive original jurisdiction to entertain a proceeding under the Uniform Reciprocal Enforcement of Support Act. G.S. 52A-9.

2. **Parent and Child § 10— Uniform Reciprocal Enforcement of Support — paternity — sufficiency of evidence**

In a proceeding instituted under the Uniform Reciprocal Enforcement of Support Act petitioner's evidence was sufficient to support the trial court's findings that petitioner's child was born to petitioner and respondent out of wedlock, and that the parents subsequently married but thereafter separated, and these findings supported the

court's conclusion that the respondent was obligated to support the minor child.

3. **Divorce and Alimony § 20— absolute divorce granted — subsequent finding of duty to support — error**

Evidence was insufficient to support the trial court's finding that plaintiff and respondent were still married at the time of trial where the evidence affirmatively showed that a judgment of absolute divorce was entered shortly before the hearing on this proceeding; thus, the trial court's finding and conclusion that petitioner was the dependent spouse and that respondent owed a duty of support to petitioner was erroneous. G.S. 50-11.

4. **Divorce and Alimony § 23— child support — alimony — identification of each allowance**

Where alimony is allowed and provision is also made for support of minor children, the order must separately state and identify each allowance. G.S. 50-13.4(e); G.S. 50-16.7(a).

APPEAL by respondent from *Turner, Judge.* Judgment entered 30 April 1975 in District Court, ONSLOW County. Heard in the Court of Appeals 14 January 1976.

This is a proceeding instituted in Virginia under the Uniform Reciprocal Enforcement of Support Act for the support of petitioner, Karen Ann Amaker, and a minor child, Chevelle Anita Amaker. The proceeding was forwarded to the District Court, Onslow County, and served on the respondent on 20 March 1975. In her petition and accompanying affidavit, petitioner alleged that she was married to James A. Amaker on 20 December 1972; that she separated from her husband in November 1973; that the parties were still married; that James Amaker was the father of her child, Chevelle Anita Amaker, born on 13 April 1969; that since the separation James Amaker had contributed nothing for the support of herself or the minor child, although he possessed the means and capability to do so; and that she was presently receiving $174.00 per month "welfare" payments for herself and her child. In addition to her petition and accompanying affidavit, petitioner appeared personally at the hearing before Judge Turner on 30 April 1975 and testified. Her testimony will be discussed more fully in our opinion.

The respondent filed no answer and did not testify at the hearing. However, through counsel, he offered into evidence documents tending to show the following:

On 20 January 1975 James Amaker filed in the Onslow County District Court a complaint seeking an absolute divorce from the petitioner, wherein he alleged that he was married to

Karen Ann Amaker but that since 3 January 1974 they had lived continuously separate and apart from each other and "that there were no children born to the marriage . . . . " On 21 March 1975 Karen Amaker filed an answer in the divorce proceeding admitting that they were married but alleging that James Amaker was the father of her child, Chevelle Anita Amaker, born on 13 April 1969. A judgment of absolute divorce was entered in the District Court of Onslow County on 4 April 1975, but the order granting the divorce made no mention of the issue of paternity or liability of James Amaker to support Chevelle.

After the hearing in the present case, Judge Turner made findings of fact which are summarized as follows:

On 13 April 1969 a child was born to Karen Amaker, and respondent is the natural father of the child. Petitioner and respondent were married on 20 December 1972 and lived together until they separated in November 1973. During the marriage the petitioner and respondent "caused a birth certificate to be issued in the name of Chevelle Anita Amaker, said minor child, listing the petitioner and respondent as the natural parents of said child." Since the separation, James Amaker has contributed nothing to the support of his wife or his child, and they have been receiving $174.00 per month from the "Portsmouth, Virginia Welfare Department." James and Karen Amaker are still married, and the petitioner is a dependent spouse and the respondent is a supporting spouse. James Amaker is a Marine stationed at Camp Lejeune, North Carolina, and has an income in excess of $780.00 per month. The needs of the wife and child are $300.00 per month.

Based on the findings of fact, the court concluded that respondent owed a duty to support his wife and child and ordered "[t]hat the Respondent . . . pay into the Court for the use and benefit of his wife, Karen Ann Amaker, and minor child. Chevelle Anita Amaker, the sum of $125.00 per month . . . . "

Respondent appealed.

Attorney General Edmisten by Assistant Attorney General Parks H. Icenhour and Associate Attorney David L. Best for petitioner appellee.

Cameron and Collins by E. C. Collins for respondent appellant.

HEDRICK, Judge.

We note at the outset that defendant's brief fails to "contain, properly numbered, the several grounds of exception and assignment of error with reference to the pages of the record . . . " as provided in Rule 28, Rules of Practice of the Court of Appeals. Indeed it is difficult for this court to determine just what assignments of error or exceptions are relied upon by the appellant. We do ascertain, however, that respondent contends that the district court did not have jurisdiction to determine the issue of paternity and that the evidence does not support the findings and conclusion that the respondent was obligated to support the minor child, Chevelle Anita Amaker.

The Uniform Reciprocal Enforcement of Support Act provides that:

> "Jurisdiction of all proceedings hereunder shall be vested in any court of record in this State having jurisdiction to determine liability of persons for the support of dependents in any criminal proceeding." G.S. 52A-9.

[1] The district court in North Carolina has exclusive original jurisdiction of misdemeanors, G.S. 7A-272, including actions "to determine liability of persons for the support of dependents in any criminal proceeding." *Cline v. Cline*, 6 N.C. App. 523, 170 S.E. 2d 645 (1969). Therefore, the district court had exclusive original jurisdiction to entertain a proceeding under the Uniform Reciprocal Enforcement of Support Act. *Cline v. Cline, id.* Thus, it is clear that the district court in Onslow County had jurisdiction to determine the issue of paternity in this case.

[2] At the hearing before Judge Turner the petitioner, Karen Ann Amaker, appeared personally and testified to the following: She met the respondent in Portsmouth, Virginia, in 1968 and had sexual relations with him several times prior to his departing on 3 November 1968. The minor child, Chevelle, was born on 13 April 1969 and lived with petitioner. Petitioner and respondent were subsequently married on 20 December 1972 in Charleston, South Carolina. After the marriage, respondent accepted Chevelle as his own child and loved and cared for her until the parties separated on 3 January 1974. After the marriage, petitioner and her mother "arranged" to have Chevelle's name changed from Benton (the petitioner's maiden name) to Amaker. Since the separation, the petitioner had been receiving $174.00 per month from the "Portsmouth, Virginia, Welfare

Department." She testified further that she had received notice of the divorce action begun by the respondent and had received a copy of the divorce decree from her "former husband," James Amaker.

We hold that the petitioner's evidence was sufficient to support the court's findings that the child was born to the petitioner and respondent out of wedlock and that the parents subsequently married, and that these findings support the conclusion that the respondent was obligated to support the minor child.

[3] Respondent contends the evidence is insufficient to support the finding "that the plaintiff and respondent are still married . . . . " We agree with this contention. The only evidence in the record that the petitioner and respondent are husband and wife is that contained in the petition and affidavit dated 20 February 1975 filed in Virginia, the initiating state, and forwarded to the district court in Onslow County on 26 February 1975. The evidence affirmatively shows that a judgment of absolute divorce was entered in the Onslow County District Court dissolving the marriage between the petitioner and the respondent on 4 April 1975. Petitioner does not challenge the validity of the judgment. She did not testify at the hearing in the district court on 30 April 1975 that she was still married to the respondent. Indeed, at the hearing she referred to respondent as her "former husband." We hold, therefore, the evidence is insufficient to support the finding by Judge Turner that the petitioner and the respondent are still married. Thus, the finding and the conclusion that petitioner is the dependent spouse and that respondent owes a duty of support to petitioner is erroneous. G.S. 50-11; *Mitchell v. Mitchell,* 270 N.C. 253, 154 S.E. 2d 71 (1967).

[4] Although respondent does not raise the question, we note the court in its order provided that the respondent should pay $125.00 per month for the support of both his wife and the child. Where alimony is allowed and provision is also made for support of minor children, the order must separately state and identify each allowance. G.S. 50-13.4(e); G.S. 50-16.7(a); *Williams v. Williams,* 13 N.C. App. 468, 186 S.E. 2d 210 (1972). We note further that the trial court found as a fact that the petitioner and the child needed financial assistance in the amount of $300.00 per month and that they were receiving from the "Welfare Department" $174.00 per month and that the

court ordered the respondent to pay for the support of both only $125.00 per month. The amount that a father is required to support his child must be "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); *Fuchs v. Fuchs,* 260 N.C. 635, 133 S.E. 2d 487 (1963)." *Gibson v. Gibson,* 24 N.C. App. 520, 211 S.E. 2d 522 (1975); G.S. 50-13.4.

Because the court erroneously combined the amount of support for the child, Chevelle Anita Amaker, with an erroneous order for the support of the wife, Karen Ann Amaker, the order requiring the respondent to pay $125.00 per month for the support of the wife and child must be vacated and the cause remanded to the district court for a new hearing to determine the appropriate amount the father will be required to pay for the support of his minor child.

The result is: That portion of the order declaring that the respondent is the father of Chevelle Anita Amaker and declaring that he owes a duty of support for the child is affirmed; that portion of the order declaring that Karen Ann Amaker is the dependent spouse and that the respondent is the supporting spouse and the respondent owes a duty of support to Karen Ann Amaker is reversed; that portion of the order requiring the respondent to pay $125.00 per month for the support of his wife and child is vacated and the cause is remanded to the district court for a new hearing to determine the appropriate amount the father will be required to pay for the support of his minor child.

Affirmed in part; reversed in part; vacated and remanded in part.

Judges PARKER and ARNOLD concur.

CURRITUCK GRAIN INCORPORATED, A NORTH CAROLINA CORPORATION v. STALEY POWELL

No. 751DC719

(Filed 18 February 1976)

Uniform Commercial Code §§ 4, 13— farmer as nonmerchant — statute of frauds as defense — summary judgment improper

In an action to recover damages for defendant farmer's failure to deliver corn and soybeans under an alleged oral contract, the trial

court erred in entering summary judgment for defendant on the ground that he was a nonmerchant within the meaning of the Uniform Commercial Code and that he was entitled to the defense of the statute of frauds, since defendant's affidavit filed in support of his motion did not establish whether defendant had ever negotiated with grain dealers prior to 1974, whether he had ever sold corn and soybeans previously, or whether he had knowledge of the customs and practices peculiar to the marketing of these grains. G.S. 25-2-201(1); G.S. 25-2-104.

APPEAL by plaintiff from *Beaman, Judge.* Judgment entered 29 May 1975 in District Court, CURRITUCK County. Heard in the Court of Appeals 12 January 1976.

Plaintiff sues for damages for defendant's failure to deliver under an alleged contract. According to the allegations an oral contract was entered into on 19 July 1974. Plaintiff agreed to buy and defendant agreed to sell 1500 bushels of #2 yellow corn at $3.00 per bushel, and 1500 bushels of soybeans at $6.60 per bushel. Delivery was to be in the fall of that year.

Defendant's answer denys the allegations, and the statute of frauds is pled as an affirmative defense. Defendant moved for summary judgment and filed an affidavit which is set out in this opinion.

In response to defendant's motion for summary judgment plaintiff filed an affidavit by its general manager asserting that on 19 July 1974 he mailed a written confirmation to defendant and that defendant made no objection to the confirmation. The affidavit also alleges that plaintiff and defendant were both merchants within the meaning of G.S. 25-2-104(1) at the time the contract was made.

Summary judgment was entered for defendant. The court found that defendant was entitled to judgment as a matter of law pursuant to G.S. 25-2-201(1), and found further that G.S. 25-2-201(2), (3) did not apply.

This appeal is from the order granting summary judgment and dismissing plaintiff's action.

White, Hall, Mullen & Brumsey, by William Brumsey III, for plaintiff appellant.

Twiford, Abbott, Seawell, Trimpi and Thompson, by John G. Trimpi, for defendant appellee.

ARNOLD, Judge.

The question presented by defendant's motion centered on whether defendant, a farmer, was a merchant as defined by the Uniform Commercial Code. If defendant were not a merchant, as defined, he was entitled to the defense of the statute of frauds. If he were a merchant he would not be entitled to the defense of the statute of frauds.

Summary judgment was granted on the grounds that the statute of frauds was a defense and there was no genuine issue of fact since defendant was not a "merchant" within the meaning of G.S. 25-2-104. Few cases have determined whether farmers are merchants in the context of the Uniform Commercial Code, and authorities seem divided. See: *Sierens v. Clausen,* 60 Ill. 2d 585, 328 N.E. 2d 559 (1975); *Campbell v. Yokel,* 20 Ill. App. 3d 702, 313 N.E. 2d 628 (1974); *Ohio Grain Co. v. Swisshelm,* 40 Ohio App. 2d 203, 69 Ohio Ops. 2d 192, (1973); *Cook Grains v. Fallis,* 239 Ark. 962, 395 S.W. 2d 555 (1965).

G.S. 25-2-201, as pertinent, provides:

> "(1) Except as otherwise provided in this section a contract for the sale of goods for the price of five hundred dollars ($500.00) or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.
>
> (2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received."

Quoting from *Black's Law Dictionary* defendant argues that the terms "farmer" and "merchant" are not interchangeable. We do not look to *Black's,* however, but to G.S. 25-2-104, where a "merchant" is defined as "a person who deals in goods of the

kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill."

Whether defendant is a "merchant" as defined by statute is a decisive point. The nonmerchant who signs nothing ordinarily will not be bound to a contract under the Statute of Frauds provision of G.S. 25-2-201. A "merchant" on the other hand may be held, even though he has signed nothing, under the provisions of G.S. 25-2-201(2), if he receives a written confirmation sufficient as against the sender and fails to give written notice within ten days. The Statute of Frauds would not be a defense.

The growing and marketing of corn and soybeans is an important part of the agricultural economy of this area. The procedures for marketing these crops are well known. We cannot say that a particular "farmer," or a grower, is not a "merchant" within the Code definition.

Defendant, in the instant case, as the movant for summary judgment, clearly had the burden of establishing that there was no genuine issue of material fact. He relied on his affidavit which therefore must be sufficient for the purpose, in this case, of establishing that he was not a merchant, and thus entitled to the defense of the Statute of Frauds.

This is the affidavit filed by defendant in support of his motion.

> "Staley B. Powell, Jr., first being duly sworn, deposes and says:
>
> 1. I was born on November 9, 1918 and have lived in Chesapeake, Virginia all my life. I have been married since 1941, and we have two children.
>
> 2. From 1960 to 1970 I was actively engaged in the trucking business, known as S. Powell Trucking Co., Inc. In 1968 I had a heart attack and tried to continue in the trucking business for two more years. In 1969 I suffered another heart attack, and in 1970 came down with phlebitis in my left leg. This kept me from trucking, and in 1970 I turned to farming.

3. I did not own any land in 1970, but rented approximately 140 to 150 acres. In that year more than half of my gross income of about $12,000.00 was derived from livestock.

4. In 1971 I rented approximately 125 acres of land. I did not own any land in that year either. My gross was about the same in 1970, and I sold out my livestock.

5. In 1972 I did not own nor rent any land. I still had trucks I was trying to dispose of, but could not do any farming because I was hospitalized for three or four months during that year. I spent the remainder of the year recuperating at home.

6. I did no farming in 1973. I did not rent any land, nor did I own any land. I lost a substantial amount of money in the trucking business after hiring several drivers to work for me.

7. On May 10, 1974 I purchased a 92.8 acre farm from Charles R. Warren in Chesapeake, Virginia. At this time I liquidated my trucking business entirely. There are 60 acres of cultivated, tillable soil on this farm, and I rented four other farms of 60, 40, 25 and 20 acres respectively, on which I planted various crops. I expect to gross around $13,000.00 to $14,000.00 this year, but do not anticipate to make a profit in that I have had to build a barn and purchase equipment.

8. During 1974 I sold a total of $25.02 [sic] bushels of soybeans at $7.50 per bushel, and a total of 1893.93 bushels of corn at $3.35 per bushel.

s/ STALEY B. POWELL, JR."

The authors of the comments following G.S. 25-2-104 state that the term "merchant" applies to "professionals in business" rather than to a "casual or inexperienced seller or buyer." The definition of "goods" includes "the unborn young of animals and growing crops." G.S. 25-2-105(1).

Defendant's affidavit does not establish that he is a casual or inexperienced seller in corn and soybeans, the "goods involved in the transaction." The affidavit establishes defendant's birthdate, his experience in trucking from 1960 to 1970, and the status of his health. It establishes that he farmed during

1970, 1971 and 1974, and that one-half his gross income in 1971 and 1972 derived from livestock. The affidavit does not establish whether defendant had ever negotiated with grain dealers prior to 1974, whether he had ever sold corn and soybeans previously, or whether he had knowledge of the customs and practices peculiar to the marketing of these grains.

Obviously if defendant were a nonmerchant under the circumstances he was in a most desirable position of being free to sell on the open market if prices went up, but having the option to enforce the written confirmation if prices fell below the contract price.

This opinion does not hold that defendant was a "merchant" under G.S. 25-2-201(2), or that there was an oral contract prior to the written confirmation. Defendant's affidavit was insufficient to meet the burden imposed on him by Rule 56(c) to show the absence of a genuine issue of material fact. *Builders Supply Co. v. Eastern Associates*, 24 N.C. App. 533, 211 S.E. 2d 472 (1975).

The order granting summary judgment is reversed and the case is remanded for trial.

Reversed and remanded.

Judges PARKER and HEDRICK concur.

DUKE UNIVERSITY v. CLIFF V. CHESTNUT AND MRS. CLIFF V. CHESTNUT

No. 7514SC793

(Filed 18 February 1976)

Limitation of Actions § 10; Process § 9— nonresident defendants — tolling of statute of limitations — effect of long arm statute

G.S. 1-21, which tolled the statute of limitations because of the absence of defendants from the State at the time the cause of action accrued against them and at all times since, allowed plaintiff to commence its action against defendants more than three years after the cause of action arose, even though plaintiff could have acquired personal jurisdiction over the nonresident defendants under the authority of G.S. 1-75.4(5) from the time the cause of action accrued.

Duke University v. Chestnut

APPEAL by defendants from *Canaday, Judge.* Order entered 12 June 1975 in Superior Court, DURHAM County. Heard in the Court of Appeals 22 January 1976.

Plaintiff instituted this suit on 15 January 1975 to recover for services rendered to defendants' minor child in 1971.

Defendants were personally served with process in Horry County, South Carolina, their county of residence, by the sheriff of that county.

Defendants moved for judgment on the pleadings for the reason, among others, that suit on the claim is barred by the statute of limitations in that the complaint discloses that the action was not started until more than three years after the services were performed.

Defendants' motion was denied and they gave notice of appeal. After the appeal was docketed in this Court, defendants requested that this Court treat their appeal as a petition for certiorari and consider the single question raised rather than dismiss the appeal from the interlocutory order. We elected to comply with that request.

Powe, Porter, Alphin & Whichard, P.A., by Willis P. Whichard, for plaintiff appellee.

Bryant, Bryant, Battle & Maxwell, P.A., by James B. Maxwell, for defendant appellants.

VAUGHN, Judge.

The parties have stipulated that the action was started more than three years after the services were rendered and that at all times in question defendants were residents of Myrtle Beach, South Carolina.

G.S. 1-21, in pertinent part, is as follows:

> "If when the cause of action accrues . . . against a person, he is out of the State . . . and if, after such cause of action accrues . . . such person . . . resides out of this State, or remains continuously absent therefrom for one year or more, the time of his absence shall not be a part of the time limited for the commencement of the action. . . . "

The parties have stipulated that defendants resided out of the State at the time the cause of action arose and at all times since. Under the express terms of G.S. 1-21, therefore, the statute of limitations has not started to run so as to bar plaintiff's claim.

One of the purposes of G.S. 1-21 was said to be to prevent defendants from having the benefit of the lapse of time—the statute of limitations—while they remain beyond the limits of the State and allow their debts to remain unpaid, it not being the policy of the State to drive its citizens to seek their legal remedies abroad. *Armfield v. Moore,* 97 N.C. 34, 2 S.E. 347.

In 1967 the General Assembly enacted what is now codified as Article 6A of G.S. Chapter 1. Under this article (and earlier legislative enactments providing for service on foreign corporations doing business with the State, nonresident motorists and certain others) the courts of this State can acquire personal jurisdiction over defendants by other than personal service of process within the State, if the defendants have had the required "minimum contact" with this State.

In the case at bar, defendants' obligation is to pay plaintiff for services rendered to defendants within the State for defendants' benefit. These circumstances permit the acquisition of personal jurisdiction over defendants under the authority of G.S. 1-75.4(5).

The question raised on this appeal may be stated as follows:

Did the enactment of G.S. 1-75.1 et seq. result in the repeal of G.S. 1-21 insofar as G.S. 1-21 would have otherwise permitted this plaintiff to start this action against these individual nonresident defendants more than three years after the cause of action arose?

Many other states have enacted similar long arm statutes designed to give their courts all the personal jurisdictional powers permitted under the due process clause of the Constitution. Many of those states, at the time of the enactment of long arm statutes, also had saving statutes, similar to our G.S. 1-21, which operated to toll the statute against those who could not be personally served with process within the state because of their absence from the state.

The courts of many of these states have had the opportunity to consider whether the statute of limitations is tolled

during a party's absence from the state when that party was, nevertheless, amenable to service of process that would have subjected him to the personal jurisdiction of the state. *See* Annot., Absence As Tolling Statute of Limitations, 55 A.L.R. 3d 1158. It appears that a majority of those courts have held the tolling statute to be inoperative. Others have held that enactment of long arm statutes did not preclude application of tolling statutes similar to our G.S. 1-21.

The precise question raised on this appeal does not appear to have been resolved by the Supreme Court of this State.

In *Green v. Ins. Co.*, 139 N.C. 309, 51 S.E. 887, the Court held that the availability of service of process against nonresident insurance companies by service upon the Commissioner of Insurance did not abrogate the suspension of the running of the statute against a nonresident insurance company. The Court through Clark, Chief Justice, said: "That service can thus be had upon a nonresident corporation may be a reason why the General Assembly should amend section 162 of The Code, so as to set the statute running in such cases, but it has not done so and the courts can not."

Later, in *Volivar v. Cedar Works*, 152 N.C. 656, 68 S.E. 200, the Court said it was then of the opinion that the earlier cases were not "well decided." In *Volivar* the Court held that the three years statute barred a claim against a foreign corporation that, at all relevant times, maintained a process agent in the State upon whom service could be had. A similar result was reached in *Smith v. Finance Co.*, 207 N.C. 367, 177 S.E. 183, where service on a Delaware corporation could have been made by leaving a copy of the process with the Secretary of the State who was required to mail the process to the appropriate corporate officer.

In a later case, suit was started against individual nonresident defendants after the statute of limitations would have ordinarily run. The Court used the following language:

> "Being a nonresident of the State, he may not be permitted to invoke the protection of the statute of limitations, even though he may spend some time each year in the State.
>
> Nor could this rule be affected by the fact that he owned property in North Carolina *(Grist v. Williams*, 111

N.C., 53), or had an agent in this State *(Williams v. Building & Loan Assn.,* 131 N.C., 267; *Green v. Ins. Co.,* 139 N.C., 309); *Volivar v. Cedar Works,* 152 N.C., 34." *Hill v. Lindsay,* 210 N.C. 694, 696, 188 S.E. 406.

The language of the Court, however, goes beyond the decision in the case because there is nothing to indicate that the nonresident defendants had theretofore been subject to service of process that would have conferred personal jurisdiction.

Broadfoot v. Everett, 270 N.C. 429, 154 S.E. 2d 522, involved, among other things, the question of whether, under the law of Pennsylvania, a nonresident defendant was entitled to assert that state's one year statute of limitations in a wrongful death action. A Pennsylvania statute, enacted in 1895, provided for the suspension of the running of the statute of limitations during a defendant's nonresidence in the state. The Secretary of the Commonwealth was, under another statute, a nonresident's agent for the service of process in any action brought against him in the courts of Pennsylvania by reason of an accident there. The Supreme Court of North Carolina, applying the case law of Pennsylvania, held that the nonresident was entitled to the benefit of the one year statute and that it was not tolled by his absence from the State.

We are in full accord with those who have said that the application of a tolling statute when defendant has at all times been subject to the service of process by which the court would have acquired personal jurisdiction is inimical to the general purposes of statutes of limitations. Those statutes exist to eliminate the injustice which may result from the assertion of stale claims by providing a reasonable but definite time within which a claim must be prosecuted in the courts or be forever barred. We also agree with those who say there is no need for a tolling statute when a nonresident defendant is amenable to process. For these and other very logical reasons the legislative bodies of several states have amended their tolling statutes to provide expressly that statutes of limitation are not tolled during the absence of a defendant who remains amenable to service that would give the court personal jurisdiction.

This Court is, however, reluctant to amend the statute by judicial declaration. When the General Assembly enacted Chapter 954 of the Session Laws of 1967 [an act creating the new Rules of Civil Procedure and Article 6A of Chapter 1, our

new jurisdictional statute] over two hundred sections of Chapter 1 were expressly repealed. Many other sections of Chapter 1 were expressly amended. G.S. 1-21 was neither expressly repealed nor amended. Section 5 of Chapter 954 re-enacted all portions of Chapter 1 "not repealed by this Act, not amended by this Act, or not in conflict with this Act. . . . "

That there is little need to give effect to a tolling statute when a nonresident is amenable to service that will confer personal jurisdiction does not place the tolling statute in hopeless conflict with the long arm jurisdictional statute. Full effect can be given to both of the statutes. The wisdom of allowing plaintiffs the additional option should be left for consideration by the General Assembly.

The order denying defendants' motion to dismiss is affirmed.

Affirmed.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. DENNIS RAY CARLTON

No. 758SC789

(Filed 18 February 1976)

1. **Searches and Seizures § 1— warrantless search of residence — consent given**

A warrantless search of defendant's residence was not unconstitutional where defendant voluntarily gave officers permission to search his home.

2. **Criminal Law § 50— soil samples — expert testimony admissible**

The trial court in a first degree murder and first degree rape case did not err in allowing a witness, who qualified as an expert in soil mineralogy with defendant's consent, to testify that he personally conducted soil comparison tests, to explain the nature of the process, and to testify that soil samples taken from the victim's yard bore typological and mineralogical points of conformity and similarity to soil particles lifted from defendant's clothing.

3. **Criminal Law § 168— submission of lesser included offenses — benefit to defendant — no prejudicial error**

In a prosecution for first degree murder and first degree rape, the trial court's submission to the jury of the lesser included offenses

of second degree murder, manslaughter, second degree rape or assault on a female in the absence of evidence to sustain those findings totally inured to the benefit of defendant and was not reversible error.

ON *certiorari* from *Rouse, Judge.* Judgment entered 19 December 1974 in Superior Court, WAYNE County. Heard in the Court of Appeals 22 January 1976.

Defendant was indicted for first-degree murder and first-degree rape. From pleas of not guilty, the jury returned verdicts of guilty of second-degree murder and second-degree rape. Defendant sought review of his trial by way of a petition for a writ of certiorari which we allowed on 14 May 1975.

Other facts necessary for decision are set out below.

Attorney General Edmisten, by Associate Attorney Elizabeth R. Cochrane, for the State.

Kornegay and Bruce, P.A., by R. Michael Bruce and Robert T. Rice, for defendant appellant.

MORRIS, Judge.

[1] Defendant first contends that the trial court erred in denying his motion to suppress as evidence articles obtained during a warrantless search of defendant's residence. We disagree.

During a voir dire examination, police officers testified that they repeatedly warned defendant that he did not have to allow this warrantless search and that defendant, while seemingly alert and in possession of his mental faculties, freely and voluntarily agreed to the search. As SBI Special Agent E. H. Cross, Jr., recalled, defendant had stated to the police that " . . . he would be more than happy to do anything he could to assist . . . [the police]." Moreover, Deputy Sheriff Robert E. Davis claimed that no promises, threats or coercion marked the search operation. After the defendant helped the investigators locate certain items, Officer Davis decided to

> " . . . warn him of his rights at this point. I did that. I warned him of his rights at this time by reading his rights from the Miranda Card I have: 'You have the right to remain silent and not make any statement. Anything you say can and will be used against you in Court. You have the right to talk to a lawyer for advice before we ask you any questions and have him or any one else with you during

questioning. You have the same right to the advice and presence of a lawyer if you cannot afford to employ one and if you are indigent a lawyer will be appointed to represent you before any questions if you desire it. Do you want a lawyer?' At this time, I said 'Do you already have a lawyer?' He said, 'Yes, sir', he had a lawyer. (In response to question as to whether he asked the Defendant if he wanted his lawyer present) he said, 'No, I have already talked to my lawyer this morning.' I said, 'If you decide to answer questions now without a lawyer you will still have the right to stop answering them at any time. You also have the right to stop answering at any time until you talk to your lawyer. Do you understand each of these rights I have explained to you?' He said, 'Yes.' At this point I felt that my card would not cover the search. I also told, now I may put one thing ahead of another, but to my recollection I told the Defendant, I said, 'We want to search your house for articles that would be involved in this homicide of Melvin Sutton.' I said, 'At any time you so desire you can stop us. Tell us to stop searching your home and we will stop. You also have the right to have your lawyer here before we start searching your home and if you don't wish us to search your home without a search warrant we can't search it.' I told him we did not have a search warrant. At this time I said, 'And having these rights in mind do you wish to let us search your house at this time,' He said, 'Go right ahead. As a matter of fact I would love to help you.' I said, 'Dennis, if you would just sit here in this chair with Mr. Pennington and me and Hap Cross will look around and see what we can find.' "

The only evidence to the contrary was the voir dire testimony of the defendant, who argued he gave no permission for the search.

Our Supreme Court, speaking through former Chief Justice Parker, recognizes the " . . . well-settled law that a person may waive his right to be free from unreasonable searches and seizures. 'No rule of public policy forbids its waiver.' *Manchester Press Club v. State Liquor Com.*, 89 N.H. 442, 200 A. 407, 116 A.L.R. 1093. It has been repeatedly decided in this jurisdiction, in the United States Supreme Court, and the Courts of this Nation that one can validly consent to a search of his premises, and consent will render competent evidence thus ob-

tained." *State v. Little,* 270 N.C. 234, 238, 154 S.E. 2d 61 (1967). However, to constitute a valid consent, the concurrence must be voluntary, specific, freely offered, unequivocal, and " . . . free from coercion, duress or fraud, and not given merely to avoid resistance." *Id.* at 239.

In this case, the evidence is plenary that defendant presented no resistance to the search, actually offered open and helpful assistance to the police, and did so without any misconceptions, misapprehensions or fears. When a person, as in this case, " . . . voluntarily permits or expressly invites and agrees to the search, being cognizant of his rights, such conduct amounts to a waiver of his constitutional protection." *State v. Colson,* 274 N.C. 295, 307, 163 S.E. 2d 376 (1968), cert. denied 393 U.S. 1087. Moreover, defendant was advised of his "rights" with respect to a search of his premises even though such a warning was not legally required. *State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28 (1970). There was evidence presented that defendant was afforded every opportunity to stop the warrantless search. The court found facts and concluded that defendant gave a "valid and voluntary" consent for the search, that the search and seizure were not unreasonable, and that the evidence was admissible. The findings are supported by competent evidence, and the facts found support the conclusions reached.

[2] Defendant next argues that the trial court erred in allowing SBI Chemist Dr. Otis Donald Philen to testify as to his soil comparison tests. Specifically, defendant asserts that the State failed to lay a proper foundation for the testimony. Moreover, defendant maintains that redirect examination of the chemist exceeded the scope of testimony developed on direct examination. We find no merit in these contentions.

Dr. Philen, qualified as an expert in soil mineralogy with defendant's consent, first explained that he personally conducted the soil comparison tests and he then fully detailed the nature of the process. When read contextually, it is clear that a proper foundation preceded the chemist's testimony that soil samples taken from the victim's yard bore typological and mineralogical points of conformity and similarity to soil particles lifted from defendant's clothing.

Though ostensibly new to North Carolina, this particular testimony is not necessarily unacceptable. "It seems abundantly clear that . . . there can be expert testimony upon practically

any facet of human knowledge and experience." 1 Stansbury, N. C. Evidence, § 134, p. 438 (Brandis Rev. 1973). Even assuming that this particular theory of soil analysis is of little scientific consequence, we fail to see prejudice to defendant in view of his own testimony that he in fact was on the victim's property on the night in question.

We are, of course, aware of our recent decision in *Williams v. Power Co.*, 26 N.C. App. 392, 216 S.E. 2d 482 (1975), wherein this Court held that the trial court properly excluded opinion testimony that the siltification of plaintiffs' property came from a right-of-way cut by the defendant's bulldozers. That witness purportedly had " . . . made extensive examinations of plaintiffs' property between 1969 and 1972 . . . " , and arguably could have possessed expertise with respect to that property. *Id.* at 395. Our Court, however, held that this particular witness's opinion was inadmissible because she was no " . . . better qualified to form an opinion from the facts than the jury was." *Id.* at 396. Here, the jury was not capable of comparing the intricate mineralogical composition of soil samples, and thus, we are confronted with a situation clearly distinguishable from the facts presented in the *Williams v. Power Co.* case.

Moreover, we have examined carefully the redirect examination of Dr. Philen and believe that it merely clarifies points raised during his earlier direct examination.

[3] Finally, defendant contends that the trial court erred in instructing the jury that they also could return verdicts of guilty of second-degree murder, manslaughter, second-degree rape, or assault on a female, because there was no evidence to sustain such findings. As noted at page 71 in our recent opinion in *State v. Tomlin*, 27 N.C. App. 68, 217 S.E. 2d 755 (1975), cert. denied 288 N.C. 513 (1975), "[s]ubmission of the lesser offense . . . to the jury totally inured to the benefit of the defendant. 'An error on the side of mercy is not reversible." (Citation omitted.) This contention, therefore, is without merit. *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431 (1956).

No error.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. ARNOLD PAUL BURLESON

No. 7529SC776

(Filed 18 February 1976)

1. **Homicide § 21— motion for nonsuit — exculpatory statements introduced by State — other evidence of guilt**

The trial court in a prosecution for second degree murder properly denied defendant's motion for nonsuit, though the State had offered into evidence certain exculpatory statements of defendant, since there was other plenary evidence that deceased died from a wound intentionally inflicted by defendant with a pistol.

2. **Criminal Law § 75—defendant's statements to officers — voluntariness**

The trial court did not err in allowing into evidence statements made by defendant to police officers, since the court concluded that the statements were made knowingly and voluntarily.

3. **Homicide § 24— intentional killing with deadly weapon — presumption — instructions proper**

The trial court in a second degree murder case did not err in instructing the jury on the presumption arising from the intentional killing with a deadly weapon, since that presumption was not invalidated by *Mullaney v. Wilbur*, 421 U.S. 684.

4. **Homicide § 24— absence of malice — burden of proof on defendant — instructions proper**

The trial court's instructions in a second degree murder case placing upon defendant the burden of satisfying the jury that malice was not present and thereby reducing the crime to manslaughter was not invalidated by the *Mullaney* decision, since the rules of that case apply only to trials conducted on or after 9 June 1975 and defendant was tried in April 1975.

APPEAL by defendant from *Baley, Judge*. Judgment entered 24 April 1975 in Superior Court, McDOWELL County. Heard in the Court of Appeals 21 January 1976.

Defendant was charged in a bill of indictment with the first degree murder of Walter Pruitt. The State elected to place defendant on trial for second degree murder to which defendant entered a plea of not guilty.

The evidence for the State tended to show the following: At approximately 8:15 p.m. on 9 November 1974, Deputy Sheriff Eddie Smith heard a shot from the direction of Johnson's Paving Company and saw the defendant drive a white Chevrolet out of a dirt road near the paving company onto Highway 221. He recognized the defendant and knew that he did not have an

operator's license. He switched on the blue light to his patrol car as he followed the defendant. Defendant pulled into Holly's Trailer Park, exited his car and ran. The officer apprehended the defendant and arrested him for operating a motor vehicle without an operator's license and driving under the influence of intoxicating liquor. After being arrested, the defendant told Officer Smith that he was seeking help for a man he had seen shot at Johnson's Paving Company. Officer Smith took the defendant to Johnson's Paving Company where he found the body of Walter Pruitt. Thereafter, defendant told Officer Smith and other officers that he had shot Pruitt with a pistol. Pruitt was coming toward him with a knife, but it was not open. The defendant further stated that they had been arguing all day and that he knew he was going to have "to kill him sooner or later." The defendant further stated that Pruitt was in the front seat of the car and he (the defendant) was in the rear seat. The defendant gave two other statements to the deputy, both of them saying that he and Pruitt had gotten into a scuffle and when Pruitt turned around reaching for his knife, the defendant shot him.

A .38 caliber pistol, with one spent cartridge and two or three live cartridges, was found in the Chevrolet owned by Walter Pruitt. No knife was found on or near the body of Pruitt.

An autopsy of the body of Walter Pruitt showed a penetrating wound on the right rear side of his head above the ear which extended into the brain causing massive brain damage and hemorrhage that resulted in his death. A fragmented bullet which had caused his death was removed from Pruitt's brain.

The bullet taken from the brain of Walter Pruitt was fired from the .38 caliber pistol found in the white Chevrolet automobile.

The jury found defendant guilty of second degree murder, and from judgment imposing a prison sentence, defendant appealed.

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

Davis and Kimel, by Horace M. Kimel, Jr., for defendant appellant.

MARTIN, Judge.

[1] Defendant assigns as error the denial of his motion for judgment as of nonsuit.

The evidence, inclusive of a portion of defendant's statement to Deputy Sheriff Smith, was sufficient to support a finding that defendant intentionally shot Pruitt and thereby inflicted a bullet wound which proximately caused Pruitt's death. If so, nothing else appearing, defendant would be guilty of murder in the second degree. See *State v. Bolin,* 281 N.C. 415, 189 S.E. 2d 235 (1972). Defendant contends that his statement to Deputy Sheriff Smith discloses that he acted within his legal right of self-defense; and, the statements having been offered in the State's evidence, the State is bound by the portions thereof which are favorable to defendant.

"On a motion for judgment as in case of nonsuit, the evidence must be considered in the light most favorable to the State. Contradictions and discrepancies, even in the State's evidence, are matters for the jury and do not warrant nonsuit. (Citations.)" *State v. Bolin, supra; State v. Carter,* 254 N.C. 475, 119 S.E. 2d 461 (1961).

" 'When the State introduces in evidence exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by these statements.' (Citations.)" *State v. Bolin, supra.*

While the exculpatory statements of defendant introduced in State's evidence were competent to be considered on the motion to nonsuit, they may not be regarded as conclusive if there be other evidence tending to throw a different light on the circumstances of the homicide. *State v. Hankerson,* 26 N.C. App. 575, 217 S.E. 2d 9 (1975). The State was not bound by the exculpatory statements if other evidence offered pointed to a different conclusion and raised the reasonable inference from all the testimony that the shooting was intentional and unlawful. *State v. Hankerson, supra.*

There was plenary evidence that deceased died from a wound intentionally inflicted by defendant with a pistol, thus creating the presumption that the killing was unlawful and that it was done with malice. Upon the jury finding that deceased died from a wound intentionally inflicted by defendant with a

pistol, it became incumbent upon defendant to satisfy the jury that the killing was justified on the ground of self-defense. The facts stated in defendant's statements to Deputy Sheriff Smith are insufficient to show as a matter of law that defendant was entitled to exoneration on the ground of self-defense. Considered in the light most favorable to defendant, these facts were sufficient only to permit the jury to find to its satisfaction that defendant so acted. In any event, when the testimony of Eddie Smith, Dr. John Reese, Ernestine Lewis, Steve Dalton, Barry Bailey, Frank Satterfield, and Mrs. Walter Pruitt is considered, the court properly denied defendant's motion for judgment as in case of nonsuit.

[2] Defendant next assigns error to the admission into evidence of statements which defendant made to Officer Eddie Smith, Deputy Sheriff Steve Dalton and Officer Harry Trinks on two separate occasions.

After conducting a voir dire hearing, the trial court concluded as follows:

> "1. That there was no offer or hope of reward or inducement on the part of the State or anyone to the defendant to make a statement;
>
> 2. That there was no threat or suggested violence or show of violence to persuade or induce the defendant to make any statement;
>
> 3. That any statement made by the defendant to Officers Eddie Smith, Lt. Dalton and Chief Deputy Trinks or any or all of them upon November 9, 1974, and again on the morning of November 10, 1974 were made voluntarily, knowingly and independently;
>
> 4. That the defendant was in full understanding of his constitutional rights to remain silent and his rights to counsel and all other rights at the time of the interrogation on November 9th and the statements made at that time and on November 10th when he signed the written statement;
>
> 5. That he purposefully, freely, knowingly and voluntarily waived each of those rights and thereupon made a statement to the officers, above mentioned.
>
> THE COURT, THEREFORE, Upon these findings of fact and conclusions of law determined that any statement made

by the defendant, Arnold Paul Burleson on November 9 and November 10, 1974, in accordance with the above findings of fact and conclusions of law is admissible in evidence and that the motion to suppress this statement or statements under the totality of all the circumstances involved is DENIED."

The record reveals there was ample evidence to support the findings of fact, and the findings of fact, in turn, supported the court's conclusions. This assignment of error is overruled.

[3, 4] The defendant finally contends that, in light of *Mullaney v. Wilbur,* 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508 (1975), the trial court erred in its instructions to the jury regarding the presumption arising from the intentional killing with a deadly weapon and the burden being placed upon the defendant to "satisfy the jury" that malice was not present and thereby reduce the crime to manslaughter. The trial judge's instructions were in accord with the well settled law in the State of North Carolina at the time of the trial with regard to the burden of proof as to the presumption arising from the intentional killing with a deadly weapon and the burden of proof on self-defense.

The instant case was tried during the week of 24 April 1975. The *Mullaney* opinion was not announced until 9 July 1975. In *State v. Hankerson,* 288 N.C. 632, 220 S.E. 2d 575 (1975), tried at the 21 November 1974 Session of Nash County Superior Court, the Supreme Court of this State, affirming the opinion of this Court reported in 26 N.C. App. 575, 217 S.E. 2d 9 (1975), refused to give *Mullaney* retroactive effect in North Carolina and held that the defendant is not entitled to the benefit of the *Mullaney* doctrine. The Court held, however, that the *Mullaney* decision would be applied to all trials conducted on or after 9 June 1975. For the reasons set forth, this assignment of error is overruled.

The defendant had a fair trial free of prejudicial error.

No error.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. WILLIE LEE HAMMONDS

No. 7526SC802

(Filed 18 February 1976)

1. **Robbery § 4— common law robbery — putting victim in fear — sufficiency of evidence**

Evidence in a common law robbery prosecution was sufficient to be submitted to the jury where it tended to show that defendant entered a store where there were only two female employees, he demanded that one of the employees open the cash register, and the employee opened the register and parted with the money because of fear for her safety.

2. **Robbery § 5— common law robbery — use of force — jury instructions proper**

The trial court's instruction in a common law robbery prosecution that the taking of money must be "by the use of force or threatened use of immediate force" was proper.

APPEAL by defendant from *Baley, Judge.* Judgment entered 3 June 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 23 January 1976.

Defendant was charged in a bill of indictment with the felony of common law robbery. The State's evidence tends to show the following: On 19 February 1975 defendant entered the Li'l General Store on Beatties Ford Road between 7:30 p.m. and 7:45 p.m. Two female employees were the only people in the store at that time. Defendant purchased a package of cigarettes and then went behind the counter. He instructed one of the employees to open the cash register. Defendant took the currency from the cash drawer and left the store. He was apprehended by two police officers shortly thereafter and was immediately identified by the two employees. A search of defendant's person produced more than twenty-seven one dollar bills, four five dollar bills, and one twenty dollar bill. The jury found defendant guilty as charged.

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

Lindsey, Schrimsher, Erwin and Bernhardt, by Lawrence W. Hewitt, for the defendant.

BROCK, Chief Judge.

[1] Defendant first argues that his motion for nonsuit should have been allowed on the grounds that the State's evidence fails

to establish an assault. The State's witness Gaut testified: "[H]e said 'O.K. open your register' and I hit the total button and stepped back . . . I was scared when he came in and asked me for the money. The fact that he asked me for the money scared me . . . I wasn't about to refuse him the money and suffer the consequences . . . But I knew that he was serious about it, because he was standing in my face staring at me as if I had done something wrong. The way he said it—'O.K., open your register'—that was enough to let me know he was not joking."

The offense of robbery has been defined many times as the taking of money or goods with felonious intent from the person of another, or in his presence, against his will, by violence or putting him in fear. 6 Strong, N. C. Index 2d, Robbery § 1, p. 678. "It is not necessary to prove both violence and putting in fear—proof of *either* is sufficient." *State v. Watson,* 283 N.C. 383, 196 S.E. 2d 212 (1973); *see also State v. Moore,* 279 N.C. 455, 183 S.E. 2d 546 (1971).

> "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.'" (Citation omitted.) *State v. Norris,* 264 N.C. 470, 141 S.E. 2d 869 (1965).

"Moreover, actual fear need not be strictly and precisely proved, since the law will presume fear if there appears to be just grounds for it. And the mere fact that the victim complied with the assailant's demands is itself indicative of fear." 67 Am. Jur. 2d, Robbery § 22, p. 43.

It seems clear from the evidence that the victim in this case, State's witness Gaut, opened the cash register and parted with the money because of fear for her safety. Surely she was

not required to wait for defendant to commit a battery upon her. This assignment of error is overruled.

[2] Defendant next argues that the trial judge committed error in his explanation of one of the elements of common law robbery. The trial judge instructed the jury that the taking of the money must be "by the use of force or threatened use of immediate force." We see no prejudice to defendant by this instruction. It appears appropriate for the circumstances of this case.

We note that this charge is taken from N.C.P.I.—Crim. 217.10, which lists six elements of the offense of common law robbery. The sixth element being "that the defendant used force or threatened immediate use of force to obtain the property." It seems that this instruction places a heavier burden on the State than is required by the long standing and often approved instruction that the taking must be by violence or putting the victim in fear. Putting the victim in fear could be accomplished by means other than an actual "threatened immediate use of force."

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

No error.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. HENRY LEE CLARK

No. 7515SC718

(Filed 18 February 1976)

1. **Criminal Law § 66— pretrial photographic identification — failure to conduct voir dire — admissibility of evidence**

Defendant was not prejudiced by the trial court's failure to hold a *voir dire* on the pretrial photographic identification of defendant by the prosecutrix, since there was no evidence that the photographic identification was impermissibly suggestive and conducive to irreparable mistaken identity and it was obvious that the prosecutrix' in-court identification was based on her observations during the crime.

2. **Criminal Law § 86— prior misconduct of defendant — evidence admissible to impeach character**

The trial court in a second degree rape prosecution did not err in allowing the State to cross-examine defendant as to whether or

not he had ever issued worthless checks, since it is proper for the State to ask defendant on cross-examination questions regarding prior acts of misconduct in order to impeach his character.

3. Rape § 6— elements of rape — definition — jury instructions

The trial court adequately defined the elements of the charge of rape.

APPEAL by defendant from *Browning, Judge.* Judgment entered 22 May 1975 in Superior Court, CHATHAM County. Heard in the Court of Appeals 14 January 1976.

Defendant entered a plea of not guilty to an indictment charging him with the rape of Phyllis Kincy. Prior to trial the State announced that it would proceed on a charge no greater than second degree rape.

Evidence for the State, in substance, showed the following:

On the night of 1 September 1974, Phyllis Kincy was walking from church to her home about two blocks away. Defendant pulled his car alongside and asked her if she wanted a ride. She refused to ride and defendant stopped and forced her into his car by what she recognized as a pistol, and by threatening to blow her brains out. Defendant drove Kincy to a secluded area and forced her into a trailer where he severely beat her, disrobed her and forcibly had sexual intercourse with her. Kincy finally was able to escape and notify the police. She denied giving defendant consent and illustrated her condition with photographs taken of her at the sheriff's office on the night of the attack. Kincy did not know defendant personally, but had seen him many times near her mother's home.

Defendant offered evidence of alibi and denied ever having seen her before seeing her at the trial.

Defendant appealed to this Court from a judgment imposing a prison sentence.

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

Dark and Edwards, by L. T. Dark, Jr., for defendant appellant.

ARNOLD, Judge.

[1] We see no merit in defendant's argument that the court erred in failing to hold a voir dire on the pretrial photographic identification of defendant by the prosecutrix.

Testimony objected to was by Deputy Whitt who testified that some six months after the offense he showed Mrs. Kincy six black and white photographs and asked her to select her assailant if his photograph were present. She immediately picked out defendant's photograph. The six pictures were exhibited to the jury for their inspection.

There is no evidence that the photographic identification was impermissibly suggestive and conducive to irreparable mistaken identity. Moreover, it is obvious that Mrs. Kincy's in-court identification was based on her observations during the crime.

The evidence disclosed that Mrs. Kincy recognized defendant before he forced her into his car. She testified that defendant lived near her mother and she had seen him many times, and that she could see defendant in the light of the street lights. Also, after she was forced into the car she stated that she paid close attention to him so that she would "know what to tell the policeman." The car passed through several stoplights and traveled on streets with street lights.

Mrs. Kincy further testified that she was with defendant for several hours, and that he had intercourse with her several times before her escape. Although it was dark inside the trailer lightning was flashing and she described the inside of the trailer in detail.

We recognize that it is the better practice for the trial judge, even upon a general objection, to conduct a voir dire in the absence of the jury, make findings of fact, and thereupon determine the admissibility of the pretrial identification testimony. *State v. Knight,* 282 N.C. 220, 192 S.E. 2d 283 (1972); *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1972); *State v. Accor* and *State v. Moore,* 277 N.C. 65, 175 S.E. 2d 583 (1970); *State v. Hubbard,* 19 N.C. App. 431, 199 S.E. 2d 146 (1973). Nevertheless, the trial court's failure to conduct a voir dire in the instant case must be considered harmless error. The evidence is clear that the in-court identification of the defendant by the prosecutrix was based upon her observations of the defendant during the perpetration of the offense. *State v. Stepney, supra; State v. Smith,* 21 N.C. App. 426, 204 S.E. 2d 693 (1974).

[2] Defendant next contends that the trial court erred by allowing the State to cross-examine the defendant as to whether

or not he had ever issued worthless checks. We disagree. It is proper for the State, on cross-examination, to ask the defendant questions regarding prior acts of misconduct in order to impeach his character. *State v. Gainey,* 280 N.C. 366, 185 S.E. 2d 874 (1972); *State v. Hartsell,* 272 N.C. 710, 158 S.E. 2d 785 (1968).

[3] Finally defendant argues that the trial court erred in its instructions to the jury by inadequately defining the elements of the charge of rape. Defendant asserts that the charge failed to state that the use of force in the commission of the act is necessary in order that the defendant be convicted of rape.

The trial judge stated emphatically: "I charge that for you to find the defendant guilty of second degree rape, the State of North Carolina must prove three things beyond a reasonable doubt:

First, that the defendant had sexual intercourse with Phyllis Kincy.

Second, *that the defendant used or threatened to use force sufficient to overcome any resistance that she might make.*

Third, that Phyllis Kincy did not consent and it was against her will." [Emphasis added.]

The elements of second degree rape were adequately defined in the charge to the jury. Defendant has not shown any prejudicial error.

No error.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. JULIO J. HERENCIA, JR.

No. 7512SC801

(Filed 18 February 1976)

Criminal Law § 66— in-court identification of defendant — failure to conduct voir dire — no prejudice

Defendant was not prejudiced by the trial court's denial of his request for a *voir dire* on the in-court identification of defendant by his armed robbery victim where the evidence tended to show that the

in-court identification was based on the victim's observation at the crime scene and was not tainted by a chance meeting between defendant and the victim after commission of the crime.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 25 June 1975 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 23 January 1976.

Defendant was tried on an indictment charging armed robbery. The State's first witness, Cindy Charboneau, testified that she, the defendant, and another male companion went to the Yancys' mobile home on March 2, 1975, at about 4:00 a.m., with the intent to rob the premises. Miss Charboneau stated that she knocked on the door and asked David Yancy if she could purchase an ounce of marijuana. When Yancy opened the door the defendant forced his way in. The defendant was armed and wore a mask. The Yancys were threatened and robbed of their valuables.

The Yancys testified that they recognized defendant as the man who threatened and robbed them. They further testified that defendant was the same person who visited their house about ten days prior to the robbery and inquired about a former neighbor.

The jury returned a verdict of guilty of armed robbery. From judgment imposing a prison sentence, the defendant appealed to this Court.

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

John A. Decker, Assistant Public Defender, Twelfth Judicial District, for defendant appellant.

ARNOLD, Judge.

Defendant assigns error to the denial by the trial court of his motion for continuance. Such a motion is within the trial court's discretion and the exercise of that discretion is not for review in the absence of manifest abuse of discretion. *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1972); *State v. Morrison,* 19 N.C. App. 717, 200 S.E. 2d 341 (1973). No abuse is shown in the denial of defendant's motion.

Defendant contends that the court should have allowed his request for a voir dire on the in-court identification by Mr. Yancy. Defendant argues that since Yancy saw him between the time of the crime and the trial the in-court identification was tainted.

There is no merit in defendant's argument. Following the robbery the Yancys were at the Fort Brag I.D. Bureau and while there they saw defendant along with Miss Charboneau. The Yancys called the M.P.s, but defendant disappeared before the M.P.s arrived.

The prior confrontation about which defendant argues was neither illegal, nor was it arranged by the police. It happened by chance, and defendant's rights were not violated in any manner. There is no evidence of any illegal pretrial identification. *See State v. Cox,* 281 N.C. 275, 188 S.E. 2d 356 (1972).

The evidence from the record is clear and convincing that the in-court identification originated at the time of the robbery. It may have been better practice to have conducted a voir dire, upon defendant's request, and to have made findings that the in-court identification was of an independent origin, but the failure to do so in this case is harmless error. *State v. Stepney, supra; State v. Smith,* 21 N.C. App. 426, 204 S.E. 2d 693 (1974).

Defendant's trial was free of prejudicial error.

No error.

Chief Judge BROCK and Judge PARKER concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 4 FEBRUARY 1976

AMIN v. AMIN No. 7510DC751	Wake (74CVD9587)	Affirmed
DAUGHTRY v. DAUGHTRY No. 7511DC743	Johnston (74CVD0900)	Affirmed
STATE v. ANDERSON AND PRETTY No. 7510SC742	Wake (74CR55740) (74CR56711)	Appeal Dismissed
STATE v. BIVENS No. 7519SC725	Randolph (74CR11959)	Affirmed
STATE v. EVANS No. 7514SC740	Durham (74CR27098) (74CR27099)	Affirmed
STATE v. HAIRE No. 7519SC706	Montgomery (74CR6467)	No Error
STATE v. HAMILTON No. 753SC736	Pitt (74CR8530) (74CR8531)	No Error
STATE v. HUNT No. 7525SC711	Burke (74CRS819)	Affirmed
STATE v. JONES No. 754SC721	Duplin (74CR2237) (74CR2238)	No Error
STATE v. LESLIE No. 7510SC758	Wake (75CR22950)	Affirmed
STATE v. LEWIS AND WILLIAMS No. 7513SC724	Brunswick (74CR3734) (74CR3812)	Affirmed
STATE v. MITCHELL No. 754SC733	Onslow (74CR10052) (74CR10053)	No Error
STATE v. MORRIS No. 7519SC716	Rowan (74CR6757)	Appeal Dismissed
STATE v. PIERCE No. 7519SC791	Randolph (74CR8820) (74CR8821)	No Error
STATE v. STRICKLAND No. 7511SC735	Johnston (74CR4190)	No Error
STATE v. TOBE No. 7528SC785	Buncombe (75CR4485) (75CR4487)	No Error

FILED 18 FEBRUARY 1976

STATE v. GOSS AND STATE v. BRADSHER No. 7515SC788 and No. 7515SC800	Alamance (75CRS3467) (75CRS3470)	No Error
STATE v. HEAD No. 7529SC814	Rutherford (74CR2403A) (74CR2403)	No Error
STATE v. JONES No. 7511SC780	Johnston (74CR11113)	Affirmed
STATE v. MATTHEWS No. 7526SC805	Mecklenburg (74CR65756)	No Error
STATE v. OVERBY No. 752SC794	Tyrrell (75CRS58)	No Error
STATE v. SILVERS No. 7524SC741	Watauga (74CR2264)	No Error

BLANKENSHIP CONSTRUCTION COMPANY AND BEATRICE BLANKENSHIP, EXECUTRIX UNDER THE WILL OF A. V. BLANKENSHIP, DECEASED v. NORTH CAROLINA STATE HIGHWAY COMMISSION

No. 7526SC727

(Filed 3 March 1976)

Highways and Cartways § 9— building of highway — claim for additional compensation — notice and record keeping requirements of contract — failure of contractor to meet — action dismissed

In an action to recover additional compensation for the building of two sections of highways during which plaintiff contractor encountered unexpected rock conditions, the trial court properly determined that the notice and record keeping requirements of the parties' contract were not satisfied with respect to the plaintiff's claim for additional compensation, since the contract required that in order to qualify for additional compensation the plaintiff was required to furnish defendant written notice of the alleged changed conditions and, in the event the plaintiff and defendant failed to reach an agreement concerning the alleged changed conditions, keep an accurate and detailed cost record with the same particularity as force account records, which record defendant must be given the opportunity to supervise and check; but plaintiff orally notified defendant of the unexpected rock conditions, defendant informed plaintiff that a claim for additional compensation under a given section of the contract was precluded by the nature of the bid, plaintiff accepted defendant's reasoning and proceeded with the project, and after completion of the project plaintiff filed a claim for additional compensation and at that time prepared cost records in support of its claim.

APPEAL by plaintiffs from *Martin (Harry C.), Judge.* Judgment entered 25 March 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 13 January 1976.

The plaintiffs in this case are Blankenship Construction Company (a North Carolina corporation) and Beatrice Blankenship, executrix under the will of A. V. Blankenship, deceased. (These plaintiffs will hereinafter be referred to as Blankenship or the Contractor.) The defendant is the North Carolina State Highway Commission (now the Board of Transportation, hereinafter referred to as the Commission), an agency of the State authorized to let contracts for the construction of highways. This appeal arises out of a contract between the Commission and Blankenship for the construction of Projects 8.1657505 and 8.1657507 (hereinafter referred to as the Project), which consists of a segment of Interstate 85 northeast of Charlotte, extending to the Mecklenburg-Cabarrus County line, and the "In-

terstate 29 Connector," which is roughly three miles long and connects Interstate 85 with U.S. 29, two miles west of the Mecklenburg-Cabarrus County line.

The evidence tends to show the following: On or about 20 April 1966 Blankenship received an invitation to submit a bid for the Project described above. The Contractor promptly requested plans for the Project. The Contractor had three weeks to prepare its bid. After receiving plans and cross-sections for the Project, the Contractor spent one full day inspecting the site of the Project. They encountered no evidence of rock or other unusual conditions.

The plans prepared by the Commission indicated that the Commission had sponsored an investigation of the subsurface conditions of the Project and offered the results of this investigation to prospective bidders. However, to obtain the subsurface report, the Contractor was required to execute a form letter containing the following provisions:

> "The information contained herein [i.e., the subsurface report] is not implied or guaranteed by the North Carolina State Highway Commission as being accurate nor is it considered to be a part of the plans, specifications or contract for the project."
>
> . . . .
>
> "By having requested this information, the contractor specifically waives any claim for increased compensation or extension of time based on differences between the conditions indicated herein and the actual conditions at the project site."

The earth work summaries in the subsurface report disclosed approximately 27,000 cubic yards of rock throughout the Project. An amended earth work summary mailed to the Contractor a few days before the bid was due reflected 135,000 cubic yards of rock. This discrepancy did not pose a serious problem, for the Contractor "did not feel this was inconsistent with the profile sheets [they] already had because by taking the profile sheets and a plenimeter [they] came up with approximately 129,000 or 130,000 cubic yards. . . ."

The testimony of F. C. Seckler, the employee of the Commission who conducted the subsurface investigation, suggests that the subsurface report mailed to the Contractor did not

contain the full extent of his findings; specifically, the report did not indicate the discovery of rock at several drilling stations used for the subsurface investigation.

To prepare its bid, the Contractor considered more than 100 distinct work items. The largest category of work by far and the largest single cost item in the bid was unclassified excavation. Section 22 of the Standard Specifications for Roads and Structures, prepared by the Commission and incorporated in the contract, is entitled "Roadway and Drainage Excavation."

> "22-1.1 DESCRIPTION. This item shall consist of the removal and satisfactory disposal of all materials excavated within the limits of the right of way, including such intersecting roads, driveways, streets, outlooks, parking areas, unsuitable subgrade material and the replacement of such unsuitable material with satisfactory material, and shall include such excavation as is necessary for berm, inlet, outlet and lateral drainage ditches; for stripping material pits, and for the formation, compacting and shaping of all embankments, subgrade, shoulders, slopes, intersections, approaches, and private entrances, to conform to the typical cross section shown on the plans and to the lines and grades set by the Engineer. . . ."

Section 22-1.2 defines four classes of excavation: (a) Solid Rock Excavation; (b) Unclassified Excavation; (c) Drainage Ditch Excavation; and (d) Stripping Excavation. It appears from the definition of unclassified excavation that it encompasses any and all of the other classes of excavation encountered within the original slope stakes: "Unclassified Excavation shall include all excavation within the limits of the original slope stakes." (22-1.2[b]).

The proposed contract called for approximately 2,076,000 cubic yards of unclassified excavation, and the Contractor bid $612,420.00 for this item. The bid for unclassified excavation was based on two major cost considerations: first, the estimated quantity of solid rock (130,000 cubic yards) was multiplied by the rate of $1.50 per cubic yard; and the remaining amount of excavation, the so-called "rough excavation," was calculated at a rate of about $.22 per cubic yard. The Contractor's total bid amounted to $1,570,369.19. As the lowest bidder, Blankenship was awarded the contract for the Project on 11 May 1966. After

the contract was executed by both parties, the Contractor began work on the Project in late June.

As work progressed, the Contractor encountered more rock excavation than originally anticipated. The first cut on the Project was made at Station 180 in July 1966, and it was mostly rock. Likewise, the next cut consisted of a large quantity of rock. None of this rock appeared in the subsurface information supplied by the Commission. In the fall the first major cut also contained large quantities of rock, and at this stage the Contractor realized that its original estimate of solid rock excavation was grossly inaccurate. Rather than the original estimate of 130,000 cubic yards, the Contractor's evidence reveals that between 750,000 and 800,000 cubic yards of rock were encountered on the job.

Due to the unexpected quantities of rock, the Contractor fell behind schedule. The construction engineer's report dated 18 January 1967 contained the following reference to the large quantities of rock:

> "Unclassified material has high percentage rock making it ideal for working this time of year. Contractor has placed another culvert crew on project in an attempt to increase culvert construction which is falling behind."

In April 1967 Malcolm Blankenship called John Davis, the Commission's chief engineer, to discuss the unexpected quantities of rock.

> "At that time I didn't know John Davis. I went to the field office which was just a few feet, I went inside and picked up the phone and called information and got the Commission telephone number and called it. The operator inside the Highway Commission building answered the phone, and I asked for Mr. John Davis. They connected me with Mr. Davis, and I told Mr. Davis this was Malcolm Blankenship, and I would like to come up and discuss the amount of rock on the project with him. He told me that we had bid the job unclassified. I was trying to talk to him about the difference in the amount of rock that we incurred from that shown on the subsurface information and that we were encountering rock throughout the job. He asked me if we received a letter. I told him we did. Then he confirmed that we had received the subsurface information, then he asked me what was on the subsurface information

and I told him, but there was a big difference between it and what we found, and I would like to come up to see him. He said it wouldn't be necessary for me to come up and see him. I would just be wasting my time and his time, too. I didn't know much what to say then. He said, 'Now, if you want to come on, you can come,' but he said, 'You'll just be wasting your time.' That ended the conversation."

The contract completion date, originally 1 December 1967, was extended to 21 April 1968 by supplemental agreement and pursuant to the extension of time terms of the contract. Due to the large quantity of rock excavation and other problems, the Contractor did not finish the Project until 9 March 1969. The Contractor received partial payments as the work was done and a final payment after completion of the Project. In all the Contractor was paid $1,506,369.10, after a $64,000.00 deduction from contract price for liquidated damages as provided by the contract.

Malcolm Blankenship kept a regular record of significant occurrences on the job by making notations almost daily on his personal set of plans. The quantity of solid and ripping rock excavated was recorded in this form. In addition the Contractor maintained payroll records which provided the information for periodic reports to the Commission and the Federal Government.

Approximately one year after the completion of the Project, the Contractor filed a claim for additional compensation. Meanwhile, the final estimate for work performed under the contract was paid on 24 January 1972. On 14 April 1972 the Contractor filed a verified claim with the State Highway Administrator in the amount of $4,167,276.30. The verified claim contained numerous separate claims within the following broad categories: (A) Failure of Commission to make right of way available ($136,016.08); (B) Commission's changes in work ($284,281.11); (C) Errors in plans ($406,809.10); (D) Errors in subsurface information ($2,723,048.27); (E) Changes in work caused by third parties ($79,225.44); (F) Errors in Commission's computation of quantities ($421,666.58); (G) Extended overhead ($50,400.00); (H) Delays — Liquidated damages ($65,800.00); (I) Recapitulation; and (J) Interest. The Administrator denied the claim *in toto,* and the Contractor promptly filed suit in the Mecklenburg County Superior Court according to G.S. 136-29.

In the summer of 1973, while the suit was pending, the Contractor turned over to the Commission its cost records relating to the job. At the request of the Highway Commission, Malcolm Blankenship prepared a comprehensive cost summary, first on a weekly basis and then on a daily basis. According to Blankenship's testimony:

> "Plaintiffs' Exhibits P-18 (a), (b), (c) and (d) are the cost records which I got up for the State at their request. They relate to the various items of the claim that I have previously discussed here in Court. I obtained the information from my payroll. I also obtained the information as to what equipment was used from my payroll. I also used my own memory and recollection in preparing the material. The plans that I had on the project, previously identified as P-5(a), were used as sort of a diary on the job. I referred to those notations and records in preparing the records. In addition I referred to the diaries and daily reports which were kept by our company and A. V. Blankenship.
>
> "I had some diaries that were kept by my foremen and daily reports, also some that were kept by A. V. Blankenship, and some daily reports that were prepared from time to time. Sometime during the construction of the project some of our diaries and daily reports were destroyed by fire. This was in the fall of 1966 and would have involved approximately the first few months on the job.
>
> "These diaries and daily reports were made available for inspection by the State auditors and its attorneys when they were in Atlanta. The information for example relating to parts and repair that were used for the maintenance of the equipment on this job was obtained from our company books. Information on things like dynamite and fuel were obtained from invoices and from the company's ledgers and the company books. This was true with respect to the parts since there were invoices for those too. All of these were in Atlanta and all of those were in the same filing cabinets that we made available to the State auditors and attorney."

For the convenience of the Commission and the court, a summary of the cost records described above was prepared (P-19); the first two pages summarize all the costs, while the remainder depicts costs according to each specific claim.

At the conclusion of plaintiffs' evidence at trial, the trial judge rendered judgment against the plaintiff Contractor. The judgment was buttressed by findings of fact with respect to each claim. Of paramount importance to this appeal are the "additional specific findings with reference to each and every claim item submitted by the contractor":

"203. The court finds, with regard to each and every claim presented by the contractor in its verified claim and complaint which requested additional compensation, that the contract requires the contractor, before beginning work on any aspect of construction that the contractor believed to be entitled to compensation over and above that stipulated in the contract or for which there is no provision in the contract for compensation, to give the Engineer of the defendant written notice of such request for such additional payment for such alleged work.

"204. In addition, the contract requires the contractor, before any work or any aspect of construction in issue is begun and after written notice of a request for additional compensation is given and is denied by the Engineer, to further notify the Engineer in writing of its intent to file a claim for additional payment for such alleged work.

"205. Moreover, in conjunction with the written notice of the intention to file a claim, the contract requires the contractor to keep, during the course of construction of the work in issue, an accurate and detailed cost record of such work in accordance with the procedures provided by Section 9.4 of the Standard Specifications.

"206. The contract requires that the records, which are kept during the course of construction of the work in issue, shall be made available to the Engineer of the defendant in order that the Engineer can supervise and check the keeping of the contractor's records.

"207. The cost records for the construction items in issue are required by the contract to be kept separate and apart from the general records kept by the contractor during the course of the construction of the project as a whole.

"208. Specifically, with regard to each and every claim for compensation in the contractor's verified claim and com-

plaint, the court finds that there was no credible evidence that the contractor:

"(a) gave written notice to the Engineer of the defendant, before beginning work on any item of construction now mentioned in its claim, that it was entitled to compensation for the work to be performed over and above that stipulated in the contract or for any work it contended was not in the contract;

"(b) gave written notice to the Engineer of the defendant, before beginning work on any item of construction now mentioned in its claim, that it would file a claim for additional payment for such alleged work;

"(c) kept, during the course of construction of the work in issue, accurate and detailed cost records of such work in accordance with the procedures provided by Section 9.4 of the contract;

"(d) made any cost records available to the Engineer of the defendant during the course of construction of the work in issue in order that the Engineer could supervise and check the keeping of such records; or

"(e) kept any cost records of the construction items in issue separate and apart from the general records kept by the contractor during the course of the construction of the project as a whole.

"209. The court further finds, however, that the contractor failed to present any competent evidence of any records, in the manner required by the contract or otherwise, of the costs applicable to the various items now claimed by the contractor in its verified claim and complaint.

"210. The contractor's exhibits 18-A, 18-B, 18-C, 18-D and 19 were prepared after this lawsuit was filed and do not otherwise comply with the contract provisions for the keeping of cost records for work performed for which the contractor claims to be entitled to additional compensation.

"211. The contract provided for compensation for the actual work done at the contract unit prices in the absence

of compliance with contract provisions for additional compensation, which included compensation for work required because of errors, changes or alterations in the plans and specifications.

"212. The contract anticipated that there could be errors and changes or alterations in the plans and specifications in the construction of the project.

"213. The contractor has failed to produce any competent evidence to show compliance with the provisions for the keeping of cost records required of the contract to support any part of its claim.

"214. The written contract which the contractor executed clearly provided the method by which the contractor could insure himself of additional compensation which he might be entitled to for changes, alterations or additional work performed.

"215. The credible evidence of this case, clearly show non-compliance on the part of the contractor with the conditions and provisions of the contract for obtaining additional compensation by reason of alterations, changes or extra work."

Greene, Buckley, DeRieux & Jones, by Ferdinand Buckley, James A. Eichelberger, and Frank E. Jenkins III; and Kennedy, Covington, Lobdell & Hickman, by Hugh L. Lobdell, attorneys for plaintiffs.

Attorney General Edmisten, by Eugene A. Smith, Special Deputy Attorney General, and Robert W. Kaylor, Associate Attorney, for the defendant.

BROCK, Chief Judge.

It is appropriate to preface this opinion by acknowledging the well-established rule that the Commission is not subject to suit except in the manner provided by statute. *Teer Co. v. Highway Commission,* 265 N.C. 1, 143 S.E. 2d 247 (1965). General Statute 136-29 establishes the procedure for the settlement of claims against the Commission by a contractor who has not received "such settlement as he claims to be entitled to under his contract." This language has been construed to mean that recovery is possible only within the terms and framework of the contract. *Teer Co. v. North Carolina State Highway Comm.,*

4 N.C. App. 126, 166 S.E. 2d 705 (1969). Thus the general question raised by this appeal is whether the Contractor is entitled to compensation in excess of the original contract price under the provisions of its contract with the Commission.

The Contractor's claim for additional compensation is governed by several provisions of the "Standard Specifications for Roads and Structures" incorporated into the construction contract. The first is entitled "Changed Conditions"; in particular, Section 4.3A, "Alteration of Plans or Character of Work":

> "The Commission reserves the right to make, at any time during the progress of the work, such increases or decreases in quantities and such alterations in the details of construction, including alterations in the grade or alinement of the road or structure or both, as may be found to be necessary or desirable. Such increases or decreases and alterations shall not invalidate the contract nor release the Surety, and the Contractor agrees to accept the work as altered, the same as if it had been a part of the original contract.
>
> "Under no circumstances shall alterations of plans or of the nature of the work involve work beyond the termini of the proposed construction except as may be necessary to satisfactorily complete the project.
>
> "Unless such alterations and increases or decreases materially change the character of the work to be performed or the cost thereof, the altered work shall be paid for at the same unit prices as other parts of the work. *If, however, the character of the work or the unit costs thereof are materially changed, an allowance shall be made on such basis as may have been agreed to in advance of the performance of the work, or in case no such agreement has been reached, then the altered work shall be paid for by force account in accordance with Article 9.4.*
>
> "No claim shall be made by the Contractor for any loss of anticipated profits because of any such alteration, or by reason of any variation between the approximate quantities and the quantities of work as done.
>
> "Should the Contractor encounter or the Commission discover during the progress of the work conditions at the site differing materially from those indicated in the con-

tract, which conditions could not have been discovered by reasonable examination of the site, *the Engineer shall be promptly notified in writing of such conditions before they are disturbed.* The Engineer will thereupon promptly investigate the conditions and if he finds they do so materially differ and cause a material increase or decrease in the cost of performance of the contract, an equitable adjustment will be made and a supplemental agreement entered into accordingly.

"In the event that the Commission and the Contractor are unable to reach an agreement concerning the alleged changed conditions, *the Contractor will be required to keep an accurate and detailed cost record which will indicate not only the cost of the work done under the alleged changed conditions, but the cost of any remaining unaffected quantity of any bid item which has had some of its quantities affected by the alleged changed conditions, and failure to keep such a record shall be a bar to any recovery by reason of such alleged changed conditions. Such cost records will be kept with the same particularity as force account records and the Commission shall be given the same opportunity to supervise and check the keeping of such records as is done in force account work.*" (Emphasis added.)

According to this language, whether a material change in the character of the work is induced by increases or decreases in quantities or alterations in the details of construction by the Commission, or the result of unexpected conditions at the site, the Contractor is required to notify the Commission of the changed condition(s) and negotiate an "allowance" or "equitable adjustment" to be embodied in a supplemental agreement. In the case of altered work, if no agreement can be reached, the altered work shall be paid for by force account. Similarly, in the case of work done under changed conditions, if the Contractor and Commission fail to negotiate a supplemental agreement, the Contractor must keep cost records of such work "with the same particularity as force account records."

In addition to the procedures discussed above for compensation for changed conditions, the contract provides for payment of "Extra Work," Section 4.4. Extra work is defined as "construction for which there is no unit or lump sum contract price" (Section 1.26). Payment for extra work is predicated on a determination by the Engineer that there is extra work to be

performed and an authorized modification providing for the performance of extra work. If the Contractor and Engineer agree on the price for the extra work, a supplemental agreement should be issued in conjunction with the authorized modification; if no agreement is reached for the price of extra work, the Contractor must furnish "a force account notice" in conjunction with the authorized modification (Sections 4.4[A][1] and [2]). In the event the Engineer disagrees that there is extra work and issues a written denial of the Contractor's request for an authorized modification, but the Contractor intends to seek compensation for performing such alleged extra work, the following procedures apply:

> ". . . [The Contractor] shall notify the Engineer in writing of his intention to file a claim for such payment and shall receive written acknowledgement from the Engineer that such notification has been received before he begins any of the alleged extra work. In such case the Contractor will be required to keep an accurate and detailed cost record which will indicate the cost of performing the extra work. Such cost records will be kept with the same particularity as force account records and the Commission shall be given the same opportunity to supervise and check the keeping of such records as is done in force account work.
>
> "The Contractor's claim to increased compensation as provided herein will be limited to the amount which would have been due the Contractor if payment for the work had been made on a force account basis as provided by Article 9.4." (Section 4.4C.)

Therefore, whether the work performed falls in the category of "altered work," "work done under the changed conditions," or "extra work," the procedures for obtaining additional compensation are generally the same. In each case the Contractor must first seek a supplemental agreement for the price of the work in question prior to the performance of such work. If an agreement cannot be reached, the Contractor must insure that the Engineer or Commission is on notice of its intention to file a claim for additional compensation, maintain accurate and detailed cost records "with the same particularity as force account records," and provide the Commission the same opportunity to supervise the keeping of such records as is done in force account work.

Section 9.4, entitled "Force Account Work," describes the manner in which work done on a force account basis is paid for:

"1. Labor. For all labor and foremen in direct charge of the specific operations, the Contractor shall receive the base rate of wages (or scale) actually being paid by the Contractor for the class or classes of labor normally necessary to perform the work for each and every hour that said labor and foremen are actually engaged in such work, to which rate 30% will be added. Before beginning the work the Contractor shall file with the Engineer for his approval a list of all wage rates applicable to the work. Approval will not be granted where these wage rates are not actually representative of wages being paid elsewhere on the project for comparable classes of labor performing similar work, or where these wage rates include costs paid to or on behalf of workmen by reason of any fringe benefit.

"2. Bond, Insurance, and Tax. For property damage, liability, and workmen's compensation insurance premiums, unemployment insurance contributions and social security taxes on the force account work, the Contractor shall receive the actual cost, to which cost 6% will be added. The Contractor shall furnish satisfactory evidence of the rate or rates paid for such bond, insurance, and tax.

"3. Materials. For materials accepted by the Engineer and used, the Contractor shall receive the actual cost of such materials delivered on the work, including transportation charges paid by him (exclusive of machinery rentals as hereinafter set forth), to which cost 15% will be added.

"4. Equipment. For any machinery or special equipment (other than small tools) including fuel, lubricants, cutting edges, all repairs and all other operating and maintenance costs (other than operator) plus transportation costs for equipment not already on the project, the Contractor shall receive the rental rates listed in the current schedule published by the Associated Equipment Distributors. When equipment is used for

a period less than one month, the rental rate shall be computed on an hourly basis using an hourly rate which is 1/176 of the monthly rate. When equipment is used for a period of one month or more, the rental rate shall be on a monthly rate basis.

"5. Miscellaneous. No additional allowance will be made for general superintendance, the use of small tools, or other costs for which no specific allowance is herein provided.

"6. Compensation. The Contractor's representative and the Engineer shall compare records of the cost of work done as ordered on a force account basis.

"7. Statements. No payment will be made for work performed on a force account basis until the Contractor has furnished the Engineer with duplicate itemized statements of the cost of such force account work detailed as follows:

"a. Name, classification, date, daily hours, total hours, rate, and extension for each laborer and foreman.

"b. Designation, dates, daily hours, total hours, rental rate, and extension for each unit of machinery and equipment.

"c. Quantities of materials, prices, and extensions.

"d. Transportation of materials.

"e. Cost of property damage, liability and workmen's compensation insurance premiums, unemployment insurance contributions, and social security tax.

"Statements shall be accompanied and supported by receipted invoices for all materials used and transportation charges. However, if materials used on the force account work are not specifically purchased for such work but are taken from the Contractor's stock, then in lieu of the invoices the Contractor shall furnish an affidavit certifying that such materials were taken from his stock, that the quantity claimed was actually used, and that the price and transportation claimed represents the actual cost to the Contractor."

Strict compliance with the contract provisions discussed above is a vital prerequisite for the recovery of additional compensa-

tion based on altered work, changed conditions, or extra work. The Contractor assigns error to the trial judge's finding that the Contractor failed to comply with the notice requirement and the record-keeping requirement prescribed by the contract in connection with its claims for additional compensation.

In order to qualify for additional compensation under Sections 4.3A or 4.4(C), the Contractor is required to furnish the Engineer written notice of the alleged changed conditions and, in the event the Contractor and Engineer fail to reach an agreement concerning the alleged changed conditions, keep an accurate and detailed cost record with the same particularity as force account records. Furthermore, the Commission must be given the same opportunity to supervise and check the keeping of such records as is done in force account work.

While the form of the notice—written or oral—may not be critical, the content of the notice must satisfy the underlying purpose of the notice requirement. In this case the Contractor orally notified the Engineer in the spring of 1967 of the unexpected rock conditions. The Engineer, Mr. Davis, informed the Contractor that the nature of the bid as "unclassified excavation" precluded a claim for additional compensation under Section 4.3A. It appears that the Contractor accepted Mr. Davis' reasoning and proceeded with the Project. Then, after completion of work on the Project, the Contractor filed a claim for additional compensation and at that time prepared cost records in support of its claim. In our opinion the purpose of the notice requirement of Section 4.3A is to apprise the Commission of the Contractor's belief that he has encountered "work conditions at the site differing materially from those indicated in the contract" for which he is entitled to an "equitable adjustment." The Contractor's notice in this case was equivocal at best; from the Engineer's standpoint, it amounted to a tentative inquiry rather than a forceful indication of changed conditions and demand for equitable compensation. Under the particular circumstances of this case, we affirm the trial judge's finding that the notice requirement of Section 4.3A or 4.4 was not satisfied with respect to the Contractor's claim for additional compensation.

Even if the Contractor's notice had sufficed, and the Engineer's response is given the same effect as a denial of changed conditions, it appears that the Contractor failed to comply with the record-keeping requirement of Section 4.3A or 4.4(C). The

Contractor's cost records, although derived from records kept by the Contractor during the course of the Project, were prepared after the completion of the Project. When viewed in conjunction with the notice requirement, it is clear that the record-keeping provision is designed to involve both parties in the record-keeping process as the work in question is performed. The contract specifies the form and manner in which the cost records must be prepared.

> ". . . The Commission shall be given the same opportunity to supervise and check the *keeping* of such records as is done in force account work." (Emphasis added.)

In Section 9.4(1) concerning the force account payment for labor, the following appears: "Before beginning the work the Contractor shall file with the Engineer for his approval a list of all wage rates applicable to the work."

Taken together, these provisions require that the cost account records be kept as the work in question is performed. The latter requirement in Section 9.4(1) presupposes that the Contractor has given the Commission clear and unequivocal notice of its desire to be compensated for altered work, work under changed conditions, or extra work prior to performing any of the work in question. Furthermore, the provision in Section 4.3A, which is repeated in Section 4.4(C) (Claims for Increased Compensation for Extra Work), affords the Commission an opportunity to supervise and check the *keeping* of the cost records. The policy of this provision is clear: such supervision and checking, to be effective at all in protecting the State from a claim based on inaccurate cost estimates, must be made possible as the work is performed. Had the Contractor in this case maintained such records during the course of the Project and notified the Commission of this action so as to provide the Commission with the opportunity to supervise and check the keeping of these records, the only question would be whether the Contractor encountered changed conditions or extra work under Sections 4.3 and 4.4. However, failure to comply with the notice and record-keeping requirements constitutes a fatal flaw in all of the Contractor's claims for additional compensation.

In construing the provisions of Sections 4.3 and 4.4, we are not blind to the possibility that the Contractor in this case encountered considerably changed conditions and extra work. But the position of the Contractor must be balanced against the

Commission's compelling need to be notified of a "changed conditions" or "extra work" problem and oversee the cost records for the work in question. The notice and record-keeping requirements are clearly set forth in the contract. The Contractor's failure to comply with these procedures is inexcusable. The Contractor first discovered the alleged changed conditions in the fall of 1967; the work on the entire Project was completed on 7 March 1969. On 2 January 1970 the Contractor filed a claim for additional compensation. After receiving payment for the final estimate under the contract, the Contractor filed a verified claim in the spring of 1972 for $4,167,276.30, more than twice the original contract price. The Commission did not receive adequate notice of the claim or have a sufficient opportunity to supervise the maintenance of the cost records as prescribed by Sections 4.3 and 4.4. The notice and record-keeping procedures of these provisions are not oppressive or unreasonable; to the contrary, they are dictated by considerations of accountability and sound fiscal policy. The State should not be obligated to pay a claim for additional compensation unless it is given a reasonable opportunity to insure that the claim is based on accurate determinations of work and cost. The notice and record-keeping requirements constitute reasonable protective measures, and the Contractor's failure to adhere to these requirements is necessarily a bar to recovery for additional compensation.

We find no error in the dismissal of plaintiffs' claim for remission of liquidated damages without prejudice. Even if such a dismissal were improper, it would not affect the validity of the findings of fact and conclusions of law with respect to plaintiffs' other claims. Plaintiffs' opportunity under the judgment of dismissal to commence a new action within a year on their claim for liquidated damages withheld by the Commission fully cured any conceivable error underlying the dismissal. This assignment of error is overruled.

The judgment of the trial court is

Affirmed.

Judges BRITT and MORRIS concur.

In re Paul

IN THE MATTER OF: JEROME PAUL

No. 7510SC855

(Filed 3 March 1976)

1. **Contempt of Court § 2— direct contempt — post-trial adjudication — notice and hearing**

Before an attorney may be finally adjudicated in contempt and sentenced after trial for conduct during the trial, he must be given reasonable notice of the specific charges and an opportunity to be heard in his own behalf.

2. **Contempt of Court § 2— attorney's remarks during trial — post-trial adjudication — notice and hearing**

The due process requirements of notice and an opportunity to be heard were adequately met before an attorney, at the conclusion of a trial, was found by the trial judge to be in direct contempt of court for remarks which the attorney had made during the course of jury selection where, on the day following the remarks, the trial judge gave the attorney a written transcript of the remarks for which the attorney was being cited for contempt, the trial judge thereafter advised the attorney that immediately upon the return of a jury verdict in the trial the attorney would be cited for contempt for such remarks and that the judge would permit and hear a statement by the attorney in open court relating to such remarks, and the attorney was permitted to make a statement in open court before the judge adjudicated him to be in contempt.

3. **Contempt of Court § 2; Judges § 5— attorney's remarks during trial — post-trial contempt hearing — failure of trial judge to recuse himself**

The trial judge did not err in failing to disqualify himself from post-trial contempt proceedings against an attorney for remarks made by the attorney during the trial where the record shows that the trial judge did not react strongly to the attorney's remarks, that there were no "marked personal feelings" or "personal stings" on behalf of the trial judge, and that there was not such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused.

4. **Contempt of Court § 2— attorney's remarks during jury selection — direct contempt**

Remarks made by an attorney during jury selection in a murder trial were properly found by the trial judge to constitute direct contempt of court.

5. **Contempt of Court §§ 2, 4— contempt statutes — constitutionality**

The statute enumerating contempts, G.S. 5-1(1), and the statute providing for summary punishment for direct contempt, G.S. 5-5, are not unconstitutionally vague and do not violate due process.

In re Paul

ON *writ of certiorari* to review order entered by *Hobgood, Judge.* Order entered 15 August 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 11 February 1976.

At the conclusion of a murder trial over which he presided, Judge Hamilton Hobgood found petitioner, a lawyer, to be in direct contempt of court for remarks which petitioner had made earlier during the course of jury selection. The court entered judgment and made findings of fact as follows:

> "The Court finds as a fact that during the first day of trial . . . on the 14th day of July, 1975, the Court directed Mr. Jerry Paul, Chief Counsel for the defendant, . . . to sit down three times before the said Paul did so after a ruling of the court to which the said Jerry Paul was vocally objecting. The court then admonished the said Jerry Paul that when a court ruled it was a ruling of the court and further statements of counsel critical of the ruling were not in order.
>
> The Court further finds as a fact that on the following day, July 15, 1975 at 2:55 o'clock p.m. when the court was hearing defense counsel, Jerry Paul, in the absence of the prospective juror Jenny Lancaster, in reference to the court's ruling on certain questions propounded to said juror by defense Jerry Paul. On that occasion Jerry Paul in a very loud voice stated that the court's rulings were denying the defendant an opportunity to effectively pick good jurors and to return to the method the court was suggesting was to return to a hundred years ago and made absolutely no sense whatsoever, at which time the court denied the defense counsel the right to ask certain questions in the manner put by defense counsel to which Jerry Paul answered in a very loud voice that any questions the state asked, they were allowed to ask, and the questions he wanted to ask were not being allowed to ask and that the court was showing bias in favor of the State and was not giving to the defense a fair trial. Thereafter, a conversation occurred between the court and the defendant as to the method of asking questions during which time defense counsel, Jerry Paul, stated that the State was taking longer to examine jurors than the defense was taking.
>
> The Court further finds as a fact that this statement as to time consumed by the State was not true at which

time Jerry Paul answered that the reason the court was cutting him off was because the defendant was getting an advantage and the court was favoring the State and the court was proceeding in a manner to ensure . . . [defendant's] conviction.

The Court further finds as a fact that the records amply disclose that this was not a true statement at which time the defense counsel, Jerry Paul, in a voice indicating loud anger asked the court to recluse [sic] himself because he didn't think that the court was capable of giving . . . [defendant] a fair trial and he didn't intend to sit or stand there and see an innocent person go to jail for any reason and that the court could threaten him with contempt or anything else but it did not worry him, at which time Attorney Jerry Paul instantly turned his back to the court and in a loud voice addressed the News Media and others in the courtroom and said 'and to sit there and say like the queen of hearts off with the heads, the law is the law, is to take us back one hundred years,' whereupon Attorney Jerry Paul then turned back to the court and said that he intended to ask the questions and said in a loud voice 'it is apparent I'm disgusted with the whole matter, whole matter of ever bringing . . . [the defendant] to trial anyway.' Thereafter he made further statements and at the completion of these statements the court inquired if he was through he stated 'I am through for the moment but not through for this trial.'

The Court finds as a fact that the statements made by the said Attorney Jerry Paul on said occasion were in manner made to disrupt the trial and in an apparent attempt to force the court at that time to find him in contempt of court in order that a mistrial would result.

The Court concludes from the above findings of fact that the above acts of Jerry Paul as set forth in these Findings of Fact are in direct contempt of this court.

The Court further concludes that in order to keep this trial in progress which was necessary in the ends of justice, this Order was delayed until the . . . [defendant's] trial had been completed.

Now, therefore, it is ordered, adjudged and decreed that the said Attorney Jerry Paul is in direct contempt of

court and he is hereby ordered in punishment therefor to be confined in the common jail of Wake County for a period of fourteen days.

This the 15th day of August, 1975 and 12:10 p.m. o'clock."

On 20 August 1975, a Writ of Certiorari was issued by this Court to review the contempt order and judgment of imprisonment, and petitioner was released pending review by this Court.

Attorney General Edmisten, by Senior Deputy Attorney General Andrew A. Vanore, Jr., and Associate Attorney Joan Byers.

Paul, Keenan, Rowan and Galloway, by James E. Keenan, James V. Rowan and Karen Bethea Galloway, for defendant appellant.

District Attorney Burley B. Mitchell, Jr., Tenth Prosecutorial District, Kyle S. Hall, Assistant District Attorney and Joyce A. Hamilton, Assistant District Attorney, for amicus curiae.

ARNOLD, Judge.

[1] The U. S. Supreme Court held in *Taylor v. Hayes,* 418 U.S. 488, 41 L.Ed. 2d 897, 94 S.Ct. 2697 (1974), that due process safeguards must be extended to persons cited for direct contempt of court in cases where final adjudication and sentencing for the contemptuous conduct is delayed until after trial.

"We are not concerned here with the trial judge's power, for the purpose of maintaining order in the courtroom, to punish summarily and without notice or hearing contemptuous conduct committed in his presence and observed by him. [Citation omitted.] The usual justification of necessity [citation omitted] is not nearly so cogent when final adjudication and sentence are postponed until after trial. Our decisions establish that summary punishment need not always be imposed during trial if it is to be permitted at all. In proper circumstances, particularly where the offender is a lawyer representing a client on trial, it may be postponed, until the conclusion of the proceedings. [Citation omitted.]. . . .

On the other hand, where conviction and punishment are delayed, 'it is much more difficult to argue that action without

notice or hearing of any kind is necessary to preserve order and enable [the court] to proceed with its business.' . . . Groppi [*Groppi v. Leslie,* 404 U.S. 496, 30 L.Ed. 2d 632, 92 S.Ct. 582 (1972)] counsels that before an attorney is finally adjudicated in contempt and sentenced after trial for conduct during trial, he should have reasonable notice of the specific charges and opportunity to be heard in his own behalf. This is not to say, however, that a full scale trial is appropriate." *Taylor v. Hayes, supra,* at 497-499.

[2] One of the questions presented by this appeal is whether the due process requirements of (1) reasonable notice and (2) an opportunity to be heard were provided to petitioner. From the record the following facts appear to be pertinent to this issue:

(1) The findings of contempt resulted from an incident which occurred on July 15, 1975, during the jury selection.

(2) The petitioner was given a verbatim transcript on 16 July 1975 of the previous day's incident from which the finding of contempt resulted. This transcript was given the petitioner in open court and findings of fact were made by the presiding judge that the incident took place at 2:55 p.m. on July 15, and stated ". . . this is called instance number one in reference to Mr. Paul and I am now handing him a record, verbatim record from the transcript of just what you said yesterday."

(3) On 21 July 1975, Judge Hobgood advised petitioner in chambers that immediately upon return of a jury verdict in the murder trial the petitioner would be cited for contempt for his statements in court on 15 July 1975.

(4) On 12 August 1975, Judge Hobgood explicitly advised petitioner in chambers that the court would permit and hear a statement by petitioner in open court relating to his actions on 15 July 1975.

(5) On 15 August 1975, petitioner was given an opportunity to be heard, and he made the following statement:

> "MR. PAUL: I would sort of respond to your Honor, if I might. If your Honor pleases, even though I tried cases before you before, I didn't get to know you too good.

THE COURT: We got to know each other better in this trial.

MR. PAUL: Better in this trial. And I hope that both of us and all of us have grown more than—more as human beings and understanding each other. Realize we have had disagreements. I hope that out of those disagreements have come growth as human beings that lead us towards understanding in reaching what is the truth.

Myself, I'm what you call an advocate or believer of nonviolence and basically of Dr. King's philosophy, as most of the people on the defense team are. And it is with this philosophy we proceed through life. This philosophy we speak out at people when we think they are wrong, but we do not do so because we just dislike them, dislike them out of hatred; do not do so to make them—to belittle them or to hurt them in any way; we do so only in order to call attention to particular issues of dialogue in a trial like this.

I, myself, your Honor, am very emotionally involved and feel very strongly about this young lady. And I would do—would give up a great deal for her, because as Dr. Flynn so aptly put it, you—he—you could not have rode back that night with her and believed that she was anything but innocent.

And your Honor, I've spent a long time in this State fighting for social change and sometimes I do become emotional and outspoken, heated. And that heat is not hatred, and that heat is not spoken in anger or to belittle or to hurt any one else. Sometimes it is necessary that we speak out knowing that others will become angry at us, so that through anger that will cause a dialogue or a thought process and will perhaps result in growth.

And if it is necessary for a person, who lives under Dr. King's philosophy, to call upon themselves punishment or harshness because of speaking out, then they know what they're doing, that; and they accept that gladly, but they at no time hate or despise or dislike the other person or the person they were talking to. And they also hope that out of that grows the dialogue which results in a better understanding.

I realize that your Honor and I have had words back and forth, and I hope that depth of nonviolence, that out of that has grown a better understanding of each other's position and that you realize that words were not said in an attempt to belittle or an attempt to harm you in any way, but maybe you can—maybe you cannot understand my life style of nonviolence. I hope that you can and hope that we made progress on that, but I know that we have talked about that and think that we now understand each other a little better. And certainly can say that for my part that I have come to appreciate your good qualities better than I did, because I know of them because of that incident. I cannot speak for you.

THE COURT: Well, I'll say to you I like you and I think you are a good lawyer. That's for publication."

The due process requirements of notice and opportunity to be heard were adequately met. Petitioner received actual notice, including the time and place, that he would be cited for contempt. A written transcript provided formal notice of the specific actions for which petitioner was being cited.

Moreover, petitioner was given advance notice that he would have an opportunity to be heard, and in fact he was heard. The U. S. Supreme Court said in *Taylor v. Hayes, supra* at 499, that "the contemnor might at least urge, for example, that the behavior at issue was not contempt but the acceptable conduct of an attorney representing his client; or, he might present matters in mitigation or otherwise attempt to make amends with the court." This is essentially the nature of the argument petitioner undertook to make to the court.

[3] Petitioner's next argument is that he was entitled to have an unbiased judge rule on the contempt charge, and that it was error for the trial judge not to recuse himself. We see no merit in this argument.

In *Taylor v. Hayes, supra,* it was found that the trial judge became embroiled in a running controversy with petitioner and displayed an unfavorable personal attitude toward petitioner, his ability, and his motives. It was held that the contempt issue should have been decided by a different judge.

However, we see the instant case as being more like that of *Ungar v. Sarafite,* 376 U.S. 575, 11 L.Ed. 2d 921, 84 S.Ct.

841 (1964), cited in the *Taylor* case wherein the court stated, "but we were impressed there with the fact that the judge 'did not purport to proceed summarily during or at the conclusion of the trial, but gave notice and afforded an opportunity for a hearing which was conducted dispassionately and with a decorum befitting a judicial proceeding.' " *Taylor v. Hayes, supra,* at 503.

That Judge Hobgood did not react strongly to petitioner's conduct emerges clearly in the following statements which the Judge made at the conclusion of the trial and prior to sentencing petitioner:

> "I have to say about counsel, I think highly of all of them. I think that the counsel has fought the case with intensity; State's counsel and defense counsel. Mr. Paul and myself will probably have some more matters to take care of because—well, we will discuss that later. But Mr. Paul is a very good lawyer and a very intense lawyer. He fights very hard and intensely for his client.
>
> This is not the first time I've had Mr. Paul right in this same courtroom before on previous occasions.
>
> Incidentally, you won the case."

After finding petitioner in contempt and passing sentence the following conversation occurred:

> "THE COURT: You understand nothing personal between you and me, don't you?
>
> MR. PAUL: Yes, sir. And if saying things in order to make advances in courts and society and create social change, and if doing what I did resulted in . . . [defendant] going free or any way contributed to that, then I do not consider time as any dishonor but as a badge of honor and note Dr. King said we turn jail walls into jails of freedom.
>
> THE COURT: All right. Thank you very much. Now, Mr. Paul realizes and I hope the News Media realizes that this is nothing personal between me as individual and Mr. Paul because I personally have no animosity towards him whatsoever. This is a matter that I felt necessary in order to preserve the court decorum and I would have held him in contempt at that moment except we could not have tried the case. . . ."

Finally, as has already been quoted, following petitioner's statement Judge Hobgood stated, "Well, I'll say to you I like you and I think you are a good lawyer. That's for publication."

From our reading of the record before us it is clear that there were no "marked personal feelings" or "personal stings" on behalf of the trial judge, nor was there "such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused." *Ungar v. Sarafite, supra,* at 588; *Mayberry v. Pennsylvania,* 400 U.S. 455, 27 L.Ed. 2d 532, 91 S.Ct. 499 (1971).

We conclude that there was no error in the failure of the trial judge to recuse himself.

[4] Petitioner admits that his remarks were "certainly contentious and persistent" but maintains that they were not contemptuous. He asserts that his comments were invited by the trial judge, and furthermore that he was within the scope of vigorous advocacy and not interrupting court proceedings or disobeying any court directive. We disagree.

The record shows that petitioner went beyond the bounds of an attorney's vigorous advocacy on behalf of his client. Due to the forbearance and self-control of the trial judge there was only a minimal interruption of the trial proceedings caused by petitioner's actions. However, the conduct of the petitioner would have greatly obstructed the court in the performance of its duties had it not been for the judge's self-restraint.

As an attorney, petitioner knew, or should have known, not to persist in making arguments after the court made its rulings. Moreover, the findings of fact by the trial judge show that petitioner had been specifically forewarned that further statements by counsel were not in order after the court made its rulings.

There is no evidence in the record to support petitioner's position that the court invited his remarks. Nor is there anything in the record to indicate that the judge badgered or provoked petitioner in any manner that would have prompted petitioner's actions.

That petitioner knew his remarks were contemptuous is reflected by his statement that it would not worry him to be held in contempt. By his words and demeanor it is shown that

petitioner intended to be contemptuous, and the record supports the finding that his acts and conduct did amount to contempt.

[5] We have considered petitioner's final arguments that G.S. 5-1(1) is unconstitutional in that it is vague and denies him due process, and that G.S. 5-5 is unconstitutional on its face and violates due process of law. His arguments are not persuasive. See *State v. Little,* 175 N.C. 743, 94 S.E. 680 (1917) (as to G.S. 5-1(1)), and *In re Williams,* 269 N.C. 68, 152 S.E. 2d 317 (1967) (as to G.S. 5-5).

The "standards of proper courtroom decorum are not altered and should not be applied differently because a trial may be characterized as political. . . ." *United States v. Seale,* 461 F. 2d 345, 367 (1972). "The court is not a public hall for the expression of views, nor is it a political arena or a street. It is a place for trial of defined issues in accordance with law and rules of evidence, with standards of demeanor for court, jurors, parties, witnesses and counsel." Matter of *Katz v. Murtagh,* 28 N.Y. 2d 234, 240, 321 N.Y.S. 2d 104, 269 N.E. 2d 816 (1971).

The order of contempt and judgment of confinement is affirmed. Having served approximately five of the fourteen day sentence petitioner must now serve the remaining nine days of the sentence. Execution for confinement of the contemnor for the remainder of the term of imprisonment pronounced by Judge Hobgood shall issue at the next session of Superior Court for Wake County following the certification of this opinion.

Affirmed.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. FLOYD GEROME VANDYKE

No. 755SC796

(Filed 3 March 1976)

1. Criminal Law § 66— motion for in-court lineup

The trial court in an armed robbery case did not err in the denial of defendant's motion for an in-court lineup to test the identifications by the State's witnesses and for an opportunity to present evidence upon his motion for a lineup.

2. Criminal Law § 66— in-court identification — pretrial lineup

In-court identifications of defendant by two State's witnesses were not tainted by a lineup identification of defendant by one witness

and an identification of defendant from a photograph of the lineup by the second witness where defendant's counsel was present for the lineup and participated in its arrangement, and no contention was made that officers made any suggestion to help the second witness identify defendant from the photographs, and where the court found from competent evidence that the identifications were based upon independent observations of defendant at the time of the robbery.

3. Searches and Seizures § 2— consent to search by one claiming ownership — ownership actually in defendant

An officer lawfully searched a zipper bag found in the trunk of a car in which defendant was riding as a passenger when he was arrested, and a shotgun found in the bag was properly admitted in defendant's trial for armed robbery, where defendant was arrested upon an unrelated felonious assault charge, the owner of the vehicle in which defendant was riding consented to a search of the vehicle, the owner opened the trunk, claimed ownership of the zipper bag and consented to a search of the bag, and when the bag was opened and the shotgun was in view, the vehicle owner then disclaimed ownership of the bag and said it belonged to defendant, since the officer only looked where he had reasonable grounds to believe he had a right to look and the contents of the bag were then in plain view.

4. Arrest and Bail § 5— warrant issued — information over police radio — legality of arrest

Arrest of defendant on a felonious assault charge was lawful where the arresting officers relied upon a police radio broadcast that a warrant had been issued for defendant's arrest on that charge, the warrant was immediately read to defendant when he was taken to the police station, and the affidavit and warrant were facially sufficient; therefore, items seized from defendant and lineup and photographic identifications were not the fruit of an illegal arrest.

5. Arrest and Bail § 5— whereabouts of defendant — informers — reliability — legality of arrest

Arrest of defendant upon information received by police radio that a warrant for defendant's arrest had been issued was not rendered unlawful by failure of the officer to show that informers who gave information as to defendant's whereabouts were reliable.

APPEAL by defendant from *Fountain, Judge.* Judgments entered 24 April 1975 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 23 January 1976.

Defendant was charged in four bills of indictment. Each charged him with the felony of armed robbery on or about 1 March 1975. One charged defendant with the armed robbery of the Holiday Inn in Wilmington, another with the armed robbery of one Pete Miranda (Miranda), another with the armed robbery of one Robert Mathis (Mathis), and the other with the armed robbery of one William R. Yates (Yates).

The State's evidence tends to show the following: During the early morning hours of 1 March 1975, David Franklin Smith (Smith) was on duty as desk clerk at the Holiday Inn (Inn) in Wilmington and was in the process of registering Mathis for a room when defendant entered the lobby of the Inn. Defendant brandished a sawed-off .410 gauge shotgun at Smith and Mathis. Defendant demanded the Inn's money. Smith emptied the cash drawer on the counter, and defendant took the money. Defendant then demanded and received the money from Mathis' wallet. About this time Miranda and Yates entered the Inn lobby. Defendant told Smith and Mathis to "keep cool" and turned the gun to point at Miranda and Yates. Defendant demanded and received the money from Miranda's and Yates' wallets, and then herded the four into a corner of the lobby. He forced them to lie on the floor and took a wristwatch from each of them. Defendant then threatened the four and left the lobby through the parking lot door.

On 8 March 1975 defendant was arrested on an unrelated felonious assault charge. At the time of his arrest defendant was a passenger in an automobile owned by one McCoy. After defendant was placed in the police car, McCoy consented to a search of his vehicle. McCoy opened the trunk and stated that the zipper bag (locally referred to as an AWOL bag) in the trunk was his. McCoy consented to a search of the bag. A dismantled, sawed-off .410 gauge shotgun was found in the bag. McCoy then disclaimed ownership and stated that the bag belonged to defendant. The shotgun was later identified before the jury as the same or similar to the one used in the robberies at the Inn on 1 March 1975. After defendant was taken to police headquarters and removed from the police car, the wristwatches taken from Smith and Yates were found on the rear floor of the police car where defendant had been sitting. While in the police station, the wristwatch taken from Mathis was removed from defendant's wrist.

Defendant offered no evidence.

The jury found defendant guilty as charged in each of the four indictments, and concurrent prison sentences were imposed.

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

Loflin & Loflin, by Thomas F. Loflin III, for the defendant.

BROCK, Chief Judge.

[1] When these cases were called for trial, and before pleading to the charges, defendant made a motion for an in-court lineup to test the identifications by the State's witnesses. The motion was denied, and defendant made a motion that he be allowed to put on evidence upon his motion for the lineup. This motion was likewise denied. Appellate counsel concedes that he can find no authority to support either motion but asks this Court to review trial counsel's exception to the ruling of the trial court. We can conceive of many reasons, which do not require discussion, why such motions were deemed specious and were properly overruled.

Because of the denial of the foregoing two motions, defendant moved for a continuance. This motion was denied. Appellate counsel concedes that he can find no error in the ruling of the trial judge but asks this Court to review trial counsel's exception to the ruling. It hardly need be said again that the motion for a continuance is addressed to the sound discretion of the trial judge. Defendant did not state any grounds for his motion other than the denial of the foregoing two motions. In our view the trial judge properly denied the motion to continue.

[2] Defendant assigns as error the admission of the in-court identifications of the defendant by the two State's witnesses, Smith and Mathis. Before these two witnesses were permitted to make an in-court identification, the trial judge conducted *voir dires*. The witness Smith was asked by the police to view a pretrial lineup. No suggestion of improper procedure is made. In fact defendant's trial counsel was present for the lineup and participated in its arrangement. Smith immediately identified defendant in the lineup. Later two photographs of the lineup were displayed to the State's witness Mathis. No contention is made that the officers made any suggestion to Mathis to help him identify defendant. Mathis immediately identified defendant in the photographs. Furthermore, the trial judge found from competent evidence that no impermissibly suggestive procedure was involved in either the lineup or the display of the photographs of the lineup. In addition the trial judge found from competent evidence that the identifications of the defendant by Smith and Mathis were based upon independent observations of the defendant at the time of the alleged robbery. These assignments of error are without merit and are overruled.

[3] Defendant argues that the evidence seized from McCoy's vehicle (the shotgun) should have been suppressed because the seizure was the fruit of an illegal search. Defendant was riding as a passenger in McCoy's vehicle at the time of his (defendant's) arrest. After defendant was arrested on an unrelated felonious assault charge and placed in a police vehicle, McCoy consented to a search. McCoy opened the trunk of his vehicle and claimed ownership of the zipper (AWOL) bag and consented that it could be searched. However, when the bag was opened and the shotgun was in view, McCoy disclaimed ownership and said the bag belonged to defendant. Also inside the zipper bag were personal belongings, personal clothes, letters, and military identification belonging to defendant. Defendant argues that because, in reality, the zipper (AWOL) bag and contents belonged to him, McCoy had no right to consent to the search, and therefore the search without a warrant was illegal.

The Constitution and the laws protect against unreasonable searches and seizures, and except for certain court imposed exclusionary rules, searches and seizures must be evaluated in the light of reasonableness under the circumstances. In this instance the owner of the vehicle in which the zipper bag was located consented to a search of his vehicle. When the owner opened the trunk of his vehicle, he claimed ownership of the zipper bag and consented to a search of the bag. Under these circumstances it was perfectly reasonable for the officer to believe that he was searching the bag with permission of its owner. It was only after the officer had viewed the contents of the bag that the owner of the vehicle disclaimed ownership of the bag and asserted that it belonged to defendant. The officer having already viewed the contents of the bag, a warrant for its search would have been of no avail. The warrant would have been based upon what the officer had already observed under circumstances that reasonably led him to believe he had the owner's permission to search. This is analogous to the plain view doctrine. The officer looked where he was led to believe he had a right to look, and the contents were in plain view. We also deem it the same as if the shotgun were lying unconcealed when the trunk was opened by the owner of the vehicle. To exclude the evidence of the contents of the bag as urged by defendant would be to sanction a tactic by which an accused and his associate could entrap an officer into a search by consent and then, by disclaimer of ownership by the associate, preclude the opportunity for a valid search warrant. Whether

defendant and his associate were cunning enough to plan such strategy is not the question, for the result is the same. We hold that the search of the zipper bag and the seizure of the contents were reasonable within the meaning of the Constitution and laws. This assignment of error is overruled.

Defendant argues that the shotgun, watches, and the lineup and photographic identifications should have been excluded from evidence because they are fruits of an illegal arrest.

Defendant was arrested on a felonious assault charge on 8 March 1975, some seven days after the robberies involved in this appeal. On 8 March 1975 one Margie Johnson and one Cynthia Johnson complained to the police that Floyd VanDyke had shot one James L. Genwright. The shooting took place during an argument between VanDyke, the defendant in this case, and the victim on Castle Street in Wilmington. The victim was placed in the hospital intensive care unit. Based upon statements given by the two complainants to Officer Chipps, he (Chipps) went before Magistrate R. T. Chestnut and obtained a warrant for the arrest of VanDyke for a felonious assault on James L. Genwright. Officer Chipps broadcast this information on the police radio along with the description given by the complainants. Officers Norris, Simpson, Kagel, and others in separate police vehicles received the broadcast of the charge against VanDyke and a description. During their search for VanDyke, the officers asked various persons if they knew of VanDyke's whereabouts. One source described the car in which VanDyke was riding and described the driver. As one of the officers was questioning another person, the vehicle in which VanDyke was riding passed by and the officer was advised VanDyke was in that vehicle. All of this information was broadcast on the police radio, and while one officer followed the VanDyke vehicle, three others responded. When the VanDyke vehicle stopped, four police vehicles converged on the scene, and VanDyke was placed under arrest on the felonious assault charge. After he was taken to the police station, the watches taken in the robbery were found as earlier described, and because VanDyke fit the description given by Smith after the robbery, VanDyke was also formally charged with the four robberies.

[4] Defendant argues that no arrest warrant for the felonious assault charge was shown to have been in existence, and therefore his arrest was without probable cause and therefore illegal.

This argument completely ignores the State's evidence. Officer Norris identified State's exhibit No. 8 as the arrest warrant he obtained before reporting on the police radio that he held a warrant. The trial judge reviewed the affidavit and the warrant and determined that they were facially sufficient to justify execution and the arrest of defendant. Defendant does not challenge the sufficiency of the affidavit or the warrant. The officers arrested defendant in reliance upon the broadcast. When defendant was taken to the police station, the warrant was immediately read to him. This showing by the State makes out probable cause for defendant's arrest on the felonious assault charge. This assignment of error is overruled.

[5] Defendant further argues that his arrest on the felonious assault charge was without probable cause because the officers relied on informers to locate defendant. Defendant seems to argue that before an officer can inquire of an informer or some other person as to the whereabouts of an accused, the officer must first demonstrate that the information comes from a reliable source before the officer can use the information. VanDyke was not charged or arrested upon information from undisclosed sources. He was merely located by such information. When he was located, his description fit the description originally given by the two complainants and as broadcast on the police radio. Also he admitted his identity before he was actually arrested. To give credence to defendant's argument, an officer could never act upon information of the whereabouts of an accused without first going before a magistrate and demonstrating the reliability of such information. This argument is feckless.

We have reviewed defendant's remaining assignments of error, and they are overruled. When read in context, the charge as a whole fully and adequately apprised the jury of the law arising upon the evidence and of its duties under the law. In our opinion defendant received a fair trial free from prejudicial error.

No error.

Judges PARKER and ARNOLD concur.

BETTY THORNE NANTZ, PETITIONER v. EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA AND THE NORTH CAROLINA STATE BOARD OF PERSONNEL, RESPONDENTS

No. 7510SC726

(Filed 3 March 1976)

1. **Administrative Law § 4; Master and Servant § 10— dismissal of employee of State agency — due process**

Where petitioner had no express contract of employment with the Employment Security Commission, and there was no statutory provision affecting her job tenure or contractual rights, petitioner had no "property" right or interest in her employment with the Commission for due process rights to attach, and she was thus not entitled to notice and a hearing before she could be dismissed from her employment.

2. **Administrative Law § 4; Master and Servant § 10— dismissal of employee of State agency — due process**

Petitioner was not entitled to due process rights in her dismissal as an employee of the Employment Security Commission on the ground that her dismissal constituted an attack upon her good name, reputation, honor or integrity where the stated reasons for her dismissal were that her conduct was unbecoming and seriously disturbed the normal operations of the agency in that she refused to answer questions or otherwise aid the agency in its investigation of the source of anonymous letters alleging mismanagement and sexual misconduct by employees in the office in which petitioner worked.

3. **Administrative Law § 4; Master and Servant § 10— dismissal of employee of State agency — notice and hearing**

Even if petitioner had a property right in her job with the Employment Security Commission, by implied tenure or otherwise, she was given adequate notice and opportunity to be heard before her dismissal by the Commission and after dismissal at her request by the State Personnel Board.

4. **Administrative Law § 5— dismissal of employee of State agency — contention for first time on appeal**

Petitioner could not contend for the first time on appeal in the superior court that her Fifth Amendment right against self-incrimination was violated by her dismissal as employee of a State agency for unbecoming conduct and serious disturbance of the normal operations of the agency based upon her refusal to answer questions or otherwise aid the agency in its investigation of anonymous letters.

5. **Administrative Law § 5— action against State Personnel Board — dismissal — power only to recommend**

Action in the superior court seeking review of petitioner's dismissal as an employee of the Employment Security Commission was properly dismissed as to the State Personnel Board since the Board was authorized to render only advisory recommendations which are

not binding on administrative agencies or the courts and was without power to grant petitioner any relief.

Judge VAUGHN dissenting.

APPEAL by petitioner from *Alvis, Judge.* Judgment entered 13 June 1975, in Superior Court, WAKE County. Heard in the Court of Appeals 13 January 1976.

On 15 January 1974, during the course of investigating several typed anonymous letters intimating mismanagement and sexual misconduct by employees in the Charlotte office, the State Employment Security Commission was informed by a document expert that the letters were written on the typewriter assigned to the plaintiff, who was a Labor Market Analyst in the office and had been employed by the Commission for twenty-five years. Investigation by the Commission did not reveal any evidence of mismanagement or sexual misconduct adversely affecting the operation of the office. On 18 January, in a conference between plaintiff and the executive officers of the Commission, she was requested to assist in the investigation and to disclose any information she may have about office conditions and the writing of the anonymous letters. Plaintiff refused to answer the questions, and she was thereupon suspended from her job. Plaintiff obtained legal counsel, and on several occasions they met with officers of the Commission for the purpose of settling any differences, but she continued to refuse to answer any questions relating to the anonymous letters. She was offered a different job with the Commission in another office within commuting distance of Charlotte, but she refused to accept it. By letters of 15 March 1974, the Commission terminated plaintiff's employment effective 18 January 1974, informing her that the reasons for doing so were violations of Items 1 and 6, Section 5, Personal Conduct Code of the State Personnel Board. Item 1 provides for "conduct unbecoming a State employee" and Item 6 for "participation in any action that would in any way seriously disrupt or disturb the normal operations of the agency."

Petitioner sought review of the Commission's action by the State Personnel Board. At the hearing before the Board, the document expert testified that in his opinion the anonymous letters were typed on the typewriter assigned to plaintiff but "it is possible" that two or more typewriters with the same type could have typed them. The Director and other employees

of the Commission testified at this hearing and this evidence tended to show the uncontroverted facts hereinabove stated. The testimony was recorded and with various exhibits constituted the record of the hearing before the court.

Petitioner then sought review in the Superior Court, where both the Commission and the Board moved to dismiss for lack of jurisdiction and failure to state a claim. The motion of the Personnel Board was allowed, but the motion of the Commission was denied. The Commission did not appeal this ruling. The hearing in the Superior Court was conducted, without objection, on the record of the proceedings before the Personnel Board, oral arguments, and written briefs. It was stipulated that the parties were properly before the court. Judge Alvis entered judgment confirming the dismissal of the plaintiff by the Employment Security Commission. From this judgment, petitioner appeals.

Attorney General Edmisten by Associate Attorney William H. Guy for the State.

Bailey, Brackett & Brackett, P.A., by Ellis M. Bragg for petitioner appellant.

Garland D. Crenshaw, H. D. Harrison, Jr., Howard G. Doyle and Thomas S. Whitaker for respondent appellee, Employment Security Commission of North Carolina.

CLARK, Judge.

[1] Plaintiff had no express contract of employment with the State Employment Security Commission; nor was there any applicable statutory provision affecting her job tenure or contractual rights. Under G.S. 96-4 the Director of the Commission had the power to "appoint" her to the job, to fix her compensation, and to prescribe her duties.

Plaintiff contends that her dismissal by the Commission violated her due process rights under the Fourteenth Amendment. The Supreme Court of the United States has established that due process requirements apply only to deprivations of liberty and property. To acknowledge that constitutional restraints exist upon a state government in dealing with its employees is not to say that all such employees have a right to notice and hearing before they can be removed from their employment. See Anno., 40 A.L.R. 3d 728 (1971). In *Board of*

Regents v. Roth, 408 U.S. 564, 33 L.Ed. 2d 548, 92 S.Ct. 2701 (1972), it was held that an assistant professor at a State University was not entitled to a statement of reasons or a hearing on the University's decision not to rehire him. The court observed that "to have a property interest in a benefit a person must . . . have a legitimate claim of entitlement to it." But the court did state that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." See *Wisconsin v. Constantineau,* 400 U.S. 433, 437, 27 L.Ed. 2d 515, 91 S.Ct. 507, 510 (1971). Since there is no evidence to support a claim of entitlement to employment, petitioner had no "property" right or interest in her employment for due process rights to attach. See *George v. Opportunities, Inc.,* 26 N.C. App. 732, 217 S.E. 2d 128 (1975); *McDowell v. State of Texas,* 465 F. 2d 1342 (5th Cir. 1972); *Wilson v. Pleasant Hill School Dist.,* 465 F. 2d 1366 (8th Cir. 1972).

[2] Nor is there evidence to support petitioner's claim that her dismissal for the reasons given by the Commission entitled her to due process rights because it constituted an attack upon her good name, reputation, honor or integrity. The Commission did not dismiss her for the reason that she wrote and distributed false and defamatory anonymous letters; rather, the stated reasons were that her conduct was unbecoming and seriously disturbed the normal operations of the agency in that she refused to answer any questions or to otherwise aid the agency in its investigation of the source of the anonymous letters. Her opportunity for employment was not impaired because the Commission offered her other employment within the agency but outside the Charlotte office. In *Cafeteria Workers v. McElroy,* 367 U.S. 866, 6 L.Ed. 2d 1230, 81 S.Ct. 1743 (1961), it was held that a cook at a military installation was not entitled to a hearing prior to the withdrawal of her access to the facility since her employer was prepared to employ her at another of its restaurants.

[3] And in the case before us, if, *arguendo,* the petitioner had any property right in her job, by implied tenure or otherwise, she was given adequate notice and an opportunity to be heard before dismissal by the Commission and after dismissal at her request by the State Personnel Board. Generally, due process of law stands for protection against the arbitrary exercise of

the powers of government, and in its procedural aspects, assures adherence to fundamental principles of justice and fair play. *Shaughnessy v. U.S.*, 345 U.S. 206, 97 L.Ed. 956, 73 S.Ct. 625 (1953). The demands of due process are met if there is an opportunity to be heard, upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked. *Anderson Nat. Bank v. Luckett,* 321 U.S. 233, 88 L.Ed. 692, 64 S.Ct. 599 (1944).

[4] Petitioner's contention that her Fifth Amendment protection against self-incrimination was violated because she had the right to remain silent and not answer questions relating to the anonymous letters is without merit. Misconduct on the part of an employee, though not constituting a crime, may justify dismissal. In this case, it appears that the claim of Fifth Amendment privilege arose for the first time in the Superior Court. A litigant may not remain mute in an administrative hearing, await the outcome of the agency decision, and, if it is unfavorable, then attack it on the ground of asserted procedural defects not called to the agency's attention when, if in fact they were defects, they would have been correctible. *First-Citizens Bank and Trust Company v. Camp,* 409 F. 2d 1086 (4th Cir. 1969).

[5] The trial court correctly dismissed the action against the State Personnel Board. The Board is authorized to render only advisory recommendations which are not binding on administrative agencies or the courts and was without power in this case to grant petitioner any relief. G.S. Chap. 126, Art. 1. In *Grissom v. Dept. of Revenue,* 28 N.C. App. 277, 220 S.E. 2d 872 (1976), it was held that an employee was not compelled to appeal to the Personnel Board to exhaust all administrative remedies since the Board had no power but to recommend.

We note that effective 1 February 1976, pursuant to G.S. 126-2, et seq., a State Personnel Commission system is established which provides for due process rights of State employees and also provides that the Administrative Procedure Act, Chapter 150A of the General Statutes of North Carolina, shall apply to hearings before the Personnel Commission. But these statutes do not apply to this case.

We have carefully examined all other assignments of error and find them to be without merit. The judgment of the trial court is

Affirmed.

Judge MARTIN concurs.

Judge VAUGHN dissents.

Judge VAUGHN dissenting.

In my opinion the Superior Court did not have jurisdiction to act on the "Petition" in this case. The appeal should be dismissed.

RICKEY MARTIN VERNON v. GARRY RANDALL CRIST

No. 7521SC778

(Filed 3 March 1976)

Automobiles § 86— plaintiff leaning on vehicle — defendant driving vehicle away — failure to instruct on last clear chance — error

In an action to recover for personal injuries sustained by plaintiff when defendant drove away a car upon which plaintiff was leaning, the trial court properly refused to instruct the jury on the doctrine of last clear chance with respect to plaintiff's evidence where such evidence tended to show that there was no contributory negligence on the part of plaintiff, and the defendant's conduct in driving forward without warning, if found negligent by a jury, would render defendant liable for plaintiff's injuries; however, on the basis of defendant's evidence that he started the car and waited 15 to 20 seconds before slowly driving the car forward, the trial court should have instructed on the doctrine of last clear chance, since defendant's "original negligence," whether based on the act of initially driving the car forward or subsequently failing to stop the car, coincided with defendant's failure to utilize the last clear chance to avoid injury to plaintiff, it not being necessary that the basis of last clear chance be totally distinct from acts of "original negligence" and that both exist to invoke the doctrine of last clear chance.

APPEAL by plaintiff from *Albright, Judge.* Judgment entered 10 April 1975 in Superior Court, FORSYTH County. Heard in the Court of Appeals 21 January 1976.

The evidence tends to show that on the night of 24 April 1971 plaintiff, defendant, and two female companions had been riding together in defendant's car. After finishing work at a theater in Winston-Salem, they drove to a Pizza Inn for a snack and subsequently drove to the home of two friends, Michael and David Porter. As a prank, they placed bags of leaves on the front doorstep, rang the doorbell, rushed back to the car, and drove off. They drove around the block, returned to the Porter home, and parked the car on the left side of the street in front of the Porter home. The four people in the car walked to the front door and rang the doorbell. The Porter brothers answered the door and chatted with the foursome for approximately fifteen minutes. The two girls returned to the car first; a few minutes later the plaintiff returned to the car. He was unable to enter the car because tthe girls had locked the doors from the inside. After seeing the two girls laughing inside the car, the plaintiff walked around to the back of the car and, according to his evidence, leaned backwards against the edge of the trunk with one leg crossed over the other and one arm crossed over the other. In a short time the defendant returned to the car and also discovered that the doors were locked. According to plaintiff's testimony, after observing the defendant's initial difficulty in getting inside the car, he (plaintiff) turned around and looked down the road in the direction the back of the car was facing. Then before he had an opportunity to get away from the vehicle, the defendant entered the car on the driver's side, started the engine, and drove the car forward, causing the plaintiff to fall backwards and strike his head against the car and/or surface of the road. According to plaintiff's testimony:

> "As to what I did then after I looked around and saw that he had attempted to get in—I turned back and looked down the street. I didn't feel too well at the time and I had a headache and I just kind of looked down the street from the car. In other words, I was facing this direction (indicating) and I was looking down the street. There is a light pole and the streetlight right here and I was looking down the street. The next thing I remember is that Garry and the girls were kind of carrying on about the doors being locked and—you know—normal thing, unlock the door and no and that type of thing. I don't recall the conversation that carried on between them, but there was a lot of laughing. And, then, at that time, the last thing I

remember is remembering that the car started up and I started to pull one leg back over the other and I threw my hands behind me."

Defendant's evidence tends to show that after entering the car, he looked in the rearview mirror and saw plaintiff sitting on the trunk of the car. Approximately thirty seconds later defendant started the engine and put the car in forward gear; after a fifteen to twenty second pause, he released the emergency brake and drove the car forward very slowly. According to defendant's own testimony:

"As to what I did the fifteen to twenty seconds that I had it in drive and what I did before I moved the car—I made sure Rickey was on the car and would not have fallen off by looking in the mirror.

. . . .

"As to how fast I went when I started out—I did not get over five miles an hour. I started off very slowly. When I started out, I was looking straight ahead. I would estimate that I had gone about twenty-five feet before I realized that Rickey wasn't on the trunk any longer—when Joyce said that he had slipped or fallen or jumped. I do not remember her exact words, no, sir. After I started off the car before he fell, before I started moving—no, sir, I did not look back in the rearview mirror at anytime. Once I had started the car in motion, no, sir, I did not look back in the mirror at all to see him on the car.

. . . .

"As to what I was intending to do when I started the car in motion with Rickey on the trunk—drive a little ways and then let him off and let him come into the car."

The police officer who investigated the accident testified that an area approximately two and one-half feet wide in the center of the trunk and two small spots on the rear bumper had been wiped clean.

The following allegations appear in plaintiff's complaint:

"3. That at all times herein complained of the defendant was negligent in the following manner, among others:

. . . .

"c. That although he had ample opportunity to do so and although he saw, or in the exercise of reasonable

diligence should have seen, that the plaintiff was standing and leaning against the rear of the automobile, that it was necessary for him to take action to avoid injuring the plaintiff, nevertheless took no action whatsoever to avoid injuring the plaintiff.

. . . .

"i. That the defendant was standing in close proximity to the plaintiff and saw, or should have seen, that the plaintiff was in a position where he could not properly protect himself but nevertheless proceeded to get into the car without any warning whatsoever to the plaintiff and started the car forward causing the plaintiff to fall and injure himself as set out herein."

Defendant answered by denying all allegations of negligence and pleading the defense of contributory negligence:

"Prior to the accident complained of, the plaintiff had voluntarily and knowingly placed himself in a place of danger on the trunk of the defendant's vehicle or in immediate and close proximity to the trunk of the defendant's vehicle and remained there when the accident occurred, voluntarily subjecting himself to danger and to any injury which might occur. The plaintiff failed to keep a proper lookout; failed to take proper care under the circumstances; placed himself in a position of known peril; remained in that position in spite of all the facts and circumstances involved; and the plaintiff was thereby guilty of such contributory negligence as constituted at least one of the proximate causes of the accident and of any injuries or damages which he may have sustained; and the plaintiff is thereby barred from any recovery against the defendant."

During the presentation of his case, plaintiff moved for permission to amend the complaint to include, in explicit terms, the doctrine of last clear chance. The motion was denied. In addition plaintiff requested that the jury be instructed on the doctrine of last clear chance after all of the evidence had been presented, and this request was also denied. Plaintiff assigns error to the trial judge's failure to grant permission to amend the complaint and instruct the jury according to the doctrine of last clear chance.

White and Crumpler, by Michael J. Lewis, for the plaintiff.

Hudson, Petree, Stockton, Stockton & Robinson, by James H. Kelly, Jr., and W. Thompson Comerford, Jr., for the defendant.

BROCK, Chief Judge.

This appeal questions the application of the last clear chance doctrine in the wake of *Exum v. Boyles,* 272 N.C. 567, 158 S.E. 2d 845 (1968). In particular we are confronted with the issue of whether the evidence in this case is sufficient to invoke the doctrine of last clear chance.

The doctrine of last clear chance is well established in this jurisdiction; it imposes upon a person the duty to exercise ordinary care to avoid injury to another who has negligently put himself in a position of peril, and who he can reasonably apprehend is unconscious of or inattentive to the peril or unable to avoid the imminent harm. 6 Strong, N. C. Index 2d, Negligence § 12, p. 30. The practical effect of the doctrine is to enable a plaintiff to recover from a defendant who, by exercising reasonable care and prudence, could have avoided the injury to the plaintiff, *notwithstanding plaintiff's negligence.* "The doctrine applies if and when it is made to appear that the defendant discovered, or by the exercise of reasonable care should have discovered, the perilous position of the party injured or killed and could have avoided the injury, but failed to do so. (Citations omitted.)" *Earle v. Wyrick,* 286 N.C. 175, 209 S.E. 2d 469 (1974). In short the doctrine applies when the evidence indicates that the defendant's failure to exercise his "last clear chance" to avoid the injury—not the contributory negligence of the plaintiff—is or could be adduced by a jury to be *the* proximate cause of the injury.

According to plaintiff's evidence, the car he was leaning against was driven forward without warning and before he had an opportunity to dislodge himself from the car. Assuming this version of the facts to be true, there is no evidence of contributory negligence on the part of the plaintiff, and the defendant's conduct in driving forward without warning, if found negligent by a jury, would render the defendant liable for plaintiff's injuries. Clearly, in the absence of evidence of contributory negligence by the plaintiff, the doctrine of last clear chance does not apply. Thus it was not error to refuse to

instruct on the doctrine of last clear chance with respect to plaintiff's evidence.

Defendant's version of the facts is more problematic. Assuming the fifteen to twenty second interval between the time the car was started and driven forward did occur, a jury could find plaintiff contributorily negligent for failing to get away from the car while he had the chance. In addition there is evidence of negligence on the part of defendant for driving the car forward with full knowledge that the plaintiff was sitting precariously on the trunk of the car. Finally, the evidence discloses the following: (1) as the car drove forward, plaintiff was in a position of peril and unable to ameliorate the danger by his own action; (2) defendant knew or should have known in the exercise of ordinary care that plaintiff was in a position of helpless peril; (3) defendant had the opportunity to avoid the harm to plaintiff by stopping the car; and (4) defendant's failure to stop caused plaintiff's injuries.

In this case the defendant's "original negligence," whether based on the act of initially driving the car forward or subsequently failing to stop the car, coincides with defendant's failure to utilize the "last clear chance" to avoid injury to plaintiff. Prior to *Exum v. Boyles, supra,* it was generally accepted that the doctrine of last clear chance only applied when both the plaintiff and defendant were negligent and *after the respective negligences had created the hazard,* the defendant had time to avoid the injury. *McMillan v. Horne,* 259 N.C. 159, 130 S.E. 2d 52 (1963). In other words, where the doctrine was applicable, recovery was not predicated on the original negligence of defendant because the original negligence of defendant was barred by plaintiff's contributory negligence and could not be made the basis for the application of the doctrine. For discussion of doctrine prior to *Exum v. Boyles, see* 6 Strong, N. C. Index 2d, Negligence § 12, p. 32. However, the requirement that the basis of last clear chance be totally distinct from acts of "original negligence" and that both must exist to invoke the doctrine of last clear chance was forcefully overruled in *Exum v. Boyles, supra:*

> "In several of our former decisions the statement appears that the 'original negligence' of a defendant cannot be relied upon to bring into play the last clear chance doctrine since this 'original negligence' is cancelled or nullified by the plaintiff's contributory negligence. See: *Mathis*

v. Marlow, 261 N.C. 636, 135 S.E. 2d 633; *Barnes v. Horney,* 247 N.C. 495, 101 S.E. 2d 315; *Ingram v. Smoky Mountain Stages, Inc., supra.* We think this is an inaccurate statement and we no longer approve it, although the decisions in those cases were correct applications of the doctrine. In each of those cases, it is clear that what the court held was that to bring into play the doctrine of the last clear chance, there must be proof that after the plaintiff had, by his own negligence, gotten into a position of helpless peril (or into a position of peril to which he was inadvertent), the defendant discovered the plaintiff's helpless peril (or inadvertence), or, being under a duty to do so, should have, and, thereafter, the defendant, having the means and the time to avoid the injury, negligently failed to do so. The only negligence of the defendant may have occurred after he discovered the perilous position of the plaintiff. Such 'original negligence' of the defendant is sufficient to bring the doctrine of the last clear chance into play if the other elements of that doctrine are proved. Thus, in *Wanner v. Alsup, supra,* and in *Wade v. Sausage Co., supra,* the defendants were not shown to have been negligent in the operation of their vehicles except in their respective failures to turn aside from their straight lines of travel in order to avoid striking the respective plaintiffs, one a pedestrian crossing the street, the other a man lying in the highway. Likewise, the doctrine may render liable a driver whose only, i.e., 'original' negligence was a failure to apply his brakes and stop his vehicle before striking a plaintiff whom he saw lying in the street."

In our opinion the evidence in this case is sufficient to invoke the doctrine of last clear chance. Indeed, *Exum v. Boyles, supra,* compels it. It was prejudicial error not to instruct the jury on the doctrine of last clear chance.

New trial.

Judges PARKER and ARNOLD concur.

UNITED STATES FIDELITY AND GUARANTY COMPANY, UNITED STATES FIRE INSURANCE COMPANY, EFTHIMIOUS MARIAKAKIS AND VIRGINIA MARIAKAKIS PLAINTIFFS v. TRAVEL-ON MOTORCYCLE COMPANY, INC. DEFENDANT

No. 7514SC786

(Filed 3 March 1976)

Fires § 3; Negligence § 29— use of defective oxyacetylene torch — sufficiency of evidence of negligence

Plaintiffs' evidence was sufficient for the jury to find that an employee of defendant's motorcycle shop, after removing the gas tank from a motorcycle and placing it on the noncombustible floor, was negligent in lighting an oxyacetylene torch which he knew or should have known was defective or improperly adjusted so that the torch popped and threw to the floor sparks and flame which ignited a flammable substance on the floor and caused the damage complained of.

APPEAL by defendant from *Canaday, Judge.* Judgment entered 12 June 1975 in Superior Court, DURHAM County. Heard in the Court of Appeals 22 January 1976.

This is a civil action wherein the plaintiffs, United States Fidelity and Guaranty Company, United States Fire Insurance Company, Efthimious Mariakakis and Virginia Mariakakis are seeking $19,059.80 damages from the defendant, Travel-On Motorcycle Company, Inc., as a result of the alleged negligence of one of defendant's employees in causing a fire which damaged property leased by the defendant from the Mariakakises and insured by the plaintiff insurance companies.

In their amended complaint, the plaintiffs alleged in pertinent part the following:

> "That John Strickland, and, through him, the defendant, was negligent in that:
>
> (a) John Strickland ignited and used a welding torch in a careless and reckless manner;
>
> (b) ignited and used said torch in an area in which gas and gas fumes were present, and in a room with no ventilation, on a damp, rainy day; . . . . "

At the close of plaintiffs' evidence at trial the court allowed the defendant's motion for a directed verdict. Plaintiffs appealed.

Spears, Spears, Barnes, Baker and Boles by J. Bruce Hoof for plaintiff appellants United States Fidelity and Guaranty Company and United States Fire Insurance Company.

Richard M. Taylor, Jr., for plaintiff appellants Efthimious and Virginia Mariakakis.

Mount, White, King, Hutson, Walker and Carden by W. H. Lambe, Jr., and R. Hayes Hofler III, for defendant appellee.

HEDRICK, Judge.

This appeal presents the question of whether the court erred in allowing the defendant's motion for a directed verdict at the close of plaintiffs' evidence. At trial the plaintiffs offered evidence tending to show the following.

Pursuant to a lease agreement with Efthimious and Virginia Mariakakis entered on 11 December 1969, Travel-On Motorcycle Company occupied part of a building located near U. S. 15-501 at Eastgate Shopping Center in Chapel Hill, North Carolina. The leased portion of the building was used to sell and service motorcycles. Travel-On had conducted extensive renovations of the interior of the building, including covering the concrete floor of the service area which measured 25 feet by 25 feet with torginol, a non-combustible, resin-like, solid floor covering.

On 16 February 1970, approximately two weeks after Travel-On began using the service area, Charles Fry drove his motorcycle to the defendant's place of business to have defendant's mechanic, John Strickland, weld a piece of the frame which was in danger of falling off.

Charles Fry testified that his motorcycle was a 1968 Triumph. Because his motorcycle was old, when the gas tank was removed, the tubes through which the gas flowed from the engine to the carburetor would "flop down." He then testified as follows:

> "It is a hard thing for me to know or not know if there was gasoline in those tubes on this occasion. The only thing I would have to go by would be every time that I ever cut my motorcycle off, there would always be some gas in those tubes—because I didn't perform the operation myself this time, I wouldn't know. It is possible to take that tank off and have the tubes empty. What you would have

to do in that case would be to cut the gas off and let the motorcycle run and then since you would have the valve turned off, no more would flow down there, it would be empty. I cut the motorcycle off myself on this occasion. It wasn't started up again after I cut it off out front and pushed it around."

As Fry stood by watching, Strickland removed the gas tank, setting it on the floor of the service area, and prepared to spot weld the broken piece of the frame. With respect to what then occurred, Fry testified:

"After the motorcycle was in there, I was sort of loitering, I guess. I was leaning up against the workbench talking to Johnny as he was preparing to fix the motorcycle. First thing that he did was started the procedure to remove the tank which he had to do in order to get the piece that he had to fix. He had to stop the flow of gas from the tank to the carburetor, which although I can't testify that I saw him turn the—there is a lever that stops the flow of gas coming from the tank, flowing from the tank to the carburetor by gravity, flow-down tube. There is a lever that opens a valve, and he did turn the lever. The valve was off when he removed the tank because if it hadn't been gas would have been everywhere.

He removed the tank, set it down, I would say four to five feet from the motorcycle. All right, he then proceeded to take the blow torch, the oxyacetylene torch, off the rack, off the tank that it was hanging on, and he lit it. He was adjusting—there is a screw that adjusts the length of the flame, or the heat of the flame, whatever it does to the torch, and the flame was burning, I would say three to four inches, a blue flame; and the next instant the flame—one big—just shoot—just went shot out really big (indicating), and in a straight line to the floor, and just like it was the fire bounced off the floor. It came out of the torch, and just instantly, one second, it was small and the next it was real big, and frightened me, honestly; and almost in the same instant though the fire went off in the torch. I don't know how the fire went off, how the fire came off the torch, whether or not it was the valve was turned off, or it went malfunctioned and went off, or what; but it did go off. My attention transferred from the fire

coming out of the torch to there being a small patch of fire burning on the floor."

Strickland described the occurrence as follows:

"On February 16, 1970, at approximately 3:30 p.m., I was doing some welding in the repair shop. There were no other open flames in the room besides my welding torch; there was no other source of ignition in the repair room beside my welding torch. After I started welding, I had my shield on, which is goggles to protect my eyes, and there was a pop which came from holding my torch too close to the material which I was welding. Seconds thereafter, and I don't remember how long, someone yelled, 'Fire'; someone who owned the motorcycle was standing behind me and he hollered, 'Fire!' and I pulled my goggles off and I saw the flame and I switched the torch off." * * *

"Prior to the time that I started welding I had removed the gas tank off this motorcycle because the particular part which I was going to weld was located on the frame beneath the tank. No gasoline spilled out of the tank when I removed it. The particular motorcycle was a Triumph, it has shut-off valves and cross-over tubes, consequently you have a valve on each side of the tank, and they were shut off. You had to disconnect the lines. No gas that I know of leaked out of the tank. I didn't see any gas and I would say no. I don't know or don't recall any gasoline leaking out. I didn't check around the gas tank before I started welding to see if there was any gasoline on the floor or if any gas had leaked or spilled out of the tank, but it wasn't leaking when I set it down. The tank was removed probably ten to fifteen feet from the point where I was doing the welding. I had removed it probably five feet from the motorcycle. If you were to take a point where that motorcycle was located, where I took the tank off, and were to draw a line to the point where I put the gas tank down, the closest point along that line at the place where I was doing the welding would be about fifteen feet. I was welding a condenser bracket, the condensers for the ignition rods are mounted under the tank, and we didn't have one in stock, so I was repairing that one. This was not attached to the motorcycle at the time I was welding, the bracket is attached to the motorcycle but it had broken in the center so consequently I removed it from the motor-

cycle and put it on the bench to weld it. I was working on the top of a big iron press, it wasn't a bench, it was a press. I was welding with an oxyacetylene torch and the torch popped.

When a torch pops, I don't know chemically what happens, but when you get the flame too close to the molten metal something happens. The oxygen or acetylene, there is an explosion and sparks fly. It throws sparks all over. It is pretty common, when you have goggles on you never notice. You are aware of sparks, you just keep on going, you don't stop. It is nothing to be alarmed about. Consequently I heard a pop but I did not see the sparks. In a very short period of time after I heard the torch pop, say a couple of seconds to a minute, I heard someone shout 'Fire', I turned around and saw the fire to my immediate right, it was on the floor. A small area of the floor was burning. When the popping occurred I continued to weld until I heard the person shout 'Fire.' It was burning with a visible flame in a small area to my immediate right."

Charles Harmon, an expert witness for the plaintiff, testified that:

"Torginol is the floor covering I think you are referring to. It is a synthetic resin, a jointless floor covering material. I am familiar with combustion as it occurs when oxyacetylene welding is done. In oxyacetylene welding, a tank under high pressure of oxygen and acetylene is connected by means of passage ways and control valves to bring the two streams together under regulated conditions, and when these streams are brought together and regulated properly and ignited, one obtains a flame that has a very high temperature.

Popping is a noise which is caused by combustion instability in the operation of an oxyacetylene torch. Popping is caused by faulty equipment, improperly adjusted equipment, or improper operation of the equipment. Popping causes a large spray, can be expected to cause a large spray of sparks and it is an undesirable thing to have happen. One can examine a welding afterwards and tell a popping had occurred because it is detrimental to the weld.

Assuming that the jury finds the facts to be that on February 16, 1970, Mr. John Strickland removed a gas

tank containing gasoline from a motorcycle and placed that gas tank on the floor of the repair room in which he was working, that the floor was made of concrete with a torginol covering, that Mr. Strickland ignited an oxy-acetylene welding torch and commenced to weld upon a motorcycle bracket, that there were no open flames or sources of sparks in the immediate area, and that there were no flammable liquids in the vicinity other than gasoline; that shortly thereafter he noticed a fire upon the floor of the room covering an area approximately three to four square feet burning with visible flames and appearing to come from the floor; that this fire was located approximately six feet from the point where the welding was taking place and was also located near the gas tank which had been removed; that in a matter of approximately ten seconds the fire spread towards and engulfed the gas tank; assuming the jury finds the above facts to be true, I have an opinion as to what caused this fire. That opinion is that the sparks caused from the oxyacetylene welding would in my view be the source of the fire. Assuming the jury finds the fact to be that the fire occurred in the manner described in the prior hypothetical question, I have an opinion as to whether such fire could have occurred if no flammable substance was on the floor of the repair room. That opinion is that there could be no fire coming from that floor if there were no flammable liquid on the floor. If there is nothing flammable on the floor, because the flooring material is noncombustible, it will not burn."

In our opinion the evidence offered at trial, when considered in the light most favorable to the plaintiff, will permit the jury to find that Strickland lighted an oxyacetylene torch which he knew or should have known was defective or improperly adjusted, and would pop and throw sparks and flame all over the vicinity where he was welding, and that the torch did pop and did throw sparks and flame to the floor which was made of a noncombustible material, and that the sparks and flame sprayed upon the floor ignited a flammable substance which Strickland knew or should have known was upon the floor within the vicinity of the point where he had lighted and was using the oxyacetylene torch, and that the fire so ignited spread and caused the damage complained of. Such findings in our opinion are sufficient to support a verdict by the jury that the defendant was negligent and that such negligence was

the proximate cause of the fire and resulting damage to plaintiffs.

Plaintiffs have brought forth and argued other assignments of error which we do not discuss since they are not likely to occur at a new trial. For the reasons stated the judgment appealed from is reversed.

Reversed.

Judges BRITT and MARTIN concur.

ANGELUS CHAMBERS RICKENBAKER v. THOMAS C. RICKENBAKER

No. 7526DC781

(Filed 3 March 1976)

Evidence § 27— tapped telephone lines — conversations inadmissible in alimony and child support action

In an action for alimony without divorce and child custody and support, the trial court, pursuant to 18 U.S.C. 2510 *et seq.*, properly excluded evidence obtained by defendant husband as a result of tapping plaintiff wife's telephone where the evidence tended to show that defendant had the telephone company install a telephone in his name in the home of the parties prior to their separation, after defendant moved from the family home he had the telephone company connect an extension to the telephone in that home and install the extension in defendant's business office downtown, this extension phone was located in a locked closet and it was connected by the defendant to a noise-activated tape recorder, and all of plaintiff's telephone conversations in her home were recorded without her knowledge or consent.

ON *writ of certiorari* to review proceedings before *Robinson, Judge.* Order entered 10 June 1975 in District Court, MECKLENBURG County. Heard in the Court of Appeals 21 January 1976.

Plaintiff instituted this action against the defendant for alimony without divorce and child custody and support. In plaintiff's complaint she alleged that the defendant used alcohol to excess and consistently falsely accused the plaintiff of being unfaithful. Plaintiff further alleged that defendant offered her

indignities so as to render her condition intolerable and life burdensome.

Defendant denied the material allegations of plaintiff's complaint, but he admitted accusing plaintiff of immoral conduct. Defendant further alleged that plaintiff committed adultery with Warren L. Gravely, Jr. and also that she has "become enamored of one Henry A. Odese, one Richard Bruce Dobbins, one George McKinzie Roberts, and Perry Lee Carver." Defendant later filed a supplemental answer, and in paragraph 8, alleged that plaintiff committed numerous other counts of adultery with Wilton Smith, Harold Hinson, and Robert Balsey. In defendant's supplemental answer he specified the exact date and place of each alleged act of adultery.

Pursuant to 18 U.S.C. § 2515, plaintiff moved to suppress "all evidence on the trial of this cause resulting from the interception of wire or oral communications." A hearing was held on this motion, and plaintiff offered the testimony of defendant, defendant's secretary, and the secretary's husband.

Evidence presented tended to establish that the plaintiff resided in a house owned by defendant and her as tenants by entirety. A telephone was installed in defendant's name prior to the separation of the parties. The telephone listing remained in defendant's name, and he continued to pay the telephone bill, after he moved out of the home.

Even though defendant had moved from the family home he had the telephone company connect an extension to the telephone in that home and install the extension in defendant's business office downtown. This extension telephone was located in a locked closet and it was connected by the defendant to a noise-activated tape recorder. All of plaintiff's telephone conversations in her home were recorded, and the recordings were provided by defendant to a detective agency engaged to assist in obtaining evidence against plaintiff.

The trial judge concluded that conversations of the plaintiff had been unlawfully intercepted by defendant in violation of 18 U.S.C. 2510 et seq. Paragraph 8 of defendant's supplemental answer was stricken, and the judge further ordered that no evidence pertaining to the allegations of Paragraph 8 would be admitted at trial.

Defendant petitions the court by writ of certiorari to review the trial judge's order suppressing defendant's evidence.

DeLaney, Millette and DeArmon, by Ernest S. DeLaney, Jr., and Ernest S. DeLaney III, for plaintiff appellee.

Warren C. Stack and Richard D. Stephens for defendant appellant.

ARNOLD, Judge.

The wife (plaintiff) argues that evidence obtained by her husband (defendant) as a result of tapping her telephone should be excluded pursuant to 18 U.S.C. 2510 et seq. The husband contends that the federal statutes, being a part of the Omnibus Crime Control and Safe Streets Act, do not apply to the facts of this domestic matter. He further asserts that even if the federal act does apply the interception was accomplished through telephone equipment used in the ordinary course of business to bring him within the statutory exception.

18 U.S.C. § 2515 provides: "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

18 U.S.C. § 2511(1) makes the willful interception of wire or oral communication unlawful. 18 U.S.C. 2510(4) defines interception as "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." Electronic, mechanical or other device "means any device or apparatus which can be used to intercept a wire or oral communication other than—(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties. . . . " 18 U.S.C. § 2510(5).

While defendant correctly contends that 18 U.S.C. § 2510 et seq. is a criminal statute it does not necessarily follow that

the Act must apply only to criminal cases. The language in 18 U.S.C. § 2515 clearly excludes the contents of intercepted communications via telephone from being received in evidence in "any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

Evidence adduced at the hearing establishes that the following facts existed at the time of the electronic interception:

1. The parties were not living together as husband and wife.
2. The wife was living in the former marital home.
3. The husband electronically intercepted the wife's telephone communications.
4. The wife did not consent to or know of the electronic interception.

These facts must be examined to determine whether the husband's interception of the wife's telephone communications violated the Act under consideration.

Defendant maintains that the telephone extension involved was furnished to him as a "subscriber" by a "communications common carrier in the ordinary course of its business," and that the extension telephone was being used by defendant in the "ordinary course" of his business. The trial court found, however, that the defendant was not using the extension telephone in his office in the ordinary course of his business. This finding is clearly supported by the evidence which showed that the extension was located in a locked supply closet in defendant's office, and it was never used for anything other than recording communications going into plaintiff's home. Moreover, it was defendant himself who installed the recording device to this extension telephone and not the "communication common carrier in the ordinary course of its business."

Defendant also contends that the statute does not prohibit a spouse from intercepting telephone communications to the other spouse. He cites authority such as *Simpson v. Simpson,* 490 F. 2d 803 (Fifth Cir. 1974), and *Beaber v. Beaber,* 41 Ohio Misc. 95, 322 N.E. 2d 910 (1974), which would seem to

allow interceptions within the "marital home" by recording devices located in the marital or family home. This case is distinguished from the facts in the cases cited by defendant. Undisputed evidence establishes that the marital home had ceased to exist, and there was no extension and recording device located inside the marital home. The recording device and extension were in defendant's office. *See Markham v. Markham*, 265 So. 2d 59, 62 (1972), where the Florida court reached a contrary result from cases cited by defendant and stated, "A husband has no more right to tap a telephone located in the marital home than has a wife to tap a telephone situated in the husband's office."

There are no circumstances in this case to bring defendant within any exceptions provided by 18 U.S.C. § 2510(5). Therefore, that portion of the order suppressing all evidence obtained from the defendant's electronic interception of plaintiff's telephone communications must be affirmed. However, that part of the order which prohibits the introduction of any evidence pertaining to the allegations of paragraph 8 of the supplemental answer is error and must be vacated. Evidence not resulting from the interception of the telephone communications may be available which would pertain to paragraph 8 of the supplemental answer.

The order is affirmed to the extent that it excludes all evidence resulting from the interception of plaintiff's telephone communications. The order is vacated to the extent that it excludes all evidence pertaining to the allegations of paragraph 8 of the supplemental answer.

Affirmed in part and vacated in part.

Judge PARKER concurs.

Chief Judge BROCK dissents.

BROCK, Chief Judge, dissenting.

I dissent from that portion of the majority opinion which affirms the suppression of defendant's evidence resulting from the interception of plaintiff's telephone communications.

IN THE MATTER OF THE WILL OF BETTY FUTRELL RICKS, DECEASED

No. 756SC748

(Filed 3 March 1976)

1. **Evidence § 43; Wills § 22— mental capacity — nonexpert opinion**

One not an expert may give an opinion, founded upon observation, that a certain person is sane or insane, and the extent of the witness's observation affects the weight to be given the opinion testimony, not its admissibility.

2. **Evidence § 11— dead man's statute — mental competency of decedent — proof of undue influence**

Where there is an issue of mental capacity of a decedent, G.S. 8-51 does not prohibit an interested witness from relating personal transactions and communications between himself and the decedent as a basis for his opinion as to the mental capacity of the decedent; however, the statute requires rejection of such testimony when it affirmatively tends to prove vital and material facts which contradict the charge of undue influence.

3. **Evidence § 11; Wills § 21— dead man's statute — evidence rebutting charge of undue influence**

In this caveat proceeding, testimony by the sole beneficiary under the will as to conversations and transactions with testatrix involving the drafting and signing of the will was improperly admitted by the court since it tended to establish the will as the voluntary act of the testatrix and to rebut the charge of undue influence, and prejudice to the caveators from admission of such testimony was not removed by the court's instruction limiting the jury's consideration of the testimony to the witness's opinion of the testatrix' mental capacity.

Judge BRITT dissenting.

APPEAL by caveators from *Tillery, Judge.* Judgment entered 14 April 1975 in Superior Court, NORTHAMPTON County. Heard in the Court of Appeals 15 January 1976.

Betty Futrell Ricks, a resident of Northampton County, died testate on 25 July 1974. She left surviving five daughters and one son. By a paper writing dated 12 July 1973, Betty Futrell Ricks purported to devise and bequeath all of her property to her son, Grady Venton Ricks. The son was also named as executor. The paper writing dated 12 July 1973 was admitted to probate in common form, and letters testamentary were issued to Grady Venton Ricks.

On 11 October 1974 the five daughters of decedent filed a caveat to the 12 July 1973 paper writing, alleging undue in-

fluence and mental incapacity. This appeal by caveators is from a trial of the issue of *devisavit vel non* and from a jury verdict sustaining the 12 July 1973 paper writing as the last will and testament of Betty Futrell Ricks.

Johnson, Johnson & Johnson, by Bruce C. Johnson, for the propounder.

Weeks, Muse & Surles, by T. Chandler Muse and Cameron S. Weeks, for the caveators.

BROCK, Chief Judge.

[1] The caveators assign as error the admission of testimony from propounder's witnesses bearing upon the mental capacity of the testator. It has long been the rule in this State that one not an expert may give an opinion, founded upon observation, that a certain person is sane or insane. *Whitaker v. Hamilton,* 126 N.C. 465, 35 S.E. 815 (1900). Where opportunity for observation is shown, the extent of such observation affects the weight to be given the opinion testimony, not its admissibility. *In re Will of Brown,* 203 N.C. 347, 166 S.E. 72 (1932). This assignment of error is overruled.

Caveators assign as error the admission of the testimony of Grady Venton Ricks, the sole beneficiary under the will offered for probate, of transactions with testator surrounding the drafting and signing of the contested will. Before the testimony was given and immediately following the testimony, the trial judge gave cautionary instructions to the jury. In these instructions he undertook to limit the jury's consideration of the testimony to its bearing upon the witness's opinion of testator's mental capacity.

[2] General Statute 8-51 does not prevent an interested witness, where there is an issue of mental capacity, from relating personal transactions and communications between the witness and a decedent *as a basis for his opinion as to the mental capacity of the decedent;* however, the statute requires rejection of such testimony of personal transactions and communications between an interested witness and a decedent when it affirmatively tends to prove vital and material facts which contradict the charge of undue influence. *Whitley v. Redden,* 276 N.C. 263, 171 S.E. 2d 894 (1970); *In re Will of Chisman,* 175 N.C. 420, 95 S.E. 769 (1918).

[3] In this case the issue of undue influence exerted upon the testator by Grady Venton Ricks, the sole beneficiary under the will offered for probate, was raised by the caveat and was submitted to the jury. The challenged testimony related solely to conversations and transactions between the witness, Grady Venton Ricks, and the testator. It related a request by testator that the witness take her to have a will drawn; the witness making an appointment with an attorney at testator's request; the witness driving testator to the attorney's office at testator's request; testator's instruction to the attorney on the provisions of her will; the witness driving testator back to the attorney's office to sign the will; the attorney's explanation to testator of what the will provided; the testator's statement that it was like she wanted it; the testator's request of the attorney and his secretary to sign as witnesses; and testator's request of the attorney that he keep the will in a safe place for her.

These conversations and transactions with the testator testified to by the witness were not casual conversations and transactions upon some indifferent subjects admitted in evidence as a basis for forming an opinion upon the sanity of the testator. These declarations and transactions constitute very vital evidence tending to establish the will and to rebut the charge of undue influence. Such declarations and transactions may not be proven by a witness interested in the result of the action. *In re Will of Chisman, supra.* The challenged testimony was so directed and weighted towards proving facts essential to establish the will as the voluntary act of the testator and rebut the charge of undue influence, rather than the basis of the witness's opinion as to sanity, that it became impossible for the trial judge to effectively remove the prejudice to caveators by a limiting instruction. Therefore, a limiting instruction by the court could not make the evidence admissible. *Whitley v. Redden, supra.*

New trial.

Judge MORRIS concurs.

Judge BRITT dissenting.

Caveators challenged the validity of the will in question on the grounds that (1) testatrix did not have sufficient mental capacity to make a will, and (2) that her signature to the

purported will was procured by Grady Venton Ricks through undue influence and duress. The burden of proof was on caveators on both of said propositions of law. 7 Strong, N. C. Index 2d, Wills § 18.

While considerable evidence was presented by caveators and propounders tending to show the mental capacity of testatrix on 12 July 1973, caveators presented little if any evidence tending to show the exercise of undue influence by Grady Venton Ricks. Although undue influence may be proved by circumstantial evidence, *In re Will of Beale,* 202 N.C. 618, 163 S.E. 684 (1932), the influence must be sufficient to amount to a substitution of the will of the influencing party for that of the testatrix. *In re Will of Franks,* 231 N.C. 252, 56 S.E. 2d 668 (1949).

A careful review of the testimony leads me to conclude that about the only evidence of undue influence in this case was inferences that might be drawn from the challenged testimony of Grady Venton Ricks. In this testimony he told how *he* made the appointment with the drafting attorney, his transporting the testatrix to the attorney's office, and even going with the testatrix into the attorney's office while she gave instructions regarding the will. The majority holds that this testimony constituted vital evidence tending to establish the will and "to rebut the charge of undue influence." I respectfully disagree. Without the challenged evidence, where was there any evidence of undue influence?

Assuming, *arguendo,* that the admission of the testimony was error, I do not think the error was sufficiently prejudicial to caveators to warrant a new trial. This case was tried primarily upon the issue of lack of mental capacity and the evidence would have supported a verdict either way on that issue. My vote is to leave undisturbed the verdict and judgment of the trial court.

JOYCE H. GIBSON v. GLENN H. CAMPBELL AND CARRIE A. CAMPBELL

No. 7518SC779

(Filed 3 March 1976)

Parent and Child § 5— action for loss of services of child — injury and death simultaneous — no recovery

There is no separate cause of action in the parent to recover for loss of services of a minor child whose death occurs simultaneously with its injury; therefore, the trial court erred in denying defendants' motion for summary judgment in plaintiff mother's action for loss of services of her child who drowned in defendants' swimming pool. G.S. 28-173.

ON *writ of certiorari* to review order entered by *McConnell, Judge.* Order entered 18 June 1975 in Superior Court, GUILFORD County. Heard in the Court of Appeals 21 January 1976.

Plaintiff, mother of a five year old child who died by drowning on 11 August 1972, brought this action against defendants, owners of the swimming pool in which the child was drowned, seeking to recover damages for loss of services of the child. Plaintiff alleged her child's death was caused by defendants' negligence. Defendants denied negligence and pleaded affirmative defenses, including a plea in bar that all claims for the wrongful death of the child had been settled with the administrator of the child's estate. Plaintiff's answers to defendants' interrogatories and requests for admissions show there is no genuine issue as to the following facts:

Plaintiff and the child's father, Richard Paul Gibson, were married on 2 July 1965 and thereafter lived together until 11 October 1970, when they separated. The child was born on 6 August 1967. Following the separation of the parents, the child remained in the care and control of the mother, the plaintiff herein, and custody of the child was awarded to the mother by order of the District Court, which also ordered the father to make weekly payments to the mother for support of the child. When the child drowned on 11 August 1972, the parents were still married, and their marriage was not dissolved until 25 May 1973, when they were divorced.

On 30 August 1972 the father qualified as Administrator of the child's estate before the Clerk of Superior Court of Guilford County, showing as the only asset of the estate an alleged

wrongful death claim. On 5 February 1973 the Administrator settled the wrongful death claim with the defendants for the sum of $4,500.00, and in connection therewith the Administrator executed a general release in favor of the defendants. On 9 February 1973 the Administrator filed his final account in which he showed as the sole receipt the wrongful death recovery in the amount of $4,500.00 and disbursements totalling $3,009.52, which included disbursements for funeral services, bond premiums, court costs, and attorney's and administrator's fees as allowed by court order. The balance of $1,490.48 was distributed by the Administrator, one-half to the father and one-half to the mother. Plaintiff mother received her one-half, being the sum of $745.24, on 9 February 1973. She instituted this action against the defendants on 9 August 1974, alleging her child's death was caused by their negligence and seeking to recover for loss of services of the child during his minority.

Defendants moved for summary judgment on the grounds there was no genuine issue as to any material fact as to their affirmative defenses. The Superior Court denied the motion by order dated 18 June 1975. Thereafter this Court allowed defendants' petition for writ of certiorari to review the Superior Court's order denying their motion for summary judgment.

Jordan, Wright, Nichols, Caffrey & Hill by Luke Wright for plaintiff.

Stephen Millikin and J. Donald Cowan, Jr. for defendants.

PARKER, Judge.

When an unemancipated minor child receives bodily injuries as result of the tortious conduct of another, a cause of action arises in the parent to recover from the tort feasor for loss of services of the child during its minority. *Kleibor v. Rogers,* 265 N.C. 304, 144 S.E. 2d 27 (1965); 3 Lee, North Carolina Family Law, § 241; Annot., 32 A.L.R. 2d 1060 (1953). However, if the child dies as a result of such tortious conduct, there can be no recovery for loss of services for the period following the death, though the parent may still recover damages for loss of services of the child for the period intermediate its injury and death. *White v. Comrs. of Johnston,* 217 N.C. 329, 7 S.E. 2d 825 (1940). Accordingly, when death results instantaneously from injury, the common law recognizes no cause of action in the parent for loss of the child's services, *Caldwell*

v. Abernethy, 231 N.C. 692, 58 S.E. 2d 763 (1950); *White v. Comr's. of Johnston, supra; White v. Charlotte,* 212 N.C. 539, 193 S.E. 738 (1937); *Croom v. Murphy,* 179 N.C. 393, 102 S.E. 706 (1920); *Hope v. Peterson,* 172 N.C. 869, 90 S.E. 141 (1916); *Killian v. R. R.,* 128 N.C. 261, 38 S.E. 873 (1901); *Kendrick v. Cain,* 1 N.C. App. 557, 162 S.E. 2d 155 (1968), and in such case the only remedy available is that provided by our wrongful death statute, G.S. 28-173, which expressly provides that the action may be brought only by the personal representative or collector of the decedent.

In the present case plaintiff alleged and defendants admitted that the child's death occurred by drowning in defendants' swimming pool. Necessarily, therefore, the death occurred simultaneously with infliction of the injury for which plaintiff seeks to hold defendants responsible. Under the long established law of this State as announced in the above cited cases, no separate cause of action arose on behalf of either of the child's parents to recover damages for loss of the child's services, and the only cause of action arising from the child's death was that created by our wrongful death statute. For this reason defendants were entitled to judgment dismissing the present action, either under G.S. 1A-1, Rule 12(b)(6) or under Rule 56.

Crawford v. Hudson, 3 N.C. App. 555, 165 S.E. 2d 557 (1969), a decision of this Court cited and relied on by plaintiff, presented the question whether it was error for the trial court to sustain a demurrer to a complaint in which the father of a deceased minor child sought damages for expenses of the child's funeral and burial and for loss of the child's services which plaintiff alleged resulted from defendant's negligence in causing the child's injuries and death. This Court held that it was error to sustain the demurrer, the opinion laying particular stress upon the right of the father as the person primarily responsible for the child's funeral expenses to sustain a separate cause of action for recovery of those expenses. The opinion does not make clear whether in that case the child's death occurred simultaneously with or subsequent to the infliction of the bodily injury to the child which plaintiff alleged resulted from the negligence of the defendant in that case. Insofar as the opinion may contain language which is susceptible of the interpretation that a separate cause of action accrued to the parent to recover for loss of services of his unemancipated minor child during the child's minority in a case in which the child's death occurs

simultaneously with its injury, such an interpretation is inconsistent with the long established law of this State as enunciated in the decisions of our Supreme Court above cited, and such interpretation is therefore disapproved.

The above cited decisions all arose prior to the effective date of Ch. 215 of the 1969 Session Laws which rewrote old G.S. 28-174. The changes effected by the 1969 statute, however, strengthen rather than weaken the conclusion that there is no separate cause of action in the parent to recover for loss of services of a minor child whose death occurs simultaneously with its injury. The statute, G.S. 28-174(a), as rewritten expressly provides that damages recoverable in an action for death by wrongful act include:

> "(4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected:
>
> * * *
>
> b. Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered."

[We note that effective 1 October 1975 Chapter 28 of the General Statutes was repealed and old G.S. 28-173 and 174 were reenacted in substance as new G.S. 28A-18-2.]

We find its unnecessary to decide and do not discuss the contention made in defendants' brief that in any event they were entitled to summary judgment on the additional ground that the parent's cause of action, if any existed in this case, for loss of services of the minor child arose in favor of the father rather than the mother. On this question see: *Smith v. Hewett,* 235 N.C. 615, 70 S.E. 2d 825 (1952) and 3 Lee, North Carolina Family Law, § 241.

For the reasons stated, the order appealed from is reversed and this cause is remanded for entry of an order allowing defendants' motion for summary judgment.

Reversed and remanded.

Chief Judge BROCK and Judge ARNOLD concur.

W. V. GIBSON v. RAY CLINE AND WIFE, MAXINE CONLEY CLINE

No. 7530SC836

(Filed 3 March 1976)

Rules of Civil Procedure § 65— order continuing temporary injunction — failure to set out acts enjoined and reasons therefor — reference to temporary injunction insufficient

When the court grants a temporary restraining order, a preliminary injunction or a permanent injunction, the order or judgment must set forth the reasons for its issuance, be specific in terms, and describe in reasonable detail the act or acts restrained or enjoined, and reference to some other document is not sufficient to provide a description of the act or acts enjoined or restrained; therefore, order of the trial court continuing the temporary restraining order to the trial did not meet the requirements of G.S. 1A-1, Rule 65(d) since it did not set forth the reasons for its issuance and did not describe in detail the acts enjoined but simply ordered that "the temporary restraining order heretofore issued by Judge Lacy Thornburg, Resident Superior Court Judge of the Thirtieth Judicial District, on the 16th day of August, 1975" be continued until final hearing.

APPEAL by defendants from *Albright, Judge.* Order entered 25 August 1975 in Superior Court, SWAIN County. Heard in the Court of Appeals 11 February 1976.

In this action plaintiff seeks to have defendants enjoined from entering upon certain lands on which plaintiff allegedly holds a lease executed by the feme defendant's father, Clyde Conley. In their answer defendants allege that the purported lease is void for the reasons that it does not contain a sufficient description of the property and its execution was obtained by fraud and undue influence. Defendants further allege that the purported lease was not recorded; that Clyde Conley conveyed the land to the feme defendant by warranty deed dated 30 July 1975 and duly recorded on said date; therefore, the unrecorded lease is invalid as opposed to the recorded deed.

On 18 August 1975, Judge Thornburg entered an order temporarily restraining defendants, and those acting in concert with them or under their control, from interfering with plaintiff or any member of his family, and from going on the premises in question during the pendency of the action. A hearing for defendants to show cause why the restraining order "should not be extended to the trial" was set for 25 August 1975.

Following the show cause hearing, Judge Albright entered the following order:

> "The above-entitled matter coming on to be heard and being heard before The Honorable Douglas Albright, Judge holding the Courts of the Thirtieth Judicial District, at Bryson City, North Carolina, on the 25th day of August, 1975, pursuant to a temporary restraining order issued by Judge Lacy Thornburg on the 16th day of August, 1975, why the temporary restraining order issued on August 16, 1975, should not be continued until the final hearing; that after reading the pleadings filed herein and hearing argument of counsel that the questions existing between the parties are such that the Court after due consideration of the same, is of the opinion that said temporary restraining order should be continued pending the disposition of the issues in the Superior Court before a jury;
>
> "It is, therefore, ORDERED, ADJUDGED and DECREED that the temporary restraining order heretofore issued by Judge Lacy Thornburg, Resident Superior Court Judge of the Thirtieth Judicial District, on the 16th day of August, 1975, be continued in all respects until the final hearing hereof before the Superior Court."

Defendants excepted to the order and appealed.

Robert L. Hyde for defendant appellants.

Francis & Hipps, by W. R. Francis, for plaintiff appellee.

BRITT, Judge.

Defendants contend that the order appealed from does not meet the requirements of G.S. 1A-1, Rule 65(d). This contention has merit.

G.S. 1A-1, Rule 65(d), provides in pertinent part as follows: "Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts enjoined or restrained; . . . ."

This rule represents a departure from prior North Carolina practice. *See* 2 A. McIntosh, North Carolina Practice and Procedure §§ 2214-16 (2d ed. 1956). The new rules envision a

temporary restraining order, a preliminary injunction and a permanent injunction. We think it is clear that when the court grants either of the three, the order or judgment must set forth the reasons for its issuance, be specific in terms, and describe in reasonable detail the act or acts restrained or enjoined; and that *reference to some other document* is not sufficient to provide a description of the act or acts enjoined or restrained. *Setzer v. Annas,* 286 N.C. 534, 212 S.E. 2d 154 (1975), *rev'g,* 21 N.C. App. 632, 205 S.E. 2d 553 (1974); *Pruitt v. Williams,* 25 N.C. App. 376, 213 S.E. 2d 369 (1975), *appeal dismissed,* 288 N.C. 368, 218 S.E. 2d 348 (1975). *See generally,* W. Shuford, North Carolina Civil Practice and Procedure § 65-9 (1975).

While the order appealed from might have been sufficient under the former practice, it does not comply with Rule 65(d). It does not set forth the reasons for its issuance and does not describe in detail the acts enjoined.

For the reasons stated, the order is vacated and this cause is remanded for further proceedings consistent with this opinion.

Order vacated and cause remanded.

Judges HEDRICK and MARTIN concur.

IN RE: WILLIAM M. NEATHERLY, JR.

No. 7514DC809

(Filed 3 March 1976)

Insane Persons § 1— respondent imminently dangerous to himself and others — insufficiency of findings

In a proceeding for involuntary commitment of respondent to a mental health care facility, the trial court's findings that respondent suffered from chronic undifferentiated schizophrenia, that he saw things that were not there, and that he talked to people who were not there were insufficient to support its finding that respondent was imminently dangerous to himself or others. G.S. 122-58.7(i).

APPEAL by respondent from *Moore, Judge.* Judgment entered 3 July 1975 in District Court, DURHAM County. Heard in the Court of Appeals 10 February 1976.

In re Neatherly

This is a proceeding pursuant to G.S. 122-58.1 et seq. to have the 53-year-old respondent committed to a mental health facility.

On 27 June 1975 respondent's sister filed a verified petition alleging that respondent was mentally ill and imminently dangerous to himself and others. Pursuant to the petition respondent was taken into custody and examined by a qualified physician on the staff of John Umstead Hospital who recommended that respondent be hospitalized.

On 3 July 1975, following a hearing on the petition, the court entered an order as follows:

> "This proceeding for involuntary commitment was heard this day before the undersigned. The court finds as follows:
>
> "That the respondent suffers from chronic, undifferentiated schizophrenia. That he is mentally ill, and imminently dangerous to himself or others. That he sees things that are not there and talks to people that are not thers (sic).
>
> "It is, therefore, ordered that
>
> "The respondent be, and hereby is, committed to John Umstead Hospital for a period not to exceed 90 days without further orders of the Court."

Respondent appealed.

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

Elisabeth S. Petersen for defendant appellant.

BRITT, Judge.

G.S. 122-58.1 provides in pertinent part as follows: "*Declaration of policy.*—It is the policy of the State that no person shall be committed to a mental health facility unless he is mentally ill or an inebriate *and* imminently dangerous to himself or others; . . . . " (Emphasis added.)

G.S. 122-58.7(i) provides: "To support a commitment order, the court is required to find, by clear, cogent, and convincing evidence, that the respondent is mentally ill or inebriate,

and imminently dangerous to himself or others. *The court shall record the facts which support its findings.*" (Emphasis added.)

Assuming, *arguendo,* that the court properly found that respondent was mentally ill, clearly it made insufficient findings showing that respondent was "imminently dangerous to himself and others." *See In re Carter,* 25 N.C. App. 442, 213 S.E. 2d 409 (1975).

For lack of sufficient findings required by statute to support its evalidity, the judgment appealed from is

Reversed.

Judges HEDRICK and MARTIN concur.

STATE OF NORTH CAROLINA v. DEBORAH WAJNA, JAMES R. GODFREY

No. 754SC828

(Filed 3 March 1976)

Obscenity; Municipal Corporations § 8— city ordinance prohibiting indecent exposure — preemption by state law

In a prosecution of the female defendant for violating a city ordinance making it a misdemeanor for any person willfully to make any indecent exposure of his or her person, or the private parts thereof, in any public place, and of the male defendant for aiding and abetting the female defendant in violating the ordinance, the defendants' motions to quash the warrants against them should have been granted on the authority of *State v. Tenore,* 280 N.C. 238, since the city ordinance under which defendants were charged was enacted at a time when the General Assembly had already preempted the field by enacting a state-wide statute which prohibited and punished the precise type of conduct prohibited by the ordinance. Former G.S. 14-190.

APPEAL by defendants from *Martin (Perry), Judge.* Judgments entered 5 June 1975 in Superior Court, ONSLOW County. Heard in the Court of Appeals 11 February 1976.

The female defendant Wajna was charged by warrant with violation of § 17-8.1 of the Jacksonville City Code which makes it a misdemeanor for any person to "willfully make any indecent public exposure of his or her person, or the private parts

thereof, in any public place." The male defendant was charged with aiding and betting the female defendant in violating said ordinance.

Motions to quash the warrants were allowed in District Court. The State appealed to Superior Court, where motions to quash were overruled and defendants were convicted by a jury. Judgments were entered sentencing each defendant for a term of 30 days, the execution of each sentence being suspended upon certain conditions. Defendants appealed.

Attorney General Edmisten by Special Deputy Attorney General Edwin M. Speas, Jr. for the State.

Edward G. Bailey for defendant appellants.

PARKER, Judge.

The motions to quash should have been allowed on authority of *State v. Tenore,* 280 N.C. 238, 185 S.E. 2d 644 (1972). Although that case involved a violation of an Onslow County Ordinance while the present case involves a violation of a Jacksonville City Ordinance, insofar as material to the question presented by the motions to quash the two cases present essentially the same situations. We note that the City Ordinance here involved was enacted 23 January 1970 and the Onslow County Ordinance involved in *State v. Tenore, supra,* was enacted effective on 27 April 1970. Thus, both ordinances were enacted when G.S. 14-190 was in effect. "It is immaterial that, subsequently, G.S. 14-190 was repealed, for the repeal of a state-wide law which, during its life, prohibited the enactment of a county ordinance is prospective in this respect and does not breathe life into an ordinance which was beyond the authority of the ordaining body when it was adopted." *State v. Tenore, supra,* pp. 248-249.

Reversed.

Chief Judge BROCK and Judge ARNOLD concur.

WILLIAM R. ANDREWS ASSOCIATES v. SODIBAR SYSTEMS OF D. C., INC.

No. 7515DC914

(Filed 17 March 1976)

1. **Rules of Civil Procedure § 4; Process § 9— nonresident defendant — goods shipped from N. C. — long arm statute applicable**

The trial court's finding that this action related to goods shipped from N. C. by the plaintiff to the defendant's principal place of business in Washington, D. C., at defendant's order and direction was supported by the uncontroverted allegations in plaintiff's complaint, and the N. C. long arm statute, G.S. 1-75.4(5)d, was therefore applicable to this case.

2. **Constitutional Law § 24; Rules of Civil Procedure § 4 — nonresident defendant — minimum contacts — in personam jurisdiction — due process**

Due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimal contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.

3. **Process § 9; Rules of Civil Procedure § 4— nonresident defendant — minimum contacts insufficient for in personam jurisdiction — due process**

The exercise of *in personam* jurisdiction over defendant by the courts of N. C. would be unconstitutional in that it would violate defendant's due process rights since the only contact defendant ever had with the State of N. C. was that on two occasions defendant entered into contracts in Washington, D. C., with a resident of N. C. for delivery and receipt of goods in Washington, D. C., and those goods were shipped by plaintiff from his warehouse in Durham, N. C.

APPEAL by defendant from *Allen, Judge.* Order entered 19 August 1975 in District Court, ORANGE County. Heard in the Court of Appeals 9 March 1976.

This is a civil action in which plaintiff seeks to recover $4,612.50 which plaintiff alleges defendant owes by reason of the sale and delivery by plaintiff to defendant of 150 new aluminum CO_2 cylinders at a unit price of $30.75. The sole question is whether the court acquired jurisdiction over the defendant.

Plaintiff is a business association owned by William R. and Bernetta A. Andrews, who reside in Orange County, North Carolina. Plaintiff has its principal place of business in Orange County and is engaged in the sale of aluminum CO_2 cylinders.

Defendant is a corporation organized and existing under the laws of the State of Delaware. It has its office and principal place of business in Washington, D. C., and is engaged in business as a wholesale seller of soda fountain supplies in Washington, D. C., and the surrounding metropolitan area. Defendant is not domesticated in North Carolina and has no place of business, agent, or representative in North Carolina.

In a previous action between these same parties, this Court found that the complaint filed by plaintiff in that case, although making mention of the 150 new aluminum cylinders sold by plaintiff to defendant, asserted a claim based entirely on plaintiff's additional allegations made in that case concerning alleged defects in certain steel cylinders sold by defendant to plaintiff in Washington, D. C., and shipped from there to Florida. Accordingly, this Court held in that case that plaintiff's claim as then asserted did not relate to goods "shipped from this State by the plaintiff to the defendant on his order or direction" so as to bring the case within the provisions of G.S. 1-75.4(5)d. See: *Andrews Associates v. Sodibar Systems*, 25 N.C. App. 372, 213 S.E. 2d 411 (1975). The opinion of this Court in that case was filed on 16 April 1975.

On 24 April 1975 plaintiff instituted the present action against defendant in the District Court in Orange County, North Carolina. The essential allegations of the complaint filed in the present case are contained in paragraphs IV, V, VI, and VII of the complaint, which are as follows:

> "IV. On or about November 1, 1973, William R. Andrews visited Mr. Alvin Simon, President of Defendant corporation, at the place of business of defendant at 1222 First Street, N.E., Washington, D. C., and offered to sell to defendant aluminum CO_2 cylinders at a unit price of $30.75; defendant accepted said offer and placed his order for 150 of said cylinders.
>
> V. Plaintiff and defendant thereby entered into a contract on or about November 1, 1973, under the terms of which defendant agreed to order and purchase 150 new aluminum cylinders from plaintiff at a unit price of $30.75, and plaintiff agreed to sell same to defendant.
>
> VI. Thereafter, on or about November 12, 1973, and on the order and direction of defendant, plaintiff shipped from his warehouse near Durham, North Carolina,

and delivered to the defendant at his place of business aforesaid 150 new aluminum CO_2 cylinders as agreed in the contract; defendant accepted delivery of said cylinders and has used said cylinders in his business.

VII. By reason of plaintiff's performance of the said contract, defendant owes to plaintiff the sum of $4,612.50; and defendant has failed and refused to pay said sum, despite repeated demands by plaintiff for payment."

On 13 May 1975 plaintiff's attorney filed an affidavit showing the mailing of a copy of the summons and complaint by registered mail addressed to defendant at its Washington, D. C. address pursuant to Rule 4(j) (9)b of the North Carolina Rules of Civil Procedure. On 21 May 1975 defendant filed a motion pursuant to Rule 12(b) to quash the service of process upon it and to dismiss the action for lack of jurisdiction over the defendant, supporting this motion by an affidavit of defendant's president. The essential allegations in this affidavit may be summarized as follows:

Affiant has been president of the defendant corporation, Sodibar Systems of D. C., Inc., ever since it was incorporated on 1 July 1948. Defendant is incorporated under the laws of Delaware and has its office and place of business in Washington, D. C. It does not have and never has had any office or place of business other than its place of business in Washington, D. C. It employs approximately ten (10) employees in Washington, D. C. Defendant has never transacted any business in North Carolina, and no products produced or manufactured by defendant have ended up in the hands of any person, firm, or corporation in North Carolina. Defendant has never maintained any salesmen or solicitors for the solicitation of business in North Carolina, has never advertised in national publications or on radio or television, and has never engaged in any form of advertising or soliciting in North Carolina. Defendant has never had any office or place of business, or any agent or employee, in North Carolina for any purpose. Except for the transactions which are the subject of this suit, neither the defendant corporation nor any officer, director, agent or employee of the corporation has ever had any contact of any kind with the State of North Carolina or with any person, firm or corporation of the State of North Carolina, for any purpose connected with any business or corporate purpose of the company. The first contact of any kind which defendant had with any representative of

plaintiff was on or about 26 July 1973 when Mr. Andrews came to the offices of defendant corporation in Washington, D. C., and solicited an order for aluminum CO_2 cylinders. These were shipped by Mr. Andrews to the defendant on or about 2 August 1973. On or before 2 November 1973, "Mr. Andrews arranged with the defendant company to ship to the defendant an additional 150 aluminum cylinders" and to pick up from defendant 150 50-pound used cylinders to ship to St. Petersburg, Florida. Plaintiff arranged for Ryder Truck Lines, Inc., to ship the defendant the aluminum cylinders and to pick up the 50-pound used cylinders for shipment to St. Petersburg, Florida, and William R. Andrews was billed directly by Ryder Truck Lines. The defendant never initiated any contract with the plaintiff, never called the plaintiff in North Carolina, and never otherwise communicated with the plaintiff, except as stated above.

On 19 August 1975 the District Court entered an order making findings of fact, including findings that "this action relates to goods and merchandise of value shipped from North Carolina by the plaintiff to the defendant at the defendant's order and direction," that "to force plaintiff to prosecute this claim in the courts of the domicile of the defendant would work substantial hardship on the plaintiff, possibly forcing him to abandon his claim," and that "defendant has on at least one occasion prior to the transaction herein caused merchandise to be shipped from plaintiff in North Carolina to its offices in Washington, D. C." On these findings the Court concluded that the District Court of Orange County has jurisdiction under G.S. 1-75.4(5)d and that application of that statute to confer jurisdiction does not offend due process under the United States Constitution.

In accordance with these findings and conclusions, the Court denied defendant's motion to dismiss, and defendant appealed.

Epting & Hackney by Joe Hackney for plaintiff appellee.

James B. Maxwell for defendant appellant.

PARKER, Judge.

The sole question presented is whether the court acquired in personam jurisdiction over defendant corporation under our "long arm" statute, G.S. 1-75.1 *et seq.* Plaintiff contends that the North Carolina court acquired such jurisdiction by virtue of

G.S. 1-75.4(5)d which provides that a court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j) of the Rules of Civil Procedure in any action which:

> "d. Relates to goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction."

Defendant, in contesting the in personam jurisdiction of the North Carolina courts, makes two contentions. First, defendant contends that there is no indication in the record that the defendant corporation ever ordered or directed plaintiff to ship any goods anywhere, and therefore G.S. 1-75.4(5)d does not apply. Second, defendant contends that the imposition of in personam jurisdiction over this defendant by the North Carolina courts under the facts of this case is unconstitutional in that it would violate defendant's due process rights under the Federal Constitution.

[1] As to defendant's first contention, plaintiff alleged in paragraph VI of the complaint that on or about 12 November 1973 "on the order and direction of defendant, plaintiff shipped from his warehouse near Durham, North Carolina, and delivered to the defendant at his place of business" the 150 new aluminum CO_2 cylinders "as agreed in the contract." No responsive pleading has been filed, and nothing in the present record controverts the above quoted allegations of the complaint. The averment in the affidavit made by defendant's president that "Mr. Andrews arranged with the defendant company to ship to the defendant company an additional 150 aluminum cylinders" is not inconsistent with the fact that the shipment may have been made on defendant's order or direction, and nothing elsewhere in the affidavit controverts the quoted portion of paragraph VI of the complaint. The trial court has found that this action relates to goods shipped from North Carolina by the plaintiff to the defendant at defendant's order and direction. That finding is supported by the uncontroverted allegations in plaintiff's complaint. Accordingly, on the present record we find G.S. 1-75.4(5)d applicable to this case, and we are thus brought to defendant's second contention, that to apply the statute to impose in personam jurisdiction upon defendant under the facts of this case would violate defendant's rights to due process under the Constitution of the United States.

[2] In the context of defendant's constitutional contentions, "due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimal contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington,* 326 U.S. 310, 316, 90 L.Ed. 95, 102, 66 S.Ct. 154, 158 (1945). The existence of minimum contacts must be determined upon the particular facts of each case. *Chadbourn, Inc. v. Katz,* 285 N.C. 700, 208 S.E. 2d 676 (1974).

[3] What contacts did defendant in the present case have with the State of North Carolina? It maintained no office here, sent no salesman, agent, or employee here, solicited no business here, advertised in no media coming into this State, and had no contact of any nature with any person, firm, or corporation of the State of North Carolina excepting only its transactions with the plaintiff herein. With regard to those transactions, the facts shown by this record, as disclosed by the allegations in plaintiff's complaint and in the affidavit of defendant's president, are that on two occasions, once in late July and once in early November 1973, Mr. William R. Andrews, representing plaintiff, visited at defendant's office in Washington, D. C., where he solicited orders for aluminum CO_2 cylinders. As a result of the first visit he obtained an order from defendant for 250 cylinders at a price of $27.55 each delivered to defendant's warehouse, and those cylinders were shipped by Andrews to defendant on or about 2 August 1973. Apparently no controversy exists between the parties with respect to those 250 cylinders. At the time of Andrews's second visit to defendant's office in Washington, D. C., on or about 1 November 1973, he offered to sell to defendant aluminum CO_2 cylinders at a unit price of $30.75. Defendant accepted this offer and placed his order for 150 of said cylinders. As agreed in the contract resulting from this offer and acceptance, plaintiff shipped from his warehouse near Durham, North Carolina, and delivered to the defendant at its place of business in Washington, D. C., the 150 new aluminum cylinders which are the subject of this suit. This shipment was arranged for by plaintiff with Ryder Truck Lines, Inc., and plaintiff also arranged with Ryder Truck Lines, Inc. to pick up from defendant in Washington, D. C., certain used cylinders for shipment to Florida.

Upon analysis of the foregoing facts, it is apparent that the only contact defendant has ever had with the State of

North Carolina is that on two occasions defendant entered into contracts in Washington, D. C. with a resident of North Carolina for delivery and receipt of certain goods in Washington, D. C. These contracts were negotiated, agreed to, and performed outside of North Carolina, and the only activity in North Carolina which resulted from them was that on two occasions plaintiff, not the defendant, made shipments of goods from plaintiff's warehouse in North Carolina.

We have found no case holding "contacts" so meager as here disclosed sufficient to sustain in personam jurisdiction in the forum State. See: Annot., 20 A.L.R. 3rd 1201 (1968). Among the cases relied upon by plaintiff, *McGee v. International Life Ins. Co.*, 355 U.S. 220, 2 L.Ed. 2d 223, 78 S.Ct. 199 (1957) states that it is sufficient for the purposes of due process that the suit be based on a contract "which had substantial connection with" the forum State, and the Supreme Court, in finding such a substantial connection in that case, pointed out that the contract of life insurance there sued upon was delivered in the forum State, the premiums were mailed from there, and the insured was a resident of that State when he died. No such continuing contractual relationship connecting defendant with the forum State is shown in the present case. *Byham v. House Corp.*, 265 N.C. 50, 143 S.E. 2d 225 (1965) involved a franchise agreement for operating a restaurant business under a chain trade name in a specified territory in this State. The nonresident defendant reserved the right to select the location, set up the business, establish procedures during the opening week, control policy, maintain general supervision throughout the life of the franchise, inspect the books, premises and operations, control all of the forms and details of the business, furnish supplies and equipment, and control advertising. The Court held there were sufficient contacts with this State by the nonresident defendant to support in personam jurisdiction over defendant in North Carolina. No such extensive contacts have been shown in the present case. *Chadbourn v. Katz, supra,* was concerned with an action for breach of a contract for sale of real property located in North Carolina. Plaintiff's action in the present case does not involve real property in this State.

For the courts of this State to exercise in personam jurisdiction over defendant in the present case under the facts disclosed by the record now before us would, in our opinion, violate

defendant's constitutional rights to due process. Accordingly, the judgment appealed from is

Reversed.

Judges BRITT and CLARK concur.

RICHARD HOWARD, A. C. GOINES, ET AL., T/D/B/A KINGS DRIVE PARTNERSHIP FUND, A LIMITED PARTNERSHIP v. JACK T. HAMILTON

RICHARD HOWARD, A. C. GOINES, ET AL., T/D/B/A KINGS DRIVE PARTNERSHIP FUND, A LIMITED PARTNERSHIP v. FRANCIS H. FAIRLEY, S. DEAN HAMRICK, JACK T. HAMILTON, AND JAMES D. MONTEITH

RICHARD HOWARD, A. C. GOINES, ET AL., T/D/B/A KINGS DRIVE PARTNERSHIP FUND, A LIMITED PARTNERSHIP v. FRANCIS H. FAIRLEY, S. DEAN HAMRICK, JACK T. HAMILTON, AND JAMES D. MONTEITH

No. 7526SC880

(Filed 17 March 1976)

1. **Frauds, Statute of § 5— attorney's oral guaranty of corporation's note — main purpose rule**

An attorney's oral guaranty that if plaintiffs invested in a limited partnership money which was to be loaned by the partnership to a corporation, he would personally repay said sum plus interest to the investors in the event the corporation defaulted on its obligation, did not come within the "main purpose" exception to the Statute of Frauds and was unenforceable under the Statute of Frauds. G.S. 22-1.

2. **Limitation of Actions § 4; Partnership § 7— action by limited partnership — statute of limitations — knowledge of general partners imputed to limited partners**

An action by a limited partnership against a law firm based on breach of contract and fraud was barred by the three-year statute of limitations, G.S. 1-52, where the two general partners of the limited partnership had knowledge of the transactions forming the basis of the action more than three years before the action was commenced, since the knowledge of the general partners was imputed to the limited partners.

APPEAL by plaintiffs from *Baley, Judge.* Judgments entered 15 May 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 20 February 1976.

Plaintiffs brought two of these actions against the partners of a Charlotte law firm, alleging that defendants are liable to them for breach of contract, negligence, constructive fraud and actual fraud. In the action against Hamilton individually, they allege that defendant Hamilton is individually liable as the guarantor of a note payable to them. The three cases were consolidated for trial.

The evidence offered by plaintiffs is lengthy, extremely complicated, and often contradictory. Viewed in the light most favorable to plaintiffs, it tends to show the following:

Prior to 1964, defendant Hamilton had represented plaintiffs Howard and Goines in numerous business activities, and they considered him their lawyer. In early 1964 Paway, Inc., undertook a development project involving the construction of a motel and office complex on Kings Drive in Charlotte. Paway obtained a $2,700,000 construction loan from the First National Bank of Boston and a permanent loan commitment from two lenders, Mutual Benefit of New Jersey and Florida Capital Corp., each agreeing to furnish a portion of the funds. In order to raise additional capital, defendant Hamilton, Paway's attorney, and Clifford Hemingway, Paway's secretary-treasurer, met with plaintiffs Howard and Goines and asked them to raise $200,000 for the project. They agreed to do so, and it was decided that the persons furnishing these funds, including Howard and Goines themselves, would not only receive a note and deed of trust from Paway, but also a substantial amount of preferred stock.

Hamilton, Howard and Goines agreed that the money should be raised from a large number of investors by means of a limited partnership, and Hamilton prepared an agreement creating a limited partnership, with Howard and Goines as general partners and all the other investors as limited partners. Defendants also prepared an escrow agreement providing that as funds were contributed to the partnership they should be held in escrow by the Bank of Charlotte, and that these funds should be turned over to Paway when $200,000 had been raised and Paway had executed a note and deed of trust constituting a valid mortgage on all real estate owned by Paway. The agreement established 15 May 1964 as the deadline for raising the funds. Goines prepared and Hamilton approved an information sheet for distribution to prospective investors, showing that each investor would receive 6 percent annual interest on his

investment, plus 60 shares of preferred stock in Paway at a par value of $10 per share for each $1,000 invested. Howard and Goines were to receive a larger amount of preferred stock for themselves. By 14 May 1964 Howard and Goines had raised $90,000.

Howard and Goines arranged a supper meeting on the night of 14 May 1964, and at this meeting they, defendants Hamilton and Monteith, and about 150 prospective investors were present. Hamilton was late in arriving at the meeting and several others had spoken to the group before he arrived. Hamilton gave a speech urging everyone present to invest in the partnership, and he represented that the partnership would have a lien on Paway's property superior to all other creditors except the construction and permanent lenders; that for all practical purposes the partnership would have a second lien, although it would technically be a third lien since the original permanent loan commitment had been given by two different lenders; that he had just that day obtained a $3,000,000 permanent loan commitment from another lender, which would be sufficient to pay off both the construction loan and the partnership loan; that because of this, investors in the partnership "couldn't lose," and this was "[t]he sweet thing about it," and that he himself would personally guarantee the investment of anyone who contributed to the partnership.

In reality it was not true that the partnership lien would be subordinate to the construction and permanent loans only. Early in 1964 Paway had entered into an agreement to borrow $587,000 from Southeastern Mortgage Investors Trust (SMIT) to finance the purchase of three tracts of land comprising the main part of the project area. For technical reasons the loan was not made directly from SMIT to Paway, but rather to three straw men or "nominees," each of whom purchased one of the tracts and executed a note and deed of trust to Goodyear Mortgage Corporation (Goodyear), an organization closely linked to SMIT, for a portion of the total loan. Paway then purchased the three tracts from the straw men and assumed the three deeds of trust, which secured a total indebtedness of $587,000 and were superior to the partnership lien. Defendants participated in the negotiations between SMIT and Paway and prepared the deeds from the straw men to Paway. Additionally, in deeds of trust recorded by defendants on behalf of Paway on 7 July 1964, 15 May 1965 and 24 September 1965, Paway granted Goodyear a lien on several other tracts within the

general project area to secure an additional loan of $298,000 made to Paway by SMIT.

After the meeting of 14 May 1964, the limited partnership received additional contributions of $210,000, for a total of $300,000. On 15 June 1964 defendant Monteith notified the Bank of Charlotte that Paway had executed a note and deed of trust to the partnership as required by the escrow agreement, and the $300,000 was turned over to Paway. $20,000 of these funds was paid to defendants' firm for legal fees, and an additional payment of $3,000 was paid to Hamilton personally. After 15 June 1964, Goines repeatedly asked defendants for a copy of the partnership's deed of trust, and each time defendants assured him that it had been duly executed and recorded and was in the office somewhere, but it had been misplaced. In June of 1966 Goines and Howard employed a lawyer from Newton to examine the records and find out if the deed of trust had been recorded. The lawyer reported that it had not. On 17 November 1966 a deed of trust from Paway to Hamilton as trustee for the benefit of the partnership, was finally recorded; this deed of trust was dated 15 June 1964 but was not signed until 1965 or 1966 and made reference to a map dated March 1965.

Construction of the motel and office building was repeatedly delayed, and finally after several false starts the contractor abandoned the job entirely. The construction loan deed of trust was foreclosed. The proceeds of the foreclosure sale were sufficient to pay off in full the lien of the construction lender, and also a lien which had been obtained by one of the contractors pursuant to a consent judgment. While there were also sufficient funds to pay off one of the SMIT liens in part, the partnership's investment was lost entirely.

At the conclusion of plaintiffs' evidence, the court allowed defendants' motions for a directed verdict. Plaintiffs appealed.

James, Williams, McElroy & Diehl, P.A., by William K. Diehl, Jr., Henry James, Jr., and James H. Abrams, Jr., for plaintiff appellants.

Golding, Crews, Meekins, Gordon & Gray, by John G. Golding, and Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by Sydnor Thompson, for defendant appellees in cases 69CVS2139 and 69CVS2040.

Wallace S. Osborne for defendant appellee Jack T. Hamilton in case 69CVS2138.

BRITT, Judge.

Did the trial court err in directing a verdict in favor of defendant Hamilton in the separate action against him (No. 69-CVS-2138)? We hold that it did not.

[1] In our opinion, the oral promise allegedly made by defendant Hamilton was unenforceable under the Statute of Frauds, G.S. 22-1, which provides in pertinent part as follows: "No action shall be brought whereby . . . to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized."

Plaintiffs' separate action against defendant Hamilton is based on their contention that defendant Hamilton orally guaranteed that if plaintiffs invested $300,000 in the Kings Drive Partnership Fund, he would personally repay said sum plus interest to the investors in the event Paway, Inc., defaulted in its obligation. Clearly, the alleged promise was one to answer the debt, default or miscarriage of another, thus would be barred by the statute unless shown to come within some recognized exception thereto.

Plaintiffs argue that this case falls within the "main purpose rule," a well known exception to the Statute of Frauds. This rule is restated in *Burlington Industries, Inc. v. Foil,* 284 N.C. 740, 748, 202 S.E. 2d 591, 597 (1974), as follows:

> " ' . . . [W]henever the main purpose and the object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability. . . .' " [Quoting *Emerson v. Slater,* 63 U.S. (22 How.) 28, 43, 16 L.Ed. 360, 365 (1859)]

After a careful review of the lengthy, and oftentimes conflicting, evidence presented by plaintiffs, we conclude that the evidence did not justify the submission of an issue to the jury under the main purpose rule.

We consider next the question whether the trial court erred in directing verdicts in favor of defendants in the other two actions (Nos. 69-CVS-2139 and 2140). We hold that it did not.

Defendants contend that the directed verdicts in their favor were proper for four reasons: (1) that the evidence failed to establish a breach of duty owed plaintiffs by defendants; (2) that any claims which plaintiffs might have had against defendants are barred by the statute of limitations; (3) that plaintiffs failed to show any damage proximately resulting from the alleged conduct of defendants; and (4) that plaintiffs are estopped to assert their alleged claims. Our holding that directed verdicts in favor of defendants were proper is based upon their plea of the statute of limitations and we do not reach any of the other three grounds argued.

[2] One of the primary keys to these cases is the $587,000 indebtedness represented by the notes covering the funds used to purchase the lands. Plaintiffs contend that they were not aware of these notes in 1964 and did not agree, implicitly or explicitly, that their deed of trust would be junior to the deeds of trust securing these notes. Defendants contend that plaintiffs Goines and Howard had full knowledge of the notes in 1964 and that their knowledge was imputed to the other plaintiffs.

Since the statute of limitations was pleaded by defendants, the burden of showing that the action was instituted within the prescribed period was placed upon plaintiffs. *Little v. Rose*, 285 N.C. 724, 208 S.E. 2d 666 (1974). It clearly appears that G.S. 1-52, the three years' statute of limitations, would apply to actions of this type. Although the actions were instituted on 1 April 1969, the record discloses that defendants executed a prospective waiver of the statute of limitations on 25 April 1968. Therefore, did plaintiffs discover, or should they have discovered, the alleged fraud or breach of contract prior to 25 April 1965?

The record firmly establishes that plaintiffs formed a limited partnership, that plaintiffs Goines and Howard are general partners and the other plaintiffs are limited partners. Not only was knowledge of the general partners imputed to the limited partners, but the knowledge of plaintiffs Goines or Howard was imputed to the other. *Friend v. H. A. Friend & Company*, 416 F. 2d 526 (9th Cir. 1969), *cert. denied*, 397 U.S. 914, 25 L.Ed. 2d 94, 90 S.Ct. 916 (1970); *Higgins v. Pottery Company*,

279 F. 2d 46 (3rd Cir. 1960), *cert. denied,* 364 U.S. 899, 5 L.Ed. 2d 193, 81 S.Ct. 232 (1960); *Southern Chemical Company v. Bass,* 175 N.C. 426, 95 S.E. 766 (1918).

It will be noted that soon after the meeting of investors on 14 May 1964, the limited partnership received additional contributions of $210,000, for a total of $300,000; and that on 15 June 1964, when defendant Monteith notified the Bank of Charlotte that Paway had executed a note and deed of trust to the partnership as required by the escrow agreement, the bank turned the $300,000 over to defendants as attorneys for Paway.

Clifford Hemingway, an officer of Paway who was called by plaintiffs as a witness, testified that before the partnership arrangements were consummated (May 1964) he told plaintiff Goines of Paway's financial situation with respect to the subject real estate and particularly the SMIT loans, and that these loans would be ahead of the partnership indebtedness.

By cross-examination of certain of plaintiffs' witnesses, defendants caused to be identified and entered into evidence a written document entitled "GUARANTEE OF NOTES" and providing as follows:

> "FOR VALUE RECEIVED, we jointly and severally guarantee the payment of principal and interest of each and all of the following notes: (1) that certain note of Paul G. Kaneklides and Wife, Nadya A. Kaneklides, dated May 28, 1964 in the principal amount of $187,000.00 to Goodyear Mortgage Corporation; (2) that certain note of Park Road Professional Center, Inc., dated May 28, 1964 in the principal amount of $200,000.00 to Goodyear Mortgage Corporation; (3) that certain note of Kings Inn of Knoxville, Inc., dated May 28, 1964 in the principal amount of $200,000.00 to Goodyear Mortgage Corporation, together with Deed of Trust securing each of the same as and when each of the same shall become due, and of any extension thereof in whole or in part; accept all their respective provisions; authorize the maker, without notice to us to obtain an extension or extensions in whole or in part, and waive protest, demand and notice of protest; and also agree that in case of nonpayment of principal and interest when due, action may be brought by the holder of all or any of these notes against us, at the option of said holders, whether or not action has been commenced against the

maker; and agree in any such action, the maker may or may not be joined with us, at the option of the holder. We do hereby specifically authorize and empower owner and holder of the notes hereby guaranteed to subordinate the lien of the respective Deeds of Trust securing these loans or release the security entirely to the lien of a construction loan to the First National Bank of Boston in the amount of $2,700,000.00 and/or Mutual Benefit Life Insurance Company and Florida Capital Corporation in like amount and we hereby agree that such action would not constitute a release of the Guarantors.

"WITNESS OUR HANDS AND SEALS, this the 28 day of May, 1964."

The document bears the signatures of Jack T. Hamilton, Clifford E. Hemingway, Steve A. Pappas, C. S. Goines, A. C. Goines, Joseph E. Moore and Richard Howard. It also purports to have been executed by Paway, Inc., through its president and secretary on 28 May 1964. The aggregate amount of the three notes is $587,000 and the notes secure the SMIT loans.

When questioned on cross-examination regarding the foregoing document, plaintiffs Goines and Howard were extremely evasive. Plaintiff Goines admitted signing the agreement and knowing what it was for, but denied that he signed it on "May 28." He acknowledged that in interrogatories answered prior to trial that he admitted signing the agreement on 28 May 1964 "or that approximate date." Plaintiff Howard admitted signing the agreement but insisted that the "date" was written in. The document reveals that "28 May" was written in but that "1964" was typed similar to the other provisions of the document.

We hold that plaintiffs failed to carry the burden of showing that the actions were instituted within three years after they discovered, or by the exercise of due care should have discovered, the alleged breach of contract and fraud.

For the reasons stated, the judgments appealed from are

Affirmed.

Judges HEDRICK and MARTIN concur.

W. D. BALTZLEY AND NORTH STATE GEM MINING, INC. v. C. RAY WISEMAN

No. 7524SC535

(Filed 17 March 1976)

1. **Estates § 1; Mines and Minerals § 1— severance of mineral rights**

When mineral rights in land are by deed or reservation severed from the surface rights, two distinct estates are created, and the estate in the mineral interests, being part of the realty, is subject to the ordinary rules of law governing the title to real property.

2. **Mines and Minerals § 1— mineral rights — selling permits to rockhounds**

An 1899 severance deed conveying the "Mineral Right" in a three-acre tract of land with the privilege of using timber growing on the tract "for mining Purposes only & for fire Wood Building houses for Mine and tools Store houses etc.," together with a right-of-way to the public highway, conveyed to the grantee or his assigns the right to conduct on the land a conventional mining operation, and the present owner of the mineral estate had no right, without the concurrence of and over objections of the owner of the surface, to sell permits to "rockhounds" to come upon the land to search for and take mineral specimens therefrom.

APPEAL by plaintiff from *Martin (Harry), Judge.* Judgment entered 17 February 1975 in Superior Court, MITCHELL County. Heard in the Court of Appeals 16 October 1975.

The individual plaintiff, W. D. Baltzley, brought this civil action against defendant to obtain monetary damages and injunctive relief, alleging that defendant had unlawfully interfered with plaintiff's mining rights on a described three-acre tract of land in Mitchell County known as the "Aquamarine Locality." Defendant, who is fee simple owner of the tract in question subject to the mineral rights conveyed by his predecessors in title, Martin D. Wiseman and wife, to one Edwin Passmore by deed dated 3 November 1899 recorded in Mitchell County Deed Book 35, page 346, denied he had unlawfully interfered with mining operations carried on in accordance with the provisions of said deed, denied plaintiff ever attempted such mining operations, and alleged plaintiff was attempting to conduct on the property the business of selling permits to "rockhounds" as provided in a lease agreement dated 19 July 1973 from North State Gem Mining, Inc., the present owner of the mineral rights in the property, as lessor to plaintiff Baltzley as lessee. North State Gem Mining, Inc. joined in this action as

a party plaintiff and adopted the complaint filed by the individual plaintiff.

The 1899 Wiseman deed to Passmore, recorded in Deed Book 35, page 346, Exhibit "A" to defendant's answer, in pertinent part provided that Wiseman and wife conveyed to Passmore, his heirs and assigns,

> "[T]he Mineral Right to a certain tract or Parcel of Land in Grassy Creek Township Mitchell County State of North Carolina Bounded as follows a certain three Square acres of Land Containing What is Known as the aquamarine Locality Lying on the South East Corner of the Property belonging to Martin D. Wiseman Beginning [there then follows a metes and bounds description of the three-acre tract here in question]. Party of the first Part herewith Grants to Party of the Second Part the Privelige [sic] of ussing [sic] timber Growing on above Described Parcel of land for mining Purposes only & for fire Wood Building houses for Mine and tools Store houses etc. Each Party to have the right of to and from and over Said tract of land to Public Highway."

The lease dated 19 July 1973 from North State to Baltzley, Exhibit "B" to defendant's answer, was for an initial term commencing 20 July 1973 and ending 31 December 1977, with option in the lessee to renew for an additonal five-year period. It provided that the lessee should "continue to mine the property for the period April 15 through October 15 of each year," that he should keep accurate records and render monthly statements showing the amount of material extracted from the property, and that he should "pay to the Lessor twenty (20%) percent of the total value extracted." Paragraphs 5 and 6 of the Lease are as follows:

> "5. Rockhounds.
>
> "During the period mentioned above, i.e., April 15 through October 15 of each year, the Lessee shall keep the mining property open and shall maintain the property in a condition to attract individuals wishing to enter the area to search for minerals or stones within designated areas, said areas to be determined by the Lessee. The Lessee shall charge a fee for such individuals wishing to mine the premises. The Lessee shall further keep accurate accounts of all funds received as admission fees from such individuals and

shall render monthly statements of such funds to the Lessor and, in addition, shall pay to the Lessor sixteen (16%) percent of the total of such fees.

"6. Stockholders.

"The Lessee shall admit to the premises, without fee, stockholders of the Lessor for the purpose of allowing such stockholders to search for minerals or stones within the designated areas in the manner that other rockhounds are allowed to search for stones. All stockholders seeking admittance to the premises shall exhibit to the Lessee, his agents or his employees, current identification cards identifying the holder as a bona fide stockholder of the Lessor."

The case was tried by the court without a jury. The parties stipulated that the mineral rights conveyed by the 1899 Wiseman deed to Passmore recorded in Deed Book 35, page 346, are now owned by plaintiff North State, that defendant is the owner of the tract subject to the mineral rights of North State, and that the lease dated 19 July 1973 from North State to Baltzley was duly executed and is binding on all the parties thereto. The parties also stipulated that the first question involved in this case is "whether or not Paragraph 5 of the Lease Agreement is a lawful activity within the terms of the Deed in Deed Book 35, Page 346."

Plaintiff Baltzley testified that an underground mine had been operated on the property from about 1904 to 1910 and that there was on the tract a shaft going approximately 114 feet deep into the ground. Plaintiff Baltzley testified he had had extensive experience with rock collectors and rock collecting throughout the whole country and that "[r]ockhounding or rock collecting means a person who is interested for one reason or another in going out and gathering raw materials either for cutting or selling for marketing. . . . " Plaintiff also testified:

"With reference to the Wiseman Aquamarine locality, the major part of the rock collecting operation would be the mining of material and bringing it to the surface. There is where the rock collector will take over. Some of them will pay a fee and scratch around in the debris when it is brought to the surface and from that they recover the things they are looking for. That is part of the operation. The debris I am talking about would be right at the entrance to the mine. . . .

"In looking for minerals rock hounds use the tools that we supply them and these tools are a screen and a shovel. The screen is about the size of a soft drink box with a screen on the bottom that sifts the fine stuff out and leaves the rock. Water is used for this purpose. For instance, the collectors are given a designated area where they can perform this action with a screen by shoveling dirt into the box and we provide a small settlement basin as a supply of water. The rest of it is up to them to sort out the things they want to keep, and we did or would charge a fee of five dollars a day to each person who did that.

"Rock collectors, in my experience, are a cross section. Some would be dealers and some families interested in their own personal satisfaction they got out of the lapidary hobby, maybe polishing and maybe selling. The people who come to look for minerals would not stay any given time and the number of people at the Wiseman Aquamarine locality on any given day could vary. The largest number that we have had at this particular mine on any given day is twenty-three and the smallest number on any given day would be one."

Plaintiff also testified that in his experience with rock collectors at a previous operation he had "something like ten thousand a year."

W. H. Collins, a witness for plaintiffs, testified that he managed the Wiseman Aquamarine Mine for five months, from May until September, in 1972, during which time the rock collectors were there every day and that on any given day they "would have out there as rock collectors thirty to eighty people." He also testified that he sold permits to adults for $3.00, that the minimum age he considered an adult was twelve years, and that "[i]t is correct to say that what everyone did was engage in selling permits and assisting the rock hounds."

At the close of plaintiffs' testimony, defendant moved for dismissal under G.S. 1A-1, Rule 41(b), on the ground that upon the facts and the law the plaintiffs had shown no right to relief. The court granted the motion and entered judgment making findings of fact, including findings that plaintiff Baltzley "has attempted to engage in activities provided for in paragraph 5" of the 19 July 1973 lease from North State and

that the 1899 deed recorded in Deed Book 35, page 346, "does not authorize or grant to the plaintiffs the right to conduct the activities described in paragraph[s] 5 and 6" of the lease between North State and Baltzley. From the judgment dismissing their action, plaintiffs appealed.

Dameron & Burgin by E. P. Dameron for plaintiff appellants.

Lloyd Hise, Jr., Staunton Norris and G. D. Bailey for defendant appellee.

PARKER, Judge.

The question presented is whether North State Gem Mining, Inc., as the present owner of the mineral rights conveyed by the 1899 severance deed, has the right to conduct on the land or to grant to another the right to conduct thereon a "rockhound" business such as is contemplated by paragraph 5 of the lease from North State to Baltzley. We agree with the trial court that it does not.

[1] When mineral rights in land are by deed or reservation severed from the surface rights, two distinct estates are created, and the estate in the mineral interests, being part of the realty, is subject to the ordinary rules of law governing the title to real property. *Vance v. Guy,* 223 N.C. 409, 27 S.E. 2d 117 (1943). Each estate is a freehold estate of inheritance separate from, and independent of, the other. 54 Am. Jur. 2d, Mines and Minerals, § 116. Due to the unique nature of these independent estates in the same land, the owner of the surface and the owner of the minerals must each necessarily exercise the rights which go with his separate title with due regard for the rights of the other. "The surface owner may use and deal with his property in any legitimate manner not inconsistent with the rights acquired by the owner of the minerals. . . . Conversely, the owner of the minerals has a limited right to use the surface in reaching and removing the minerals." 54 Am. Jur. 2d, Mines and Minerals, § 148, p. 330.

[2] In the present case the parties stipulated that whatever rights Passmore, the grantee in the 1899 severance deed, may have received pursuant to that deed were subsequently conveyed to North State. Those rights were the "Mineral Right" in the three-acre tract here in question together with the privilege of using timber growing on the tract "for mining Purposes only & for fire Wood Building houses for Mine and tools Store houses

etc.," together with a right-of-way to the public highway. Clearly, the parties to the 1899 deed contemplated that the grantee or his assigns might conduct on the land a conventional mining operation, and there was evidence that such an operation was conducted on the land during the decade following execution of the deed. Necessarily the separate estate retained by the owner of the surface was subject to and burdened by such uses of the surface as were entailed in the conduct on the land of such a conventional mining operation. Now, however, North State, or more accurately its lessee, Baltzley, seeks to conduct on the land a totally different business, that of selling daily permits to "rockhounds" (i.e., any persons who for whatever reasons of their own, are interested in searching for and collecting mineral specimens of various types), to come upon the land to search for and take mineral specimens therefrom. The success of such a business depends on the number of such persons who can be induced to buy permits to come upon the land, and there was evidence that a substantial number of persons were attracted daily to come upon this three-acre tract in a rural area. Certainly such an activity relates to the "Mineral Right" in the land, and no person, whether a "rockhound" or another, could lawfully remove minerals from the land without permission from the owner of the mineral estate. But that ownership alone does not give to the owner of the minerals the right to subject the estate of the owner of the surface to the burden of a use radically different in nature and extent from anything contemplated by the parties when the ownership of the two estates was severed by the 1899 deed.

"Rockhounding" is a wholesome activity which in recent years has grown rapidly in popularity and has attracted to its ranks an increasing number of persons. Certainly nothing in this opinion is intended to denigrate that activity or those who engage in it. We are here concerned only with the legal question of whether the present owner of the mineral estate granted by a particular 1899 severance deed has the legal right, without the concurrence of and over the objections of the owner of the surface, to grant to rockhounds the right to go upon the land. We agree with the trial court that it does not.

The judgment dismissing plaintiffs' action is

Affirmed.

Judges MARTIN and MORRIS concur.

HOBSON CONSTRUCTION CO., INC., PLAINTIFF v. HAJOCA CORPORATION, DEFENDANT

No. 7528SC739

(Filed 17 March 1976)

1. **Rules of Civil Procedure § 41— nonjury trial — motion for dismissal — evidence weighed by trial judge**

In a nonjury case G.S. 1A-1, Rule 41(b) provides a procedure whereby, at the close of plaintiff's evidence, the judge can give judgment against plaintiff not only because his proof has failed in some essential aspect to make out a case but also on the basis of facts as he may then determine them to be from the evidence then before him, and, as trier of the facts, the judge may weigh the evidence, find the facts against plaintiff and sustain defendant's motion at the conclusion of his evidence even though plaintiff has made out a *prima facie* case which would have precluded a directed verdict pursuant to G.S. 1A-1, Rule 50(a), for defendant in a jury case.

2. **Uniform Commercial Code § 15— water filter tanks used under excessive pressure — no breach of implied warranty of merchantability**

Water filter tanks purchased by plaintiff from defendant were not defective and in breach of the implied warranty of merchantability where the evidence established that the tanks were used under excessive water pressure, which was not the ordinary purpose for which the goods were sold. G.S. 25-2-314(2).

3. **Uniform Commercial Code § 15— purchase of equipment — no implied warranty**

In an action for damages resulting from defective equipment purchased from defendant, evidence was sufficient to support the trial court's conclusion that there was no implied warranty by defendant of the fitness of the equipment upon which plaintiff relied where such evidence tended to show that plaintiff purchased the equipment in reliance upon the specifications of its contract with a third party and not in reliance upon any representation by defendant as to the merchantability or fitness of the equipment for its intended use. G.S. 25-2-315.

4. **Uniform Commercial Code § 15— no affirmation of fact affecting bargain — no express warranty**

In an action for damages resulting from defective equipment purchased from defendant, the trial court properly determined that there was no express warranty made by defendant since there was no affirmation of fact by defendant which affected the bargain. G.S. 25-2-313.

APPEAL by plaintiff from *Snepp, Judge.* Judgment entered 29 May 1975 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 14 January 1976.

Plaintiff [Hobson] brought this action against defendant [Hajoca] for damages resulting from defective equipment pur-

chased from Hajoca. It was alleged that the defects amounted to a breach of warranties. Hajoca denied that the equipment was defective and denied liability.

The case was tried without a jury and plaintiff's evidence tended to establish the following:

Triple Community Water Corporation [Water Corp.], located in Drexel, North Carolina, retained the services of Register & Cummings, Engineers, to prepare plans and specifications for a water treatment and conditioning plant. Hobson entered into a contract with the Water Corporation to construct the plant in accordance with the plans and specifications of the engineers.

The plant was to be built primarily for the purpose of filtering iron and manganese from the water supply. The engineers' specifications provided that "filter equipment shall be similar and equal to Diamond Model Three (3) DMG 84-45 as manufactured by Oshkosh Filter and Softener Company." Further specifications provided that the "plate shall contain a sufficient number of corrosion resistant segmented plastic distributors with stainless steel bolts to provide uniform distribution." It was established that Oshkosh was the only company that manufactured the segmented plastic distributors.

Hobson purchased from Hajoca three Diamond Model Three (3) DMG 84-45 filter tanks which were manufactured by Oshkosh. One of Hajoca's representatives stated to Hodson's president that the filter tanks being sold "should remove the iron and manganese from the water."

Near the bottom of each filter tank was a steel plate with fifty-two threaded holes with nipples screwed into them. A segmented plastic distributor head was attached to each nipple. The distributor heads were plastic with small holes through which the filtered water could pass.

The steel plate and distributor heads were covered with silica sand, and above the silica sand was a layer of "green sand." Raw water flowed into the tank at the top, chemicals were added, and the water was supposed to react with the chemicals and green sand in such a way that the iron and manganese would stick to the particles of green sand leaving the finished water to flow through the silica sand and distributor heads and on out the bottom of the tank.

Difficulties developed after the filter tanks were installed in April of 1971. The finished water contained silica sand and green sand, and not enough iron and manganese was removed to comply with government requirements. There were also other serious difficulties and problems. The distributor heads either ruptured or disintegrated and the silica sand and green sand that remained in the tanks became mixed together.

In December of 1971 plaintiff took out the distributor heads, nipples, silica sand and green sand, and bored 88 new holes into the steel plate. The 52 plastic distributor heads and nipples were replaced with 140 stainless steel ones manufactured by a different company. The water treatment plant worked very well thereafter and produced good water.

The president of Hobson testified that he believed the difficulties with the filter tanks were caused by an insufficient number of distributor heads for the amount of water passing through the tanks, and that the distributor heads broke under the excessive water pressure.

At the conclusion of plaintiff's evidence the trial court granted defendant's motion for involuntary dismissal under Rule 41(b) of the N. C. Rules of Civil Procedure. The court made findings of fact and conclusions of law and held that there was no breach by defendant of any express or implied warranty. Plaintiff appealed to this Court.

Uzzell and DuMont, by William E. Greene, for plaintiff appellant.

Morris, Golding, Blue and Phillips, by James W. Golding, for defendant appellee.

ARNOLD, Judge.

By its first assignment of error plaintiff argues that the evidence, viewed in the light most favorable to it, and giving to it the benefit of all reasonable inferences and resolving all inconsistencies in its favor, was sufficient to show its right to relief. It contends that the court erred in granting defendant's motion for dismissal under Rule 41(b). The assignment is without merit.

G.S. 1A-1, Rule 41(b) states:

> "After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evi-

dence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. *The court as trier of the facts may then determine them and render judgment against the plaintiff* or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a)." (Emphasis added.)

Plaintiff's contentions and arguments as presented in its brief, though phrased in terms of Rule 41(b), apply the standards applicable to Rule 50(a) motions for directed verdicts. The distinction between a Rule 50(a) motion for directed verdict and a Rule 41(b) motion for involuntary dismissal is more than one of mere nomenclature. A different test is to be applied to determine the sufficiency of the evidence to withstand the motion when the case is tried before a court and jury than when the court alone is finder of the facts. *Helms v. Rea,* 282 N.C. 610, 194 S.E. 2d 1 (1973); *Neff v. Coach Co.,* 16 N.C. App. 466, 192 S.E. 2d 587 (1972).

[1] "In a nonjury case . . . , Rule 41(b) now provides a procedure whereby, at the close of plaintiff's evidence, the judge can give judgment against plaintiff not only because his proof has failed in some essential aspect to make out a case but also on the basis of facts as he may then determine them to be from the evidence then before him. As trier of the facts, the judge may weigh the evidence, find the facts against plaintiff and sustain defendant's motion at the conclusion of his evidence even though plaintiff has made out a *prima facie* case which would have precluded a directed verdict for defendant in a jury case." *Helms v. Rea, supra,* 618-619.

The trial judge's evaluation of the evidence pursuant to a Rule 41(b) motion to dismiss is to be made free of any limitations as to the inferences which a court must indulge in favor of plaintiff's evidence on a motion for directed verdict. *Fearing v. Westcott,* 18 N.C. App. 422, 197 S.E. 2d 38 (1973); *Bryant v. Kelly,* 10 N.C. App. 208, 178 S.E. 2d 113 (1970). Where the trial judge sits as trier of facts, his findings are conclusive upon appeal if supported by competent evidence, even though there may be evidence to the contrary. *Bryant v. Kelly, supra.*

By its second assignment of error plaintiff contends the court erred in several of its findings of fact and conclusions of law. Plaintiff again mistakenly argues that the court was required to view the evidence in the light most favorable to it. As has already been said, this is not correct when the court is ruling on a motion for involuntary dismissal under Rule 41(b).

The court was free to make whatever findings it deemed appropriate, and to draw unfavorable inferences to plaintiff, so long as the findings were supported by competent evidence and were sufficient to support its conclusions of law. The findings of fact are clearly supported by competent evidence and court's conclusions are all supported by the findings of fact.

In its third assignment of error plaintiff contends the court erred in failing to make findings of fact in accord with findings of fact requested by plaintiff. This position is untenable for reasons stated in the preceding paragraph.

[2] Plaintiff maintains that the filter tanks were defective and in breach of the implied warranty of merchantability. We find no evidence that the tanks were unmerchantable. Plaintiff asserts that the distributor heads were not "fit for the ordinary purposes for which such goods are used" as required by G.S. 25-2-314(2). The evidence, however, merely establishes that the distributor heads were not fit for use under excessive water pressure as contained by the Water Corp.'s system, which was not the ordinary purpose for which the goods were sold.

[3] In regards to any implied warranty of fitness for a particular purpose the court made the following conclusion: "The plaintiff has failed to present evidence of any implied warranty by Hajoca of the fitness of the system to perform its intended purpose, upon which plaintiff relied." That conclusion is supported by the court's finding that under its contract with the Water Corp. plaintiff was required by the specifications, prepared by the engineers, to use the equipment specified as the 3 Model DMG 84-4 [sic] [84-45] Diamond filter units manufactured by Oshkosh, and that plaintiff purchased "in reliance upon the specifications, and pursuant to its contract, and not in reliance upon any warranty, affirmation, or representation, express or implied, by Hajoca as to the merchantability or the fitness of the system for its intended use." There is no warranty of fitness for a particular purpose unless "the buyer is

relying on the seller's skill or judgment to furnish suitable goods." G.S. 25-2-315.

[4] G.S. 25-2-313 contains the requirements for express warranties. Any affirmation of fact or promise made by the seller concerning the goods sold is an express warranty if it "becomes part of the basis of the bargain." There was no express warranty in the present case in view of the following finding of fact made by the court: "The statements of Hajoca's manager to plaintiff to the effect that the apparatus 'should' be able to remove iron and manganese from the water did not amount to an affirmation of fact effecting [sic] the bargain between plaintiff and Hajoca."

Plaintiff further argues that notwithstanding any other statements made by Hajoca an express warranty arose from the fact that the tanks were described as "iron removal filters." This argument has no merit. There is no evidence that the tanks were not "iron removal filters." They simply failed to sufficiently filter the water under the system as it was designed by the Water Corp., and from the evidence the defect was in the plans and specifications of the engineers, and not the filter tanks.

The judgment appealed from is affirmed.

Affirmed.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. TOMMY RAY WEST, AZER GENE WEST AND BARBARA JEAN LONG

No. 755SC812

(Filed 17 March 1976)

Criminal Law § 84; Searches and Seizures § 1— legality of search — failure to hold voir dire

The trial court in an armed robbery case did not err in failing to conduct a *voir dire* to pass upon the legality of a warrantless search of defendant's automobile where the evidence showed the search was incident to a lawful arrest and based on probable cause; furthermore, the admission over objection of certain testimony relating to property found in the car was rendered harmless by testimony of similar import admitted without objection.

State v. West

APPEAL by defendants from *Fountain, Judge.* Judgments entered 24 April 1975 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 10 February 1975.

Each defendant was charged in separate indictments with the armed robbery of C. D. Price, C. E. Smith, and C. D. Howard. They pled not guilty to all charges and the State presented evidence which tended to show:

On the night of 13 March 1975, Eddie Williamson was operating a restaurant on Castle Hayne Road (Highway 117) in or near the City of Wilmington. The restaurant was located approximately five miles north of the Wrightsboro 7-11 Store operated by the victim C. D. Price. Between 10:00 and 11:30 p.m. on that night, a woman, identified by Williamson at trial as the feme defendant, entered the restaurant very briefly, then went back outside to a tan colored Cougar automobile. Considering her conduct unusual, Williamson wrote down the number of the license on the Cougar, DFJ620. He observed that three other people were in the car; the feme defendant was the driver, another woman was the front seat passenger, and two men occupied the backseat. After some three or four minutes, the car left and proceeded south in the direction of the Wrightsboro 7-11 Store.

Thereafter, shortly after midnight, two young people, a man later identified as defendant Azer Gene West and an unidentified woman, entered the Wrightsboro 7-11 Store located on the corner of Kerr Avenue and Castle Hayne Road. They walked around in the store, eyed the premises and picked up several items as they moved to the checkout counter. There they purchased several bottles of wine, a six-pack of beer, some cigarettes and a candy bar. The couple then left the store, pausing at the door as defendant Azer West looked around the outside of the building and down the Castle Hayne Road. They then walked north toward a brown and white 1970 or 1971 Mercury Cougar which was parked in a secluded spot off the shoulder of Kerr Avenue next to some pecan trees at the outer fringe of the 7-11 parking lot.

Within moments after defendant Azer West and the young woman left the store, a lone gunman came around the north corner of the building, entered the store, announced a robbery and took more than two hundred dollars from store manager Curtis Price along with money from the wallets of two cus-

tomers, C. E. Smith and C. D. Howard. The robber was armed with a black sawed-off shotgun and a small caliber pistol. He wore an orange hood, dark jacket, and white ski goggles with blue lenses. After scooping up the money, he fired the pistol into the floor, ordered everyone to lie on the floor, and fled.

When the victims got to their feet, the Cougar was gone. They called police and gave a description of the vehicle. Investigating officers later found currency scattered in the grass near the pecan trees where the Cougar had been parked. Ski goggles, identified as those worn by the gunman, were found lying in the roadway of Highway 117 about half a mile from the store.

About the time the robbery was taking place and soon thereafter, Officers Keon and Prescott of the Wilmington Police Department were on routine patrol when they received a radio call informing them of the robbery of the Wrightsboro 7-11. A second call gave them a description of a brown and white 1970 or 1971 Cougar believed to have been used in the robbery. Armed with this information, the officers began following a car answering the description at the intersection of North Fourth and Front Streets. The Cougar was proceeding on Front Street at about 25 m.p.h. When police turned on their blue light and siren, the driver of the Cougar, later identified as the feme defendant, accelerated and headed for the approach to the bridge spanning the North East Cape Fear River. The officers gave chase at speeds up to 60 m.p.h. but were unable to overtake the vehicle before it reached the bridge. Once on the bridge, their efforts to force the car over were thwarted by the rough, broken pavement of the bridge and evasive maneuvering by the driver of the Cougar who swerved back and forth, blocking off the pursuing officers. Near the center span of the bridge both vehicles slackened speed to avoid colliding with oncoming traffic. At the center of the bridge, and while over the North East Cape Fear River, officers observed the interior dome light come on inside the Cougar. They saw several passengers in the car, including two males, moving around in the backseat. Next they observed several items being thrown out of the right rear window toward the river below. While most of the items were not discernable, Officer Keon distinctly recognized coins and currency which peppered the squad car as they pursued the fleeing Cougar. He testified that he attempted to grab some of the currency blown against their windshield but it blew over the top of the car and was lost.

Once across the bridge the Cougar pulled off the road coming to a stop on the shoulder. The officers pulled in behind them. They saw the feme defendant step from behind the wheel and observed the two male defendants they had seen throwing things from the car in the backseat. In the front passenger seat was the young woman with whom defendant Azer West had been seen in the Wrightsboro 7-11 Store just moments before the robbery. Through open car doors, they saw a sawed-off shotgun, broken down into three sections, lying on the transmission hump in the backseat.

Once the occupants had been removed from the car, backup units arrived and placed the suspects in custody. Officers then began their examination of the vehicle. In the right rear floorboard where defendant Tommy West had been sitting, they found an Army fatigue jacket, concealing a packet of currency and silver certificate bearing the legend "Wrightsboro 7-11." In the left rear floorboard, where defendant Azer West had been sitting, they found a paper bag containing the beer, wine, cigarettes and candy bar defendant Azer West and the young woman had purchased from the store shortly before the robbery. A 12-gauge shotgun shell was also recovered from the rear passenger compartment.

Defendants were placed under arrest and transported to police headquarters. The Cougar, registered to the feme defendant and bearing license number DJF620, was driven back to the Wrightsboro 7-11 Store where witnesses positively identified it as the vehicle they had observed parked off the shoulder of Kerr Avenue moments before the robbery and where officers later found currency strewn on the ground.

Defendants offered no evidence.

A jury found all defendants guilty as charged. From judgments imposing active prison sentences, they appeal.

Attorney General Edmisten, by Associate Attorney Daniel C. Oakley, for the State.

Samuel C. Whitt for defendant appellant Tommy Ray West.

Douglas A. Fox for defendant appellant Azer Gene West.

James K. Larrick and Goldberg and Anderson, by Frederick D. Anderson, for defendant appellant Barbara Jean Long.

BRITT, Judge.

Defendants assign as error the failure of the trial court to grant their motions for nonsuit. We hold that the assignments are without merit and that the evidence was sufficient to survive all nonsuit motions and to sustain all charges against each of the defendants.

Defendants also assign as error the failure of the trial court to conduct a voir dire to pass upon the legality of the search of the Cougar automobile. These assignments likewise have no merit.

It will be noted that defendants did not move to suppress the testimony and they do not challenge the validity of the search, only the failure of the court to conduct a voir dire. The validity of the search can be defended on several grounds, including the fact that it was incident to a lawful arrest. *State v. Haney,* 263 N.C. 816, 140 S.E. 2d 544 (1965). A further ground is that it was based on probable cause. *State v. Ratliff,* 281 N.C. 397, 189 S.E. 2d 179 (1972).

Defendants rely upon the well established rule that ordinarily an objection to the admission in evidence of the fruits of a warrantless search is sufficient to require an inquiry by the court, in the absence of the jury, into the validity of the search. While we recognize the rule, there are many reasons why it does not avail defendants in this case.

The record fails to disclose that any of the defendants objected when Officer Tucker (R pp 86, 87) testified with respect to what he found in the car immediately after the arrest of defendants. Without objection he told of finding a broken-down shotgun, a gun shell, a paper bag containing wine, beer, etc., and U. S. currency with identification showing that it belonged to the Wrightsboro 7-11 Store. Those were the primary items found in the car.

While it is true that defendants objected to certain other testimony relating to property found in the car, its admission was rendered harmless by the testimony of similar import admitted without objection. 3 Strong, N. C. Index 2d, Criminal Law § 169.

Furthermore, under the facts in this case we do not think a voir dire would have been required even if defendants had properly objected to the challenged testimony. *See State v.*

Vestal, 278 N.C. 561, 180 S.E. 2d 755 (1971), *cert. denied,* 414 U.S. 874, 38 L.Ed. 2d 114, 94 S.Ct. 157 (1973); *State v. Altman,* 15 N.C. App. 257, 189 S.E. 2d 793 (1972), *cert. denied,* 281 N.C. 759 (1972).

We have carefully considered the other assignments of error brought forward and argued in defendants' briefs but find them too to be without merit.

We hold that defendants received fair trials, free from prejudicial error.

No error.

Judges HEDRICK and MARTIN concur.

LAWRENCE J. TRABER v. JAMES T. CRAWFORD, VESTAL C. TAYLOR, THOMAS D. HARRELL, JR., FRANKLIN M. HOEL, EARL CRAWFORD, JR., T/D/B/A OVERLAND ENTERPRISES, A GENERAL PARTNERSHIP ORGANIZED UNDER THE LAWS OF THE STATE OF NORTH CAROLINA; OVERLAND INVESTMENTS, INC., A NORTH CAROLINA CORPORATION; AND JAMES T. CRAWFORD, VESTAL C. TAYLOR, THOMAS D. HARRELL, JR., T/D/B/A OVERLAND INVESTMENTS LIMITED, A LIMITED PARTNERSHIP ORGANIZED UNDER THE LAWS OF THE STATE OF NORTH CAROLINA; AND JAMES T. CRAWFORD, INDIVIDUAL DEFENDANT

No. 7528SC765

(Filed 17 March 1976)

1. **Contracts § 3— agreement to pay 5% of cost of hotel — definiteness**

An agreement to pay an architect 5% of the cost of a hotel for architectural services constituted a binding contract although the cost of the hotel was not definitely established but was only estimated since the agreement provides a sufficient method for determining the final amount to be paid.

2. **Architects — action for fee — insufficiency of court's findings**

In this action by an architect to recover for breach of contract or, in the alternative, for quantum meruit, judgment entered by the trial court in a nonjury trial did not contain findings of fact on all issues joined on the pleadings where no findings were made as to defendants' allegations of accord and satisfaction and that any amount due plaintiff should be reduced by the value of a membership given plaintiff in a limited partnership, and a new trial is awarded on all issues raised by the pleadings.

Traber v. Crawford

APPEAL by defendant from *McLean, Judge*. Order entered 6 December 1974 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 20 January 1976.

Plaintiff alleged that in May, 1969, he entered into an agreement with defendants to provide architectural services for a hotel project. This action is for breach of contract, or, in the alternative, for quantum meruit.

In their answer defendants admit there was an agreement entered in May, 1969, but they denied any liability and expressly plead that plaintiff was given a membership in a partnership in "full and final settlement" of all obligations the defendants had to plaintiff. Defendants further alleged that if it be determined that they did owe plaintiff anything that the amount be reduced by the value of the membership in the partnership.

The case was tried without a jury. According to plaintiff's evidence, he and others, including defendant, James T. Crawford, agreed to pool their services and build a convention hotel facility in the City of Asheville. Each party was to be a partner in the project, and plaintiff was to receive a 5% interest in the ownership of the hotel, plus reimbursement for expenses which were to be deducted from his ownership interest, in return for his architectural services. It was later agreed that plaintiff would receive a fee of 5% of the cost in lieu of an ownership interest.

According to defendants' evidence it was never agreed to reimburse plaintiff for expenses, and that in September, 1971, plaintiff was given an interest in the partnership of Overland Investments, Limited, worth $15,000, in full payment of his services, and that plaintiff was discharged because of his failure to provide construction plans on time.

The trial court made numerous findings of fact which are summarized, in part, as follows:

(1) On 21 May 1969 plaintiff, defendant and others met and decided to work towards construction of a convention hotel. Each party agreed to furnish services toward the project, and while no specific percentages were discussed they did discuss ownership of the hotel by percentage interests. A tentative site was chosen.

(2) From 21 May 1969 through June 1970 plaintiff performed certain work on the project. (Findings were made as to the exact details and hours spent on the project.) By June 1970 the group had decided to seek a different location for the site of the hotel.

(3) Between June 1970 and January 1971 plaintiff did further work on the project. (The findings were detailed as to the work performed.)

(4) In January 1971 plaintiff met with defendant, Crawford, and others, and Crawford indicated that Overland Investments, Limited, was taking an interest in the hotel project, and in return Overland would obtain financing for the project. Defendant further indicated that there would be a change in the "make-up" of the project and each party was requested to declare what interest, i.e., percentage, he wanted. Everyone agreed that plaintiff would receive 5% interest in the ownership of the total cost, estimated to be $6,200,000, of the project. Defendant stated that Overland Investments, Limited, would acquire 80% of the ownership.

(5) Between January and December 1971 plaintiff did more work, and by December, 1971, Overland had acquired a contract to purchase the site chosen for the hotel. Plaintiff adapted the plans and specifications to the site.

(6) At another meeting in December, 1971, defendant, James T. Crawford, informed the group that the lender would not allow anyone except Overland Investments, Limited, to have an equity ownership in the hotel, and that the participants would have to receive percentage fees in lieu of equity ownership percentages. Defendant specifically said that plaintiff could have a "5% architectural fee on the cost of the hotel project in lieu of an equity ownership interest." Plaintiff stated that he "would go along" with this arrangement, and stated that he also needed $5,000 per month to cover expenses. No other changes were made in the December 1971 meeting from those conditions that existed at the January 1971 meeting.

(7) Following the December 1971 meeting plaintiff did further work.

(8) In March, 1972, the defendant, Earl Crawford, stated to plaintiff and others at a meeting that he, Earl Crawford, was in complete charge of the project and that the other partners in Overland Investments, Limited, had been removed.

(9) In April, 1972, defendant, Earl Crawford, requested plaintiff to reduce his architect's fee, and plaintiff refused. On 27 April 1972 plaintiff was notified that he was no longer the architect for the project.

(10) Plaintiff remained ready, willing and able to complete his duties as architect, and at the time he was discharged plaintiff had completed 35% of the total work which he had agreed to perform.

(11) Overland Enterprises was a general partnership formed by defendants, and it acted as general partner in Overland Investments, Limited, a limited partnership formed for the purpose of providing financial backing for the hotel project (and other projects).

(12) The services rendered by plaintiff for defendants from December 1970 until his discharge were reasonably worth $20,020, and plaintiff incurred $250 in expenses.

The court concluded that at the January 1971 meeting the parties had not entered a valid contract "as the cost of the hotel was not definitely established and agreed upon, but was estimated." It was also concluded that plaintiff had rendered valuable services which were accepted by defendants, and plaintiff was awarded $20,020 as the reasonable value of his services, plus $585 for expenses.

Defendants appealed to this Court.

Bennett, Kelly, Cagle, P.A., by E. Glenn Kelly and Robert F. Orr, for plaintiff appellee.

Reynolds and Fowler, P.A., by Earl J. Fowler, Jr., for defendant appellant.

ARNOLD, Judge.

In actions tried upon the facts without a jury the trial judge is required to make findings of fact and conclusions of law. G.S. 1A-1, Rule 52(a)(1) directs the court to "find the facts specially and state separately its conclusions of law thereon and direct entry of the appropriate judgment."

The reason for requiring a separate statement of the conclusions of law is to allow the appellate courts to determine what law the trial court applied in directing the entry of judg-

ment. *Hinson v. Jefferson,* 287 N.C. 422, 215 S.E. 2d 102 (1975). The trial court's conclusions of law are subject to review on appeal. *Davison v. Duke University,* 282 N.C. 676, 194 S.E. 2d 761 (1973).

[1] It was concluded by the court that the plaintiff and defendants "did not in January of 1971 at the meeting in Mr. William E. Greene's office, enter into a valid and lawful [sic] binding contract as the cost of the hotel was not definitely established and agreed upon, but was estimated to cost $6,200,000."

Defendants maintain that the judge's conclusion of law is an incorrect statement of the law, and we agree. Assuming arguendo that such an agreement existed, an agreement to pay 5% of the cost of the hotel as compensation for architectural services provides a sufficient method of determining the final amount to be paid. 2 N. C. Index, Contracts, § 3; 17 Am. Jur. 2d § 82.

Where the trial court passes on the facts the court is required "to find the facts on all issues of fact joined on the pleadings," declare the resulting conclusions of law, and enter judgment accordingly. *Campbell v. Blount,* 24 N.C. App. 368, 371, 210 S.E. 2d 513 (1975); *Coggins v. City of Asheville,* 278 N.C. 428, 180 S.E. 2d 149 (1971); *Littlejohn v. Hamrick,* 15 N.C. App. 461, 190 S.E. 2d 299 (1972).

[2] The judgment entered in the present case does not comply with the requirement to find facts on all issues joined on the pleadings. The defendant specifically pleaded accord and satisfaction in bar of any recovery by plaintiff. Defendants further alleged in their answer that if the court determined that defendants were in any way indebted to plaintiff that the amount due should be reduced by the value of the membership of plaintiff in the limited partnership. There is nothing in the judgment determining these issues. The judgment is therefore insufficient because the findings do not cover all the issues of fact joined on the pleadings, even though there was evidence from which findings could have been made. *Littlejohn v. Hamrick, supra.*

While the findings of fact by the trial court might appear to support a conclusion that there was an express contract we feel that this is an appropriate case to exercise our discretion and award a new trial on all issues raised by the pleadings. See *Ayers v. Tomrich Corp.,* 17 N.C. App. 263, 193 S.E. 2d 764

(1973); *Kinney v. Goley* and *Crowson v. Goley* and *Noll v. Goley*, 6 N.C. App. 182, 169 S.E. 2d 525 (1969).

New trial.

Judges PARKER and HEDRICK concur.

J. H. OVERTON v. W. D. HENDERSON AND MARGARET H. COLE, T/A THE CHIEF MOTEL

No. 756SC635

(Filed 17 March 1976)

1. **Master and Servant § 33— assault by employee — no responsibility of employer**

In an action to recover damages by reason of an assault made on plaintiff when defendant Henderson shot him, the trial court properly directed verdict in favor of defendant Cole, Henderson's employer, since there was no evidence from which the jury could find that defendant Henderson's assault on plaintiff was committed while he was engaged in performing any duty of his employment.

2. **Damages § 3— injury from assault — present worth of future damages — failure to instruct — error**

In an action to recover damages for assault it was error for the trial court in instructing the jury on the issue of compensatory damages to limit recovery to past and present damages without including recovery for the present worth of future damages proximately resulting from the assault, since there was evidence that at the time of the trial plaintiff had a scar on his neck as result of one of the bullets fired by defendant, shattered portions of the bullet had never been removed from plaintiff's head, he still took medicine which he received from the doctor at the time of the assault, the back of his head still hurt, and he was not able to work all day because of severe headaches.

APPEAL by plaintiff from *Tillery, Judge*. Judgment entered 23 April 1975 in Superior Court, HERTFORD County. Heard in the Court of Appeals 13 November 1975.

This is a civil action to recover compensatory and punitive damages by reason of an assault made on plaintiff when defendant Henderson shot plaintiff on 25 October 1971. Plaintiff alleged that on this occasion Henderson was acting as agent of his co-defendant, Mrs. Margaret Cole, within the course and

scope of his employment as such agent. Defendant Cole denied these allegations. Plaintiff's evidence showed:

On the afternoon of 25 October 1971 Henderson walked into plaintiff's barber shop in Ahoskie while plaintiff was cutting a customer's hair. Henderson sat down and engaged in conversation with a waiting customer. During the course of the conversation Henderson asked the customer if he knew that man, pointing to plaintiff. The customer replied that he did, whereupon Henderson said, "I'm going to shoot him." Plaintiff asked Henderson to leave, stating he did not want any trouble. Henderson then shot at plaintiff two or three times with a pistol, one of the shots striking plaintiff at the base of his skull. Plaintiff was taken to the hospital, where he was given blood and treatment for his wounds. He remained in the hospital nine days.

Defendant Cole, who is Henderson's sister, owned and operated a motel in Ahoskie. Henderson lived at the motel and at times worked at the desk, renting rooms and checking customers in and out. He made deposits and had authority to sign checks on the motel bank account, and at times he signed salary checks for other employees. He supervised other employees at the motel, including plaintiff's son, who worked there prior to September 1971. The son testified that when Mrs. Cole employed him she told him Henderson would be his supervisor and he was to take any orders and his working schedule from Henderson. Plaintiff's son also testified that Mrs. Cole told him that when she was in Ahoskie, he should turn the money over to her at night, but if she was not in Ahoskie, he would turn it over to Henderson when he was sober, and he should get assistance from his father when he needed it.

On Friday, 22 October 1971, plaintiff mailed a letter to Mrs. Cole at the motel. In this letter plaintiff asked that Mrs. Cole pay him for work he had done for her at the motel. On Saturday afternoon, 23 October 1971, Henderson phoned plaintiff and said, "I want to know why you sent my sister a letter demanding pay for you working here because you have never worked here a minute in your entire life." Plaintiff replied that the letter was between him and Mrs. Cole, whereupon Henderson said, "God damn it, I will kill you for it one way or the other."

Mrs. Cole, called by plaintiff as an adverse witness, testified she did tell Henderson that plaintiff had never worked for

her, but stated that she did not tell Henderson to do anything about the letter.

At the close of plaintiff's evidence the court allowed the motion by defendant Cole for a directed verdict. The jury answered issues finding that Henderson assaulted plaintiff and awarded plaintiff $5,000.00 as compensatory damages and nothing as punitive damages. From judgment on the verdict, plaintiff appealed.

Cherry, Cherry, Flythe and Evans by Joseph J. Flythe for plaintiff appellant.

Carter W. Jones by Ralph G. Willey, Jr., for defendant appellees.

PARKER, Judge.

Plaintiff first contends the court erred in directing verdict for defendant Cole, the alleged principal. We find no error in this regard.

Our Supreme Court has had many occasions to examine the law applicable to cases in which it is sought to hold a principal or employer liable for an assault committed by his agent or employee, most recently in *Clemmons v. Insurance Co.*, 274 N.C. 416, 163 S.E. 2d 761 (1968) and in *Wegner v. Delicatessen*, 270 N.C. 62, 153 S.E. 2d 804 (1967). Insofar as pertinent to the present case, the applicable principles of law derived from the opinions in those cases may be summarized as follows: The principal is liable for the acts of his agent, whether malicious or negligent, and the employer for similar acts of his employees, which result in injury to third persons, when the agent or employee is acting within the line of his duty and exercising the functions of his employment. The test is whether the act was done within the scope of his employment and in the prosecution and furtherance of the business which was given him to do. "If the servant was engaged in performing the duties of his employment at the time he did the wrongful act which caused the injury, the employer is not absolved from liability by reason of the fact that the employee was also motivated by malice or ill will toward the person injured, or even by the fact that the employer had expressly forbidden him to commit such act. . . . If the act of the employee was a means or method of doing that which he was employed to do, though the act be unlawful and unauthorized or even forbidden, the employer is

liable for the resulting injury, but he is not liable if the employee departed, however briefly, from his duties in order to accomplish a purpose of his own, which purpose was not incidental to the work he was employed to do." *Wegner v. Delicatessen, supra,* pp. 66, 67. However, it is not enough to render the employer liable that the employee did the wrongful act for the purpose of benefiting the employer.

[1] Applying these principles to the present case, we find that the directed verdict for the employer, the defendant Cole, was properly entered. The evidence shows that she employed her brother, Henderson, to work at her motel, and that she authorized him to deal with the guests, checking them in and out, and to supervise other employees. She also authorized him to make deposits in the bank account which she maintained in connection with the motel business and to draw checks on that account. However, when Henderson assaulted the plaintiff, he was not engaged in performing any of the work he was employed to do. He was not dealing with a guest or supervising any other employee, and he was not even on his employer's premises. Apparently his animosity toward plaintiff was aroused by the letter which plaintiff wrote to Mrs. Cole in which plaintiff claimed she was indebted to him for work plaintiff performed at the motel, but there was no evidence that it was any part of Henderson's duties to settle claims against his employer. Clearly, there was no evidence that Mrs. Cole ever expressly authorized Henderson to perform any such function on her behalf and such a function cannot be reasonably implied from the duties which she did authorize him to perform. Since there was no evidence from which the jury could find that Henderson's assault on plaintiff was committed while he was engaged in performing any duty of his employment, the directed verdict in favor of his employer was properly granted.

[2] The court properly submitted plaintiff's action against defendant Henderson on issues as to (1) whether Henderson assaulted plaintiff, (2) compensatory damages, and (3) punitive damages. The jury answered the first issue in plaintiff's favor, answered the second issue in the amount of $5,000.00, and answered the third issue "None." We find no error in connection with the first and third issues. However, the plaintiff has assigned error to a portion of the court's charge to the jury bearing upon the second issue in which the court instructed that a person who has been injured as result of an assault "is

entitled to recover in a lump sum the present worth of all the damages, past and present, which naturally and proximately result from that assault." Nowhere in the charge did the court instruct the jury that they might consider any future losses which plaintiff may incur as result of the assault. There was evidence that at the time of the trial plaintiff had a scar on his neck as result of one of the bullets fired by Henderson, that shattered portions of the bullet had never been removed from plaintiff's head, that he still took medicine which he received from the doctor at the time of the assault, that the back of his head still hurt, and that he was not able to work all day because of severe headaches. In view of this evidence, it was error for the court in instructing the jury on the issue of compensatory damages to limit recovery to past and present damages. On the evidence plaintiff was entitled to recover also an award for the present worth of future damages proximately resulting from the assault.

The result is:

The order allowing defendant Cole's motion for a directed verdict in her favor is affirmed.

For error in the court's charge to the jury on the issue of compensatory damages, plaintiff is entitled to a new trial on that issue. The new trial will be limited to the issue of compensatory damages, and the jury's answers to the first and third issues will not be disturbed.

Affirmed in part and remanded for a new trial on the issue of compensatory damages.

Judges MORRIS and MARTIN concur.

STATE OF NORTH CAROLINA v. JAMES ALEXANDER PARKS

No. 7526SC737

(Filed 17 March 1976)

1. Constitutional Law § 30— motion for speedy trial — failure to hold hearing

The trial court did not err in failing to hold a plenary hearing on defendant's handwritten motion to dismiss for lack of a speedy trial where a hearing was set twelve days after the motion was made

by defendant, no one showed up for the hearing, defendant did not demand a hearing between the date set for a hearing and the date judgment was entered against him, and defendant did not complain of not having a hearing at the beginning of his trial.

2. **Criminal Law § 98— denial of motion to sequester witness**

The trial court did not abuse its discretion in the denial of defendant's motion to sequester the State's witness in a prosecution for felonious assault.

3. **Criminal Law § 88— right of cross-examination — repetitious questions**

The trial court did not unduly limit defendant's right of cross-examination of a State's witness in refusing to permit defense counsel to ask the witness a question which was repetitious of questions already asked of the witness.

4. **Assault and Battery § 15— instructions — recapitulation of evidence — labeling offense as "guilty of assault with deadly weapon"**

When the charge of the court in this felonious assault prosecution is read as a whole, the trial court did not err in recapitulating certain testimony of defendant, in failing to recapitulate evidence adduced by defense counsel on cross-examination, or in labeling the offense "guilty of assault with a deadly weapon" rather than simply "assault with a deadly weapon."

5. **Assault and Battery § 15— felonious assault — instructions on intent to kill**

The trial court's instructions in a felonious assault case did not allow the jury to find the element of intent to kill based solely on proof of the assault where the court further stated that the jurors must determine from the facts and circumstances whether the assault was committed with the specific intent to kill.

APPEAL by defendant from *Snepp, Judge.* Judgment entered 11 June 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 15 January 1976.

Defendant was charged in a bill of indictment with the offense of assault with a deadly weapon with intent to kill, inflicting serious injury.

The evidence for the State tends to show that on 14 July 1974, there was a rock concert being held at Charlotte Memorial Stadium and that defendant, along with several companions, was milling around the outside of the stadium. Officer Barry W. Worley and Officer Dunn chased the defendant and his companions through a tunnel leading under Independence Boulevard into a parking lot because the defendant had cursed at them. As the defendant reached the parking lot, he turned without provocation, without motive, and for some unexplained reason, shot Barry Worley five times with an undescribed

weapon thought to be a handgun or pistol. After the shooting, defendant fled through the parking lot but was apprehended behind the buildings some blocks away. As a result of one of the gunshot wounds received, Officer Worley is now paralyzed from the waist down. The Charlotte Police Department recovered this weapon, but it was not introduced into evidence nor compared with the bullet found in Officer Worley's body.

The defendant offered evidence tending to show that he had been chased from the vicinity of Charlotte Memorial Stadium through a tunnel under Independence Boulevard and struck on the head by a policeman with a billy stick. After having been struck, he fled through the parking lot and was later apprehended by the police some blocks away. The defendant testified that he did not fire any shots at Officer Worley and he did not possess a handgun.

From a jury verdict of guilty and a judgment imposing a prison sentence thereon, defendant appealed.

Attorney General Edmisten, by Associate Attorney Acie L. Ward, for the State.

John H. Hasty, for defendant appellant.

MARTIN, Judge.

[1] Defendant contends the trial court committed prejudicial error in failing to hold a plenary hearing on the defendant's motion for a speedy trial and habeas corpus which was filed prior to his trial in this manner. Although Judge Snepp's order finds that defendant's handwritten petition presented grounds for determination upon review under habeas corpus, it does not state the specific basis of grounds alleged by defendant to have violated his constitutional rights.

Assuming that the petition presents a motion for dismissal for lack of a speedy trial or a motion for a speedy trial and a reduction of bond, the trial judge should hear evidence and find facts where the record shows a substantial delay and does not show the cause therefor. *State v. Roberts,* 18 N.C. App. 388, 197 S.E. 2d 54 (1973). We do not propose, however, that the trial judge must hold an evidentiary hearing each time a defendant contends that he has been denied a speedy trial. In this case, a hearing was set twelve days after the handwritten motion was made by the defendant. However, there is no indica-

tion in the record that anyone showed up for the hearing although the date, hour, and court was specifically set in Judge Snepp's order.

" . . . [A] defendant may waive the benefit of statutory or constitutional provisions by express consent, failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it. (Citations omitted.)" *State v. Gaiten,* 277 N.C. 236, 176 S.E. 2d 778 (1970). The defendant did not demand a hearing from and after May 21, 1975, the date set for the hearing, and June 11, 1975, the date judgment was entered against him, nor did the defendant complain of not having a hearing at the beginning of his trial. "A defendant who has himself caused the delay, or acquiesced in it, will not be allowed to convert the guarantee, designed for his protection, into a vehicle in which to escape justice." *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274 (1969). This assignment of error is overruled.

[2] The defendant next contends that the trial court committed prejudicial error in failing to sequester the State's witness. The trial court's denial of defendant's motion, made prior to the commencement of trial, to sequester the witness is not reviewable on appeal except in the case of abuse of discretion. *State v. Felton,* 283 N.C. 368, 196 S.E. 2d 239 (1973). We find no indication in the present record of abuse of discretion.

[3] Defendant next contends the trial court committed prejudicial error in limiting the defendant's right of cross examination of the State's witness Walter J. Dunn. The relevant portion of the record is as follows:

> "I did not examine his physical person after I arrested him. Particularly, I did not examine his head. I did not recall his head bleeding when I found him with a gash in it. I don't recall him having a busted head. I did not see that as I recall. I saw him briefly, yes, sir.
>
> Q. Well, you saw him within five minutes after you say you heard the shooting, yet you didn't see this man's head?
>
> Court: Now, Mr. Plumides, he has answered your questions. Let's move on.
>
> Q. Your honor, please, may I be permitted to ask him that again.
>
> Court: No, you have asked him and he has answered the question. Let's move on."

While defendant's counsel should be allowed a fair cross examination of all prosecution witnesses, it appears in the present case that the question defendant's counsel wanted to ask Walter J. Dunn was repetitious of questions already asked of the witness. Thus, the judge acted properly in asking counsel to "move on" with his questioning. " 'The limits of legitimate cross examination are largely within the discretion of the trial judge, and his ruling thereon will not be held for error in the absence of showing that the verdict was improperly influenced thereby.' (Citation omitted.)" *State v. McPherson,* 276 N.C. 482, 172 S.E. 2d 50 (1970). This assignment of error is overruled.

[4] The defendant next contends that the trial court committed prejudicial error in its charge to the jury. The defendant makes three separate exceptions within this assignment of error. First, he claims that the court erred in recapitulating certain testimony of the defendant. The defendant had testified that he and some others were sitting in a parking lot, and "had a beer with us." The court recapitulated this testimony by saying, "so they walked over to the parking building lot across Independence and had a beer bust." Second, the defendant claims that the court erred in failing to recapitulate evidence which his counsel adduced on cross examination. This evidence was as follows:

> "DEFENDANT'S ATTORNEY: Was there a comparison [of the bullets found in the victim and the gun found near the scene of the crime] made?
>
> OFFICER DUNN: Yes, sir, as far as I know."

Third, the defendant claims that the court erred in charging the jury on the offense of assault with a deadly weapon. The essence of this claim is that the court labeled the offense "guilty of assault with a deadly weapon . . . " rather than simply "assault with a deadly weapon." We find no merit in any of these exceptions. As our Supreme Court noted in *State v. Lee,* 277 N.C. 205, 176 S.E. 2d 765 (1970), "[w]e perceive nothing in the instructions which should prejudice a mind of ordinary firmness and intelligence. 'The charge of the court must be read as a whole . . . , in the same connected way that the judge is supposed to have intended it and the jury to have considered it . . . . ' *State v. Wilson,* 176 N.C. 751, 97 S.E. 496 (1918). It will be construed contextually, and isolated portions will not be held prejudicial when the charge as a whole is correct. (Citations omitted.)"

[5] Defendant further contends the trial court committed prejudicial error in its charge to the jury on "intent to kill," an essential element of the offense charged.

In its charge to the jury the trial court stated the following:

> "Now, as to the first of these, the offense of assault with a deadly weapon with intent to kill inflicting serious injury, I instruct you that for you to find the defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury, the State must prove four things beyond a reasonable doubt: (1) that the defendant acted intentionally; (2) that the defendant used a deadly weapon, and a handgun or a pistol is a deadly weapon as a matter of law; (3) the State must prove that the defendant had the specific intent to kill. By intent to kill, it means that no special intent is required beyond the intent to commit an unlawful act which may be inferred from the nature of the assault and the attending circumstances. It is for you to determine from the facts and circumstances in evidence whether the assault was committed with the specific intent to kill; and (4) the State must prove beyond a reasonable doubt that the defendant inflicted serious bodily injury upon Mr. Worley."

The defendant contends that by its charge, the trial court has informed the jurors that no further specific proof was necessary concerning the intent to kill and that the jurors could infer from the fact of the assault that the intent to kill was existent. However, the instruction did not allow the jury to find this element based solely on proof of the assault since the court further stated that the jurors must determine from the facts and circumstances whether the assault was committed with the specific intent to kill.

As stated above, it is settled law in North Carolina that the charge of the court must be read as a whole and construed contextually, and " . . . isolated portions will not be held prejudicial when the charge as a whole is correct. (Citations omitted.) If the charge presents law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal. (Citation omitted.)" *State v. Lee, supra.*

Construing the charge as a whole, the court correctly instructed the jury on the burden of proof as to each element of the offense. This assignment of error is overruled.

We find no prejudicial error in defendant's trial.

No error.

Judges VAUGHN and CLARK concur.

JIM WALTER HOMES, INC. v. WILLIE HERMAN PEARTREE

No. 752DC756

(Filed 17 March 1976)

1. **Courts § 11.1— district court — authority to hear motions and enter interlocutory orders**

A district court judge had authority to hear motions and enter interlocutory orders during the session over which he had been assigned to preside whether the assignment was oral or in writing. G.S. 7A-192.

2. **Judgments § 25; Rules of Civil Procedure § 60— setting aside judgment — excusable neglect — illness of defendant — attorney's failure to ask for continuance**

Failure of defendant's attorney immediately to appeal to the court for a continuance upon receipt of a doctor's statement that defendant was unable to appear in court on the date of the trial constituted neglect not imputable to defendant which was sufficient to support an order under Rule 60(b)(1) setting aside the judgment against defendant.

Judge VAUGHN concurring in result.

APPEAL by plaintiff from *Manning, Judge.* Judgment entered 9 June 1975 in District Court, BEAUFORT County. Heard in the Court of Appeals 19 January 1976.

Plaintiff alleged in its complaint that it had entered into a contract to build a house for defendant for $8,325. Defendant had paid $4,225 and was indebted to plaintiff for $4,100. Defendant answered, admitting that he had agreed to pay $8,325 for building a house and had paid only $4,225, but denied that he was liable for the remaining $4,100. He alleged that the house built by plaintiff was defective in numerous ways. The case was tried on 6 and 7 May 1974 and plaintiff obtained judgment

for $4,100. On 8 April 1975 defendant moved to vacate the judgment and that he be granted a new trial.

At the hearing on defendant's motion attorney Frazier T. Woolard testified in substance as follows: He represented defendant at the 1974 trial. Defendant's case was originally scheduled for trial in March 1974 and he obtained a continuance for the defendant on the ground that defendant was ill. He wrote to defendant and told him that the case had been rescheduled for Monday, May 6. On the morning of Friday, May 3, Woolard received a letter dated 1 May 1974 from Dr. Myer Shapiro in New York, stating that defendant was under medical treatment for acute lumbo-sacral sprain with sciatica and would not be able to appear in court on May 6th. Woolard did not do anything about this matter until Monday, May 6. On Monday, he moved for a continuance and the motion was denied because several of plaintiff's witnesses had traveled to North Carolina from out of state for the trial. On Monday afternoon he telephoned defendant to tell him that the case was being tried in his absence. On Tuesday afternoon, after the trial was over, defendant came into Woolard's office and appeared to be in excellent physical condition. He walked quickly and without assistance.

Defendant testified in substance as follows: In May 1974 he was living in New York and suffering from severe back trouble. He arranged for Dr. Shapiro to write and notify Woolard that he could not appear in court on May 6. On May 6 he received medical treatment in Dr. Shapiro's office. When he returned home from the doctor's office he found that Woolard had telephoned and left word that the trial was under way. He then had three of his friends and relatives drive him to North Carolina during the night of May 6 and 7. On the afternoon of May 7 he met with Woolard and at this time he was not in good physical condition; he could not even walk without assistance.

At the conclusion of the hearing the court made extensive findings of fact, summarized above, and concluded that the failure of defendant's attorney to move for a continuance after receipt of a letter from defendant's physician constituted neglect.

From the judgment vacating the judgment of 7 May 1974 and ordering a new trial, plaintiff appealed.

W. Faison Barnes and Anthony L. Giordano, for plaintiff appellant.

John H. Harmon, for defendant appellee.

MARTIN, Judge.

Plaintiff contends the trial court erred in entering an order granting a new trial.

[1] Plaintiff argues that under G.S. 7A-192 Judge Manning had no power to rule on defendant's motion because he had not been authorized in writing to hear motions and enter interlocutory orders. G.S. 7A-192 provides, in relevant part:

> "*Any* district judge may hear motions and enter interlocutory orders in causes regularly calendared for trial or for the disposition of motions, at any *session* to which the district judge has been assigned to preside. The chief district judge and any district judge designated *by written order* or rule of the chief district judge, may *in chambers* hear motions and enter interlocutory orders in all causes pending in the district courts of the district. . . . " (Emphasis added.)

In other words, a district judge other than the chief district judge may hear motions and enter interlocutory orders during any session over which he has been assigned to preside, whether the assignment be oral or written, but he may not hear motions in chambers without written authorization.

The record shows that defendant's motion was heard "[b]efore Manning, J., June 9, 1975 Session of Beaufort County, the General Court of Justice, District Court Division," and that Judge Manning had been assigned to this session orally. The motion was not heard in chambers. Judge Manning was thus authorized to hear motions and enter interlocutory orders during the session over which he had been assigned to preside whether the assignment be oral or in writing.

[2] Plaintiff contends there was no excusable neglect sufficient to grant a new trial. Rule 60(b) of the North Carolina Rules of Civil Procedure provides:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistake, inadvertence, surprise, or excusable neglect;
>
> . . .
>
> (6) Any other reason justifying relief from the operation of the judgment."

Rule 60(b) has been described as " . . . a grand reservoir of equitable power to do justice in a particular case. . . . " 7 Moore's Federal Practice, ¶ 60.27[2], at 375. The North Carolina Supreme Court has stated that its "broad language . . . 'gives the court ample power to vacate judgments whenever such action is appropriate to accomplish justice.' " *Brady v. Town of Chapel Hill,* 277 N.C. 720, 178 S.E. 2d 446 (1971).

It is our opinion, and we so hold, that there is plenary competent evidence to support the findings of fact, which in turn support the conclusion that the failure of attorney Woolard to appeal to the court for a continuance upon receipt of the statement of Dr. Shapiro constituted neglect on the part of said attorney which is not imputable to the defendant, and that defendant had a meritorious defense. The judgment appealed from is

Affirmed.

Judge CLARK concurs.

Judge VAUGHN concurs in the result.

Judge VAUGHN concurring.

I concur in the result of this opinion. Although there was some testimony from which the judge could have concluded that defendant's failure to appear at trial was excusable, there is not a scintilla of evidence to indicate that his counsel, Mr. Woolard, neglected the case. Instead, it affirmatively appears from the record that Mr. Woolard went to great lengths to protect a procrastinating client.

ALBERTA C. OWENS v. JOHN R. OWENS

No. 7515DC820

(Filed 17 March 1976)

1. **Divorce and Alimony § 16— alimony — adultery pled in bar — necessity for finding of fact**

Where adultery is pleaded in bar in an action for alimony or alimony *pendente lite*, an award will not be sustained in the absence of the finding of fact on the issue of adultery in favor of the party seeking the award. G.S. 50-16.6(a).

2. **Divorce and Alimony § 14— adultery — proof by circumstantial evidence — proof of opportunity and inclination not required**

Adultery may be proven by circumstantial evidence, the evidence must be more than that which raises a suspicion or conjecture, and it must show more than mere opportunity; however, there is no rule of law requiring circumstantial evidence of both opportunity and inclination to prove adultery.

3. **Divorce and Alimony § 17— alimony — adultery pled in bar — sufficiency of evidence for jury**

In an action for divorce from bed and board and alimony where defendant pled adultery of plaintiff in bar, the trial court erred in failing to submit the issue of adultery by plaintiff to the jury on defendant's evidence that plaintiff was living with another man.

APPEAL by defendant from *Paschal, Judge.* Judgment entered 22 April 1975 in District Court, ALAMANCE County. Heard in the Court of Appeals 10 February 1976.

The plaintiff, Alberta Owens, initiated this action for divorce from bed and board, and for temporary and permanent alimony. She alleged abandonment, adultery, cruelty, and defendant's offering of indignities. In his answer defendant denied the allegations of adultery and alleged that plaintiff had committed adultery with Raymond Charles Green. It was stipulated that at trial plaintiff offered sufficient evidence from which the jury could conclude that defendant committed adultery. Defendant offered the testimony of Jackie Baize, operator of a store near plaintiff's residence, which tended to show that Raymond Green was "living with" plaintiff in October and November of 1973; that each morning Green left the house about 8:00 a.m.; that sometimes they left together; that the two were seen together buying clothes.

Plaintiff testified that in October 1973 she and defendant were negotiating with Green for the purchase of Cane Mountain

Resort, where plaintiff was living; that she and Green slept in separate bedrooms and never had sexual intercourse; that defendant was aware of Green's stay in the house and continued negotiations with him.

The trial court did not submit the issue of adultery by plaintiff to the jury, but the jury found that plaintiff was a dependent spouse and that defendant had committed adultery. The court made the following findings of fact with regard to alimony in substance as follows:

(1) Defendant is able-bodied and capable of earning money.

(2) His income in 1973 was $20,000, but he is now unemployed.

(3) He owns 104,000 shares of Cane Mountain Resort stock. (230,000 shares outstanding.)

(4) In October 1973 the resort was sold to Raymond Green for $300,000, Green executing a note to the Corporation for $265,000, secured by a deed of trust on the resort property.

(5) Green was defaulted on the note, and the deed of trust is currently being foreclosed.

(6) Defendant's father, owner of substantial property, died during the trial, and thus "it is probable that the plaintiff will inherit a portion of his father's estate."

From the judgment awarding counsel fees and a lump sum of $75,000, defendant appeals.

Smith, Patterson, Follin, Curtis & James by Marion G. Follin III; Latham, Wood & Cooper by James F. Latham for plaintiff appellee.

Seawell, Pollock, Fullenwider, Van Camp & Robbins, P.A., by James R. Van Camp and Bruce T. Cunningham, Jr., for defendant appellant.

CLARK, Judge.

[1] Where adultery is pleaded in bar in an action for alimony or alimony pendente lite, an award will not be sustained in the absence of the finding of fact on the issue of adultery in favor of the party seeking the award. G.S. 50-16.6(a); *Foster v. Foster,* 25 N.C. App. 676, 214 S.E. 2d 264 (1975).

In support of the trial court's ruling that the evidence of adultery by the plaintiff was not sufficient to submit to the jury, plaintiff contends that the defendant offered evidence of opportunity but not inclination, and relies on the following statement in *Hicks v. Hicks*, 4 N.C. App. 28, 35, 165 S.E. 2d 681, 686, reversed on other grounds, 275 N.C. 370, 167 S.E. 2d 761 (1969):

> ". . . It is settled that, where circumstantial evidence is relied upon to establish adultery, there must be evidence of both inclination and opportunity on the part of the party charged. 1 Lee, N. C. Family Law, § 65, p. 262. . . . "

In support of this proposition of law *Lee* cites several treatises, Including Nelson, Divorce and Annulment (2d Ed.).

In Nelson, *supra,* § 5.14 it is stated:

> "One of the factors necessary to making out a case of adultery by circumstantial evidence is proof of adulterous disposition or inclination to commit adultery. Such a disposition or inclination may be indicated by a habit of fondling women generally, consorting with prostitutes, illicit relationship with the same person prior to marriage, or that the correspondent is a former spouse of the party charged."

But in § 5.15 the following appears:

> "It has been held, repeatedly, that it is not sufficient to prove adultery that there was more or less ample opportunity for it to occur. But opportunity plus other improper circumstances indicative of the offense, such as occupancy of the same room or same bed at night, may well, unexplained, lead to a finding of adultery."

Both 27A C.J.S., Divorce, § 139(2)b and 24 Am. Jur. 2d, Divorce and Separation, § 369 substitute "adulterous disposition" for "inclination." In 27A C.J.S., *supra,* at 480, it is stated: "In the absence of evidence of an adulterous inclination, proof of opportunity to commit adultery is not sufficient to establish the offense, *unless it occurs under incriminating circumstances.*" (Emphasis added.)

It appears from the language used in Nelson, *supra,* § 5.15 that "opportunity plus other improper circumstances indicative of the offense," and from the language used in 27A C.J.S., *supra,* at 480, that "proof of opportunity to commit adultery is

not sufficient . . . unless it occurs under incriminating circumstances" do not sustain the hard and fast rule of law that if circumstantial evidence is relied on to establish adultery there must be evidence of both inclination and opportunity. Further, an examination of the cases cited by Nelson reveals that in many of them circumstantial evidence of adultery was held to be sufficient though there was no evidence of inclination or adulterous disposition. See *Keyes v. Keyes,* 252 Miss. 138, 171 So. 2d 489 (1965); *Poole v. Poole,* (La. App.), 189 So. 2d 75 (1966).

[2] An examination of the cases in North Carolina, both civil and criminal, reveals that adultery may be proven by circumstantial evidence, that the evidence must be more than that which raises a suspicion or conjecture, and must show more than a mere opportunity. *State v. Davis,* 229 N.C. 386, 50 S.E. 2d 37 (1948); *State v. Gordon,* 225 N.C. 757, 36 S.E. 2d 143 (1945); *State v. Davenport,* 225 N.C. 13, 33 S.E. 2d 136 (1945); *State v. Woodell,* 211 N.C. 635, 191 S.E. 334 (1937); *Burroughs v. Burroughs,* 160 N.C. 515, 76 S.E. 478 (1928); *Warner v. Torrence,* 2 N.C. App. 384, 163 S.E. 2d 90 (1968). We do not find in any of these cases any rule of law requiring circumstantial evidence of both opportunity and inclination to prove adultery, except the above-quoted dicta in *Hicks, supra.* We do not overrule *Hicks* but repudiate the quoted dicta.

[3] We consider it unwise to adopt general rules as to what will or will not constitute proof of adultery, but the determination must be made with reference to the facts of each case. In some cases evidence of opportunity and incriminating or improper circumstances, without evidence of inclination or adulterous disposition, may be such as to lead a just and reasonable man to the conclusion of adulterous intercourse. *State v. Davenport, supra.* If so, the evidence should be submitted on an issue of adultery to the jury so that it may judge the probative force of the evidence.

Sub judice, the evidence of adultery is conflicting, but we find it is sufficient to be submitted to the jury on the issue of plaintiff's adultery, and the failure of the trial court to do so is error.

In awarding alimony in the lump sum of $75,000, it appears that the trial court based the award on earning capacity without finding that defendant had disregarded his material obliga-

tion to support his wife, on the shares of stock in a possibly defunct corporation without finding the value of the stock, and on the possibility of the defendant's inheriting property from his father. We must remand for a new trial, which will include the determination of alimony and counsel fees, if appropriate, based on appropriate findings of fact. We order a

New trial.

Judges MORRIS and VAUGHN concur.

FREEWOOD ASSOCIATES, LTD. v. DAVIE COUNTY ZONING BOARD OF ADJUSTMENT

No. 7522SC759

(Filed 17 March 1976)

Municipal Corporations § 30; Counties § 5— county zoning — conditional and nonconforming use permits — applications for family campground — intended use as nudist camp

Where applications for conditional use and nonconforming use permits designated the proposed use of property as "family campground," but at the hearing before the zoning board of adjustment it was established that the intended use was a nudist camp, the designated use was so inaccurate, and the variance between the designated use and the intended use so substantial, that the board of adjustment could not lawfully grant either a conditional use or nonconforming use permit for use of the property as a family campground.

APPEAL by petitioner from *Seay, Judge.* Judgment entered 8 May 1975, Superior Court, DAVIE County. Heard in the Court of Appeals 19 January 1976.

On 20 December 1972, petitioner purchased a tract of land containing 60.65 acres in rural Davie County, comprised primarily of woodland and unimproved farmland. On 1 November 1973, Davie County adopted a zoning ordinance. The tract was zoned R-A (Residential-Agricultural).

In mid November 1973, petitioner orally requested of the zoning officer that the tract be granted nonconforming status as a "mobile home park." Upon investigation the zoning officer found that a road had been cut, a power pole installed, a lake built, and a small area cleared. The request was denied.

On 19 March 1974, petitioner made application to the zoning officer for use of a Single Unit Mobile Home on the tract, and the application was approved. On 14 June 1974, the zoning officer notified petitioner that it was in violation of the zoning ordinance and ordered it to cease development for the purpose of "private campground." In June 1974, petitioner applied for a conditional use permit to operate a "private family campground." In a public hearing before the Board, an officer of petitioner admitted that the tract was intended to be used as a nudist camp. The permit was denied by the Board on 1 July 1974. On the following day, petitioner moved for permit as a nonconforming use on the ground that the tract had been used as a family campground prior to the adoption of the county zoning ordinance on 1 November 1973. The Board again denied the permit. Petitioner then sought review in the Superior Court of the Board's denial of both the conditional use and nonconforming use permits. Judge Jackson remanded the cause to the Board of Adjustment for further hearing and findings of fact.

At the hearings before the Board on 6 January and 3 February 1975, petitioner offered evidence tending to show that before the adoption of the zoning ordinance it had applied for membership in a national sun-bathing club and had advertised petitioner's club in the nudist publication; that the first membership in petitioner's nudist club was sold in July 1973 and in November 1973 there were six families owning membership; that petitioner had taken every possible precaution to avoid any publicity or to be identified as a nudist camp and had falsely denied to a local news reporter that he intended to operate a nudist camp; and that about $21,800 had been spent in development, primarily for road construction, drainage, land clearing, and building a lake.

Numerous witnesses opposed the permits and offered evidence tending to show that such camp would lower property values in the area; that the rural road and bridges leading to the tract would not stand heavy camping vehicles; and that "if the Lord had intended people to go nude . . . Noah's son [would not have] been turned into a serpent because of looking upon his father's nude body."

The Board of Adjustment found facts and concluded (1) that petitioner had not established a nonconforming use since its property had not been used as a family campground prior

to the adoption of the ordinance and (2) that the conditional use permit was "not in accordance with the plan of orderly development." On certiorari the superior court affirmed the Board's denial of both the conditional use and nonconforming use permits. From this judgment, petitioner appeals.

Peebles & McConnell by Joel C. McConnell, Jr., and Stafford R. Peebles, Jr., for petitioner appellant.

Davie County Attorney John T. Brock; Womble, Carlyle, Sandridge & Rice by Roddey M. Ligon, Jr., for respondent appellee.

CLARK, Judge.

If the findings of fact made by the Board of Adjustment are supported by the evidence, the findings are conclusive. But that determination by the superior court is its conclusion upon a question of law and is reviewable by the appellate courts. *In re Campsites Unlimited,* 287 N.C. 493, 215 S.E. 2d 73 (1975).

Freewood applied to the Board of Adjustment for a conditional use permit for use of their premises as a "family campground." Upon denial of the permit on 1 July 1974, Freewood applied for a nonconforming use permit as a family campground. A "conditional use permit" is distinct from a "variance" in that it is granted for a public or quasi-public purpose, such as cemeteries or recreational parks, rather than to obviate unnecessary hardship or other conditions for which a variance may be granted. 101 C.J.S., Zoning, § 274. A "nonconforming use permit" is granted for the continuance of an existing use notwithstanding the zoning ordinance does not permit similar uses in the area in which the property so used is located. 101 C.J.S., Zoning, § 180.

The continuation of a nonconforming use is permitted to avoid hardship to the landowner who incurred such expense in the development of his property, or has incurred a contractual obligation to the extent that he has acquired a vested right to carry on the existing use. In North Carolina it has been established that one of the requisites for a nonconforming use permit is that the expenses be incurred in good faith. *In re Campsites, supra; Town of Hillsborough v. Smith,* 276 N.C. 48, 170 S.E. 2d 904 (1969); *Stowe v. Burke,* 255 N.C. 527, 122 S.E. 2d 374 (1961).

All the evidence for Freewood tends to show that it intended at the time it purchased the land in December 1972 to use the property for a nudist camp, and that continuously thereafter it had so intended to use it. However, the intended use was deliberately concealed from the public and was not disclosed to the Board of Adjustment until elicited by cross-examination of an officer of Freewood at a hearing before the Board on the application of Freewood for a conditional use permit to operate a *family campground.* Thereafter, in this and subsequent hearings before the Board of Adjustment, the petitioner offered evidence of the intended use of its property as a nudist camp and its expenses incurred in development of the premises for the intended use, and the Board also heard evidence opposing the use of the premises as a nudist camp.

Nevertheless, we think it important that the use of the property be stated truthfully and accurately in the application for a permit to a Board of Adjustment. Broadly, the purpose of a zoning is to limit the use of land in the interest of the public welfare. It is based on the exercise of police power, and generally may be exercised only after adequate public notice and hearing, and this notice should correctly inform the public and the Board of Adjustment of the use that the applicant proposes to make of the premises.

In the case before us, it was apparently assumed that if a permit was granted for use, conditional or nonconforming, of the premises as a family campground, then the petitioner had the right to use the premises as a nudist camp. There is a significant difference between a "family campground" and a "nudist camp" as commonly understood by the public. Those who would support or oppose the operation of a family campground may not support or oppose a nudist camp. Too, the inadequate and improper designation in the application of the proposed use of the premises does not properly raise the issues before the Board. For example, the existing use must be a lawful one to qualify as a nonconforming use, and the proposed use must be a lawful one to qualify as a conditional use. There may be no question that use as a family campground is lawful, but there may be a serious question that use as a nudist camp is unlawful and in violation of G.S. 14-190.9, commonly referred to as the indecent exposure statute. See Anno., 94 A.L.R. 2d 1353, 1379. But this issue was not raised in this case, possibly because the proposed use was inaccurately designated in the application as "family campground" rather than "nudist camp."

We conclude that since the applications for conditional use and nonconforming use permits designated the proposed use of the premises as "family campground" but at the hearing it was established that the proposed use was a "nudist camp," the designated use was so inaccurate, and the variance in the designated use and the intended use so substantial, that the Board of Adjustment could not lawfully grant either a conditional use or nonconforming use permit for use of the premises as a family campground.

The judgment denying the conditional and nonconforming use permits is

Affirmed.

Judges VAUGHN and MARTIN concur.

WESLEY C. BAREFOOT AND WIFE, SHIRLEY A. BAREFOOT v. EDITH C. LUMPKIN AND CHARLES L. FULTON, SUBSTITUTE TRUSTEE

No. 7510SC720

(Filed 17 March 1976)

1. **Mortgages and Deeds of Trust § 9— release of part of land — action for specific performance — summary judgment for defendant**

In an action for specific performance of release provisions of a purchase money deed of trust instituted after plaintiffs paid the first installment on the underlying note and then defaulted, summary judgment was properly entered for defendants on the ground that plaintiffs had failed to comply with a requirement of the deed of trust that a plan of development be approved before defendants were required to release any of the land; furthermore, summary judgment should also have been granted for defendants for the reason that plaintiffs did not request the release of any land until after they had defaulted on the note and the entire sum had become due.

2. **Mortgages and Deeds of Trust § 39— wrongful restraint of foreclosure — damages**

Damages awarded for wrongful restraint of a foreclosure sale should have been the cost of readvertising the sale, not the cost of the original advertisement of the sale.

APPEAL by plaintiffs from *Alvis, Judge.* Judgment entered 1 May 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 13 January 1976.

This is an action for specific performance of release provisions contained in a purchase money deed of trust.

The deed of trust was executed on 27 September 1972 and was given to secure payment of a note executed by plaintiffs to defendant Lumpkin in the amount of $153,564.11. The note was to be paid in seven equal installments of principal, plus accrued interest, beginning 27 September 1973.

Plaintiff paid the first installment, defaulted and has paid nothing since.

Foreclosure was started and the sale was set for 10 December 1974. Plaintiffs filed a complaint and sought to enjoin the sale and a temporary restraining order was entered on 9 December 1974. On 9 January 1975 Judge McKinnon entered an order terminating the restraining order and denied plaintiffs' motion for a preliminary injunction. The foreclosure sale was readvertised. The sale was conducted on 10 February 1975 and defendant Lumpkin placed the highest bid of $146,500.00. On 21 February 1975 the trustee executed a deed to defendant Lumpkin.

In their complaint, plaintiffs alleged that they were entitled to have 7.59 acres released from the deed of trust by virtue of their payment of the first installment of $21,937.73 in September, 1973. Defendant had previously released 9.72 acres. The deed of trust was attached as an exhibit to the complaint. Plaintiffs rely on the following from the deed of trust to support their claim.

> "It is agreed that ten acres plus the right of way of a dedicated 60-foot street shall be released from the foregoing property without payment, as shown by a development plan mutually agreeable to the Grantors and Beneficiary herein.
>
> Upon approval of a mutually agreeable development plan, land shall be released from the lien of this deed of trust upon payment of $3,000.00 per acre. The Beneficiary [sic] shall be entitled to release of land at the rate of $3,000.00 per acre for all annual payments on the principal of the note secured by this deed of trust."

Plaintiffs allege that in October, 1974, they requested defendants to release the acreage and defendants refused.

Defendants answered and pleaded, among other things, that the deed of trust required, as a condition precedent to the release of any property, that there first be a mutually agreeable plan of development of the property and that no such plan had been developed, submitted or approved. Defendant also pleaded that the request for release of the acreage came after plaintiffs were in default. Defendants counterclaimed for damages resulting from plaintiffs' wrongful restraint of the foreclosure sale. Plaintiffs did not reply to the defense and counterclaim.

On 24 March 1975 defendant Lumpkin moved for summary judgment against plaintiffs on plaintiffs' claim and defendants' counterclaim. The motion was supported by affidavits from defendants. Plaintiffs filed nothing in response. The motion was allowed and judgment was entered dismissing plaintiffs' action and awarding defendants damage in the amount of $190.40 (the cost of advertising the first proposed sale.)

Plaintiffs appealed.

Reynolds and Russell, by Dennis P. Myers, for plaintiff appellants.

M. Marshall Happer III, for defendant appellee, Edith C. Lumpkin.

VAUGHN, Judge.

Although plaintiffs alleged that they caused a plan to be prepared, that defendant Lumpkin had seen the plan and was aware that plaintiffs intended to develop the property according to that plan, plaintiffs did not plead the existence of a mutually agreeable plan of development. Defendants, in their answer, expressly denied the existence of such a plan. Defendant Lumpkin, in her affidavit filed in support of the motion for summary judgment, reaffirmed that no such plan had been submitted to or approved by her. Plaintiffs did not respond by affidavit or otherwise. Plaintiffs' argument, on appeal, that an issue of fact exists as to whether defendant Lumpkin approved the plan is without merit.

On appeal, appellants contend that questions exist about whether defendants waived their right to insist on a plan of development and are now estopped to assert said plan as a condition precedent. Plaintiffs contend that these questions are raised because defendants executed a deed of release for 4.72

acres on 9 January 1973, and another deed of release for a five-acre tract on 18 July 1974. Both deeds also released an easement for ingress and egress over an adjoining strip of land. The descriptions in the deeds were by metes and bounds and contained no reference to a lot number or other plan of development. In plaintiffs' complaint there is neither an allegation that there was consideration for the purported waiver nor an allegation that plaintiffs relied on the two releases as a waiver of the express condition of the deed of trust. They came forward with nothing at the hearing on the motion for summary judgment to support that argument. Plaintiffs, therefore, raised no material issue of fact as to waiver or estoppel.

[1] The trial judge appears to have granted defendants' motion for summary judgment for the reason that plaintiffs had failed to comply with the requirement that a plan of development be approved before defendants were required to release any of the land. We hold that this was a valid reason to grant the motion to dismiss the action.

There is another reason why summary judgment should have been granted against plaintiffs. The deed of trust provided that upon any default in payment, the entire sum became, at the option of the beneficiary, immediately due and collectible, "anything herein or in said note to the contrary notwithstanding." It then became the duty of the trustee to expose the land for sale at public auction. Plaintiffs did not request release of the land in question from the operation of the deed of trust until after they had defaulted in their obligation to pay the debt that was secured by the deed of trust.

Consideration of the express terms of the purchase money deed of trust in question and the failure of plaintiffs to meet their obligation to defendant leads us to the conclusion that these plaintiffs cannot fail or refuse to pay their debt, force the beneficiary to resort to the security as her only remedy for collection of the debt due her and, therefore, ask the Court to compel the beneficiary to divest herself of part of the security and convey it to the defaulting plaintiffs.

[2] The only damages awarded defendant Lumpkin on the counterclaim was the cost of advertising the first sale in the newspaper, $190.40. She did not appeal. It was the cost of advertising the second sale, $183.60, for which plaintiffs should have been held liable. The sum is disclosed by unrefuted affi-

davits filed in support of defendants' motion for summary judgment. We hereby modify the judgment so that defendants recover $183.60 instead of $190.40.

For the reasons stated, the judgment is affirmed.

Affirmed.

Judges MARTIN and CLARK concur.

STATE OF NORTH CAROLINA v. RANDY LEE SEE

No. 7518DC834

(Filed 17 March 1976)

Courts § 7— criminal case — appeal from district court to Court of Appeals improper

Petitioner had no right to appeal a criminal case from the district court to the Court of Appeals without first seeking review in superior court.

APPEAL by petitioner, GUILFORD County, from *Alexander, Judge.* Heard during the 12 May 1975 session of GUILFORD District Court. Judgment entered 11 June 1975. Heard in the Court of Appeals 11 February 1976.

On the 25th day of January 1974 judgment absolute in the amount of $2,501.18 was entered against Piedmont Bonding Company, surety, in the cases entitled *State of North Carolina v. Randy Lee See.*

The sum of $2,501.18 was paid into the Office of the Clerk of Superior Court on the 23rd day of May 1974. The clerk paid the sum of $2,500.00 to the Treasurer of Guilford County and before the 1st day of July 1974, the Treasurer issued checks transferring the $2,500.00 to the Boards of Education for the City of Greensboro, City of High Point and Guilford County.

On the 10th day of December, 1974, the defendant See petitioned the district court to strike out and set aside the judgment absolute on the appearance bond. On 20 January 1975 Judge Alexander ordered the judgment set aside and further ordered the Treasurer of Guilford County to refund all monies

rendered to his office by said judgment save and except the costs.

On 28 April 1975 Guilford County filed a motion to set aside the order entered on 20 January 1975.

The hearing was held before Judge Alexander on 12 May 1975 after which she entered the following order which was filed on 11 June 1975:

"This cause coming on to be heard and being heard before the undersigned District Court Judge upon the motion of Mr. William L. Daisy, Assistant County Attorney for Guilford County, to set aside the order of this court entered January 20, 1975, and the hearing having been held before the court after notice to the attorneys for the three school boards involved, as well as the attorney for the defendant and bonding company; and the court having considered the motion of Guilford County, the court file, and the argument of counsel, the court makes the following:

FINDINGS OF FACT

1. That on January 25, 1974, judgment absolute against Piedmont Bonding Company, surety, in the case entitled STATE OF NORTH CAROLINA v. RANDY LEE SEE (File numbers 73-Cr-46019-46021) was entered in the amount of $2,501.18.

2. That this amount was paid into the office of the Clerk of Superior Court on May 23, 1974, and was subsequently paid to the Treasurer of Guilford County, who before the 20th day of January, 1975, subsequently paid this amount, according to a distribution formula, to the three Boards of Education within Guilford County.

3. That on the 20th day of January, 1975, this court entered an order setting aside the judgment absolute on the bond in this case and ordering the Treasurer of Guilford County to refund all monies rendered to his office by said judgment save and except the costs.

4. Upon further hearing of this matter the court finds that it had sufficient reason in its discretion to order the return of the bond.

5. The court found and finds that there was just cause to return the bond in spite of the failure of the defendant to

appear and the court finds that the defendant subsequently did return and surrender himself to the court whereupon a new and substantially lower bond was set.

6. The court finds that it did not abuse its discretion in its decision (pursuant to North Carolina General Statute 15-116) in ordering the return of a bond.

Based on the foregoing findings of fact, the court makes the following :

CONCLUSIONS OF LAW

The court concludes as a matter of law that it did not abuse its discretion or act beyond its legal authority in ordering the return of the bond in this action.

It is now, therefore, ORDERED, ADJUDGED AND DECREED that the Treasurer of Guilford County shall pay the amount of the bond to Piedmont Bonding Company.

This 11th day of June, 1975.

s/ ELRETA MELTON ALEXANDER
District Court Judge"

Guilford County appealed, assigning error.

Assistant County Attorney William L. Daisy, for appellant Guilford County.

Smith, Patterson, Follin, Curtis & James, by Michael K. Curtis, for appellees Randy Lee See and Piedmont Bonding Company.

MARTIN, Judge.

We perceive the constitutional and statutory structure of our General Court of Justice to provide that, generally, appeals from the district court in *civil* causes go to the Court of Appeals, while appeals in *criminal* causes must first go to the superior court.

The record shows the following:

"SCI FA INDEX TO CRIMINAL ACTIONS
File No. 73cr46019-20-21
Name: PIEDMONT BONDING Co., Surety
Address: SEE, Randy Lee, Def.
Offense: Poss. of L.S.D.—Poss. M.D.A.—
Poss. of Marij.
Bond $2,500.00 dated 8-1-73
Sci Fa Warrant Issued 9-19-73

Final Disposition: 1-25-74 Judgment absolute in the amt. of $2,500.00 execution 60 days. continued to May 1, 1974 on March 28, 1974 Pd. $2,501.18 5-23-74"

This was a criminal prosecution, heard on petition of defendant to strike out and set aside the judgment absolute on a bond for his appearance in court. The motion by Guilford County and the proceedings thereafter did not change the identity of the proceedings from criminal to civil.

G.S. Chapter 15, Article 11 is entitled "Forfeiture of Bail" and within that article is G.S. 15-116 entitled "Judges may remit forfeited Recognizances," which provides as follows:

"The judges of the superior and district courts may hear and determine the petition of all persons who shall conceive they merit relief on their recognizances forfeited; and may lessen, or absolutely remit, the same, and do all and anything therein as they shall deem just and right and consistent with the welfare of the State and the persons praying such relief, as well before as after final judgment entered and execution awarded."

We hold that petitioner, even if it be a proper party, has no right to appeal a criminal cause from the district court to this Court.

In view of the foregoing, we do not reach the question of whether the action of the trial court from which the petitioner attempted to appeal was in conformity with the applicable statute. The question must be considered in the superior court before it can be considered by us.

For the reasons stated, the appeal is

Dismissed.

Judges BRITT and HEDRICK concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 3 MARCH 1976

ROBINSON v. ROBINSON No. 7518SC840	Guilford (73CVS15495)	Affirmed
STATE v. BARKER No. 7527SC827	Gaston (74CR19295)	No Error
STATE v. BROWN No. 7514SC710	Durham (75CR237)	No Error
STATE v. CALDWELL No. 7526SC755	Mecklenburg (74CR59648) (74CR59649) (74CR59650) (74CR59651)	No Error
STATE v. DAVIS No. 7529SC903	Henderson (74CR7357)	No Error
STATE v. EVANS AND ATKINSON No. 757SC817	Wilson (75CR2033) (75CR2032)	No Error
STATE v. LITTLE No. 753SC723	Craven (75CR3205)	No Error
STATE v. LYONS No. 754SC831	Onslow (75CR3489)	No Error
STATE v. McCLEAN No. 7522SC887	Iredell (74CR10881)	Affirmed
STATE v. McGEE No. 7521SC856	Forsyth (75CR9655)	No Error
STATE v. MILLER No. 7526SC882	Mecklenburg (74CR67418)	Affirmed
STATE v. PARKS No. 7521SC857	Forsyth (75CR334)	No Error
STATE v. SINGLETON No. 7518SC792	Guilford (74CR19938)	Affirmed
STATE v. SMITH No. 7519SC734	Randolph (75CR645)	No Error
STATE v. SMITH No. 7518SC818	Guilford (74CR19939)	No Error
STATE v. UNDERWOOD No. 7517SC893	Surry (74CR9195)	Affirmed
WALTERS v. CONSTRUCTION No. 7512SC853	Cumberland (74CVS3772)	Appeal Dismissed

FILED 17 MARCH 1976

FEIMSTER v. BANK No. 7526DC897	Mecklenburg (74CVD3753)	New Trial
STATE v. BRODIE No. 759SC899	Franklin (75CR4124)	No Error
STATE v. DOZIER No. 7526SC922	Mecklenburg (75CR19362)	No Error
STATE v. GRESHAM No. 754SC829	Onslow (75CR6577)	No Error
STATE v. HALL No. 7516SC804	Robeson (74CR3595) (74CR3745)	No Error
STATE v. McCASKILL No. 7527SC825	Gaston (75CR1802)	No Error
STATE v. McLELLAND No. 7526SC866	Mecklenburg (74CR20082)	No Error
STATE v. STALEY No. 7523SC843	Wilkes (75CR2923) (75CR2924) (75CR2925)	No Error
STATE v. WEATHERS No. 7527SC930	Cleveland (74CR12306)	No Error

ADDITIONS TO NORTH CAROLINA RULES OF APPELLATE PROCEDURE

ANALYTICAL INDEX

WORD AND PHRASE INDEX

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 Appeal Reports.

Done by the Court in Conference on December 18, 1975.

EXUM, J.
For the Court

ANALYTICAL INDEX

Titles and section numbers in this index, e.g., Appeal and Error § 1, correspond with titles and section numbers in N. C. Index 2d.

TOPICS COVERED IN THIS INDEX

ACCOUNTS

§ 1. Open and Running Accounts

An itemized statement of account was properly admitted into evidence in an action to recover for credit purchases. *Men's Wear v. Harris,* 153.

Trial court properly granted summary judgment for plaintiff in an action on an account. *Steel Corp. v. Lassiter,* 406.

ADMINISTRATIVE LAW

§ 4. Procedure Hearings and Orders of Administrative Boards

Petitioner was not entitled to due process rights in her dismissal as an employee of the Employment Security Commission; however, she was given adequate notice and an opportunity to be heard before and after her dismissal. *Nantz v. Employment Security Comm.,* 626.

§ 5. Appeal

Petitioner whose employment with the Department of Revenue was allegedly terminated because of his political views was not required to appeal to the State Personnel Board before he could seek judicial review. *Grissom v. Dept. of Revenue,* 277.

ADOPTION

§ 5. Effect of Decrees

Adopted children had no remainder interest in land deeded to their natural grandmother. *Crumpton v. Crumpton,* 358.

ADVERSE POSSESSION

§ 24. Competency and Relevancy of Evidence

Trial court properly admitted certificate of tax sale of land to defendants' predecessor, evidence of declarations by defendants' predecessor that he bought the land in question and it belonged to him, and evidence that defendants' predecessor had signed an easement across the property. *Lea v. Dudley,* 281.

§ 25. Sufficiency of Evidence

Evidence was sufficient for submission of an issue of title by adverse possession. *Lea v. Dudley,* 281.

§ 25.1. Instructions

Trial court properly instructed on entry into possession of land with permission of the owner. *Lea v. Dudley,* 281.

ANIMALS

§ 2. Liability of Owner for Injuries Inflicted by Domestic Animal

In an action to recover for personal injuries sustained when minor plaintiff was bitten by defendants' dog, trial court erred in failing to instruct on the city ordinance requiring leashes on dogs. *Pharo v. Pearson,* 171.

APPEAL AND ERROR

§ 6. Orders Appealable

Appeal from an order not adjudicating all claims is premature. *Hall v. Hall,* 217.

Purported appeal from an order which adjudicates the rights and liabilities of fewer than all the parties is premature. *Beck v. Beck,* 488.

§ 7. Parties Who May Appeal

Attempted appeal from an order confirming the sale of an incompetent's property by a person who had been dismissed as a party to the proceeding is dismissed. *In re Lancaster,* 295.

§ 9. Moot Questions

Appeal of a person involuntarily committed to a mental health care facility was not moot although the commitment period had expired. *In re Crouch,* 354.

ARCHITECTS

Court's findings were insufficient in an action by an architect to recover for breach of contract or quantum meruit. *Traber v. Crawford,* 694.

ARREST AND BAIL

§ 1. Right of Private Citizen to Make Arrest

Trial court in a first degree murder prosecution did not err in failing to instruct on the law with respect to citizen's arrest. *S. v. Barbour,* 259.

§ 2. Deputized Citizens

Trial court in a first degree murder prosecution did not err in failing to instruct on the law arising from defendant's evidence that he believed he was acting as a law enforcement officer. *S. v. Barbour,* 259.

§ 3. Right of Officer to Arrest Without Warrant

An officer had reasonable grounds to arrest defendant without a warrant for a felony where the officer received information from his dispatcher that the car defendant was driving had been stolen. *S. v. Weddington,* 269.

§ 5. Method of Making Arrest

Arrest of defendant on a felonious assault charge was lawful where the officer relied on a police radio broadcast that a warrant had been issued for defendant's arrest on that charge. *S. v. VanDyke,* 619.

Arrest of defendant was not rendered unlawful by failure of the officer to show that informers who gave information as to defendant's whereabouts were reliable. *Ibid.*

ASSAULT AND BATTERY

§ 14. Sufficiency of Evidence

State's evidence was sufficient to support defendant's conviction for simple assault in trying to run the victims' vehicle off the road. *S. v. Sawyer,* 490.

ASSAULT AND BATTERY — Continued

§ 15. Instructions

Trial court erred in giving the jury an instruction that a policeman's nightstick was a deadly weapon as matter of law. *S. v. Buchanan,* 163.

Instruction that an assault would be excused as being in self-defense if defendant did not have an intent to kill was erroneous. *S. v. Wardlow,* 220.

Trial court erred in failing to instruct jury on defendant's right to act in defense of his home. *S. v. Edwards,* 196.

Trial court's instructions in a prosecution for assault with a deadly weapon did not place upon defendant the burden of proving self-defense. *S. v. Smith,* 314.

Trial court in a felonious assault case erred in failing to explain the law of accident or misadventure as it applied to the evidence in the case. *S. v. Wright,* 481.

Trial court's instructions in a felonious assault case did not allow the jury to find the element of intent to kill based solely on proof of assault. *S. v. Parks,* 703.

ATTACHMENT

§ 1. Nature and Grounds of Remedy

The N. C. attachment statute is not unconstitutional and does not require notice and an opportunity of hearing prior to attachment. *Properties, Inc. v. Ko-Ko Mart, Inc.,* 532.

Defendants' answer was sufficient to raise the question of whether plaintiff was entitled to attachment. *Ibid.*

ATTORNEY AND CLIENT

§ 4. Testimony by Attorney

Trial court properly refused to permit plaintiff's attorney to testify unless the attorney withdrew as trial counsel. *Town of Mebane v. Insurance Co.,* 27.

AUTOMOBILES

§ 53. Failing to Stay on Right Side of Highway

Evidence in an automobile collision case was sufficient for the jury where plaintiff's evidence tended to show that defendants' testatrix crossed the center line of the highway. *Peterson v. Johnson,* 527.

§ 54. Passing Vehicles Traveling in Same Direction

Trial court properly concluded that an automobile driver passing a motorcyclist traveling in the same direction was not negligent. *Clark v. Moore,* 181.

§ 62. Striking Pedestrian

Evidence was insufficient to show negligence by defendant in an action to recover for the death of a pedestrian struck by defendant's car while crossing the street. *Foster v. Shearin,* 51.

AUTOMOBILES — Continued

§ 86. Last Clear Chance

In an action for personal injuries sustained by plaintiff when defendant drove away a car upon which plaintiff was leaning, the trial court erred in failing to instruct on last clear chance. *Vernon v. Crist*, 631.

§ 90. Instructions in Accident Case

Trial court's instructions on contributory negligence were proper. *Lee v. Kellenberger*, 56.

§ 126. Competency and Relevancy of Evidence in Prosecution for Drunken Driving

Defendant charged with driving under the influence is entitled to a new trial where the State failed to show that statutorily prescribed methods were followed in administering a breathalyzer test. *S. v. Gray*, 506.

It was not necessary for the trial court in a drunken driving case to conduct a voir dire hearing and find that a breathalyzer operator had followed each and every procedural step prescribed by the Division of Health Services before the breathalyzer results could be admitted in evidence. *S. v. Hurley*, 478.

Testimony concerning alcohol content of defendant's blood was properly admitted in a prosecution for drunk driving and manslaughter. *S. v. Karbas*, 372.

BILLS AND NOTES

§ 20. Sufficiency of Evidence in Actions on Notes

Summary judgment was properly entered for plaintiff bank in an action to collect demand notes executed by defendant. *Bank v. Gillespie*, 237.

BURGLARY AND UNLAWFUL BREAKINGS

§ 4. Competency of Evidence

Stolen items found in a car in which defendant had been riding were properly admitted in evidence. *S. v. Adams*, 186.

§ 5. Sufficiency of Evidence

Evidence was sufficient to be submitted to the jury in a prosecution for breaking or entering a home. *S. v. Putman*, 70.

CARRIERS

§ 2. State License and Franchise

The Utilities Commission properly granted an application for common carrier authority to transport heavy commodities between all points within the State. *Utilities Comm. v. Transportation Co.*, 340.

CLERKS OF COURT

§ 3. Probate Jurisdiction

Statutes vest in the clerk and the superior court concurrent jurisdiction of probate matters, and provide for appeals from the clerk directly to the judges of superior court, bypassing the district court, on all such matters heard originally before the clerks. *In re Estate of Adamee*, 229.

CONSPIRACY

§ 7. Instructions

Defendant was not prejudiced when the court instructed the jury on conspiracy after telling the jury that, although defendant was not charged with conspiracy, it was necessary for the court to define the term "conspiracy" in order for the jury to understand the instructions. *S. v. Chandler*, 441.

CONSTITUTIONAL LAW

§ 29. Right to Trial by Duly Constituted Jury

Trial court did not err in failing to conduct a hearing upon defendant's motion to dismiss the jury panel on the ground there were no Negroes on the panel. *S. v. Wright*, 426.

§ 30. Due Process in Trial

Defendant was not denied his right to a speedy trial on a felonious escape charge by the delay of a year between his recapture and trial. *S. v. Baysinger*, 300.

Defendant was not denied his right to a speedy trial by a delay of 137 days between his arrest and trial. *S. v. Weddington*, 269.

Defendant's letter to the clerk of superior court requesting disposition of charges which were the basis of a detainer did not comply with statutory provisions. *S. v. Wright*, 426.

Defendant was not denied his constitutional right to a speedy trial by delay of 17 months between his indictment and trial. *Ibid.*

Trial court did not err in failing to hold a plenary hearing on defendant's motion to dismiss for lack of a speedy trial where a hearing had been set up and no one showed up. *S. v. Parks*, 703.

§ 31. Right of Confrontation and Access to Evidence

Disclosure of the identity of an informer who had introduced an SBI agent to defendant was not required where the informer did not participate in the sale of marijuana to the agent. *S. v. Parks*, 20.

Trial court erred in failing to require disclosure of the identity of an informant who had participated in the crime. *S. v. Orr*, 317.

§ 32. Right to Counsel

Defendant was not denied his right to effective assistance of counsel where the court allowed the attorney not to ask a witness who planned to offer perjured testimony any questions. *S. v. Robinson*, 65.

Defendant was not denied effective representation of counsel when the court told a defense witness that he would not tolerate perjury and admonished her to tell the truth. *S. v. Rhodes*, 432.

§ 37. Waiver of Constitutional Guaranties

Trial court erred in allowing into evidence a confession of defendant without first finding that defendant expressly waived his right to counsel. *S. v. Head*, 189.

CONTEMPT OF COURT

§ 2. Direct or Criminal Contempt

Due process requirements of notice and opportunity to be heard were adequately met before an attorney, at the conclusion of the trial, was found by the trial judge to be in direct contempt for remarks made by the attorney during jury selection. *In re Paul,* 610.

Trial judge did not err in failing to disqualify himself from post-trial contempt proceedings against an attorney. *Ibid.*

Statutes enumerating contempts and providing for summary punishment for direct contempt are not unconstitutionally vague. *Ibid.*

CONTRACTS

§ 3. Definiteness and Certainty of Agreement

A paper writing labeled "Rough Draft" was not unenforceable as a contract as a matter of law. *Piatt v. Doughnut Corp.,* 139.

An agreement to pay 5% of the cost of a hotel for architectural services was sufficiently definite to constitute a binding contract. *Traber v. Crawford,* 694.

§ 26. Competency and Relevancy of Evidence

Trial court properly allowed testimony based on personal knowledge of the witnesses in an action for breach of contract to purchase a water treatment business. *Brooks & Brooks, Ltd. v. Water Conditioning,* 143.

CONVICTS AND PRISONERS

§ 2. Discipline and Management

Writ of habeas corpus was the improper remedy for respondent in a disciplinary proceeding by the Department of Corrections. *In re Stevens,* 471.

CORPORATIONS

§ 1. Corporate Existence

Evidence did not establish that a corporation was merely defendant's alter ego and that he was individually liable on a note he executed for the corporation. *Equipment Co. v. DeBruhl,* 330.

§ 25. Contracts and Notes

Parol evidence was admissible to show defendant signed a note and security agreement, "LaFayette Transportation Service," with defendant's name signed thereunder, as agent for a corporation and not in his individual capacity. *Equipment Co. v. DeBruhl,* 330.

COUNTIES

§ 5. County Zoning

Board of Adjustment could not lawfully grant a conditional use or nonconforming use permit where applications designated the proposed use of the property as a "family campground" but the actual intended use was a nudist camp. *Freewood Associates v. Board of Adjustment,* 717.

COURTS

§ 5. Concurrent Original Jurisdiction

Statutes vest in the clerk and the superior court concurrent jurisdiction of probate matters, and provide for appeals from the clerk directly to the judges of superior court, bypassing the district court, on all such matters heard originally before the clerks. *In re Estate of Adamee,* 229.

§ 7. Appeal from Inferior Court to Court of Appeals

Petitioner has no right to appeal a criminal case from the district court to the Court of Appeals without first seeking review in superior court. *S. v. See,* 725.

§ 11.1. Practice and Procedure in District Court

District court judge had authority to hear motions and enter interlocutory orders during the session over which he had been assigned to preside whether the assignment was oral or written. *Jim Walter Homes, Inc. v. Peartree,* 709.

CRIME AGAINST NATURE

§ 2. Prosecutions

Any error in the court's instruction that the prosecuting witness would be an accomplice if he willingly participated in the crime and the jury must carefully scrutinize his testimony was not prejudicial to defendant. *S. v. Speight,* 201.

CRIMINAL LAW

§ 5. Mental Capacity

Trial court's instructions could have caused the jury to find defendant guilty because they believed an insanity acquittal would free in a short time one who was dangerous to society. *S. v. McMillian,* 308.

§ 6. Mental Capacity as Affected by Drugs

Trial court in a breaking and entering case did not err in refusing to give defendant's requested instructions on being under the influence of drugs. *S. v. Scales,* 509.

§ 9. Aiders and Abettors

Trial court's instruction on aiding and abetting in a prosecution for breaking and entering and larceny was supported by defendant's in-custody statement. *S. v. Williams,* 320.

§ 16. Status of Offense; Concurrent Jurisdiction

District and superior courts had concurrent jurisdiction of a misdemeanor charge for driving under the influence, but original jurisdiction of the district court was lost after nolle prosequi was entered. *S. v. Karbas,* 372.

§ 26. Plea of Former Jeopardy

Defendant was placed in double jeopardy by his conviction of two separate charges of armed robbery where there was only one robbery in which two kinds of property were taken. *S. v. Fambrough,* 214.

Defendant's armed robbery of each of six persons was a separate and distinct offense. *S. v. Lewis,* 212.

CRIMINAL LAW — Continued

§ 29. Suggestion of Mental Incapacity to Plead

Defendant was not denied his constitutional rights by the trial court's denial of his motion for a second psychiatric examination. *S. v. Bullock*, 1.

Mental capacity of defendant to stand trial was a preliminary question for the trial court in the absence of prospective jurors. *S. v. McMillian*, 308.

§ 48. Silence of Defendant as Implied Admission

Defendant was not prejudiced when the trial court allowed the prosecutor to ask defendant whether he refused to make a statement to the police. *S. v. McNeil*, 347.

§ 50. Expert and Opinion Testimony

Trial court did not err in allowing a State's witness to testify with respect to silver nitrate though there was no express finding the witness was an expert. *S. v. Lankford*, 521.

In a first degree murder and rape prosecution trial court properly allowed expert testimony as to soil samples. *S. v. Carlton*, 573.

§ 55. Blood Tests

Testimony concerning alcohol content of defendant's blood was properly admitted in a prosecution for drunk driving and manslaughter. *S. v. Karbas*, 372.

§ 57. Evidence in Regard to Firearms

Evidence of a witness's expertise in firearms was sufficient to permit his expert testimony. *S. v. Mayfield*, 304.

§ 60. Evidence in Regard to Fingerprints

Trial court properly admitted fingerprint identification card. *S. v. McNeil*, 347.

Trial court properly allowed expert evidence as to fingerprint impressed on a moon pie during an armed robbery. *S. v. Gaten*, 273.

§ 63. Evidence as to Sanity of Defendant

Evidence that defendant was found not guilty by reason of insanity in a prior criminal trial was properly excluded. *S. v. Bullock*, 1.

§ 64. Evidence as to Intoxication

It was not necessary for the trial court in a drunken driving case to conduct a voir dire hearing and find that a breathalyzer operator had followed each and every procedural step prescribed by the Division of Health Services before the breathalyzer results could be admitted in evidence. *S. v. Hurley*, 478.

§ 66. Evidence of Identity by Sight

Trial court properly allowed an armed robbery victim's in-court identification of defendant. *S. v. Lewis*, 212; *S. v. Bozeman*, 404.

Robbery victim's identifications of defendant from photographs, at the preliminary hearing, and at trial were not the result of impermissibly suggestive procedures. *S. v. Jackson*, 136.

Witness's identification of defendant was based on observation at the crime scene. *S. v. Bozeman*, 404.

CRIMINAL LAW — Continued

A witness's in-court identification of defendants as the men who robbed her at gunpoint was not tainted by any out of court confrontation. *S. v. Lankford,* 521.

Defendant was not prejudiced by the trial court's denial of his request for a voir dire on the in-court identification of defendant by his victim. *S. v. Herencia,* 588; *S. v. Clark,* 585.

In-court identifications of defendant were not tainted by a lineup identification of defendant by one witness and an indentification of defendant from photographs of the lineup by a second witness. *S. v. VanDyke,* 619.

The trial court in an armed robbery case did not err in the denial of defendant's motion for an in-court lineup to test the identifications by the State's witnesses. *S. v. VanDyke,* 619.

§ 73. Hearsay Testimony

Officer's testimony that he went to a store because he received a radio call that there had been a robbery-shooting at the store was not objectionable as hearsay. *S. v. Chandler,* 441.

§ 75. Voluntariness of Confession and Admissibility

Trial court erred in allowing into evidence a confession of defendant without first finding that defendant expressly waived his right to counsel. *S. v. Head,* 189.

Incriminating statements made by defendant at the crime scene in response to a question by officers as to "what had happened" were not the result of custodial interrogation and were admissible in evidence even if defendant did not waive his right to counsel. *S. v. Gardner,* 484.

Trial court properly allowed into evidence voluntary statements made by defendant to officers. *S. v. Burleson,* 578.

Defendant's in-custody statements were inadmissible where defendant told the sheriff he did not want to talk but the sheriff continued to interrogate him and elicited incriminating statements. *S. v. Toms,* 394.

Defendant's confession was not the fruit of an illegal arrest. *S. v. Weddington,* 269.

Defendant's in-custody statement made after warnings were given him was admissible in evidence. *S. v. Johnson,* 265.

§ 76. Determination of Admissibility of Confession

Trial court did not err in failing to make findings of fact in support of its conclusion that defendant's confession was admissible. *S. v. Adams,* 186.

§ 79. Acts of Companions and Codefendants

Admission of an officer's testimony that defendant's alleged accomplices were in prison did not constitute prejudicial error. *S. v. Roberts,* 194.

§ 84. Evidence Obtained by Unlawful Means

Trial court in an armed robbery case did not err in failing to conduct a voir dire to pass upon the legality of a warrantless search of defendants' automobile. *S. v. West,* 689.

CRIMINAL LAW — Continued

§ 86. Credibility of Defendant

For purposes of impeachment, it is permissible to cross-examine a juvenile defendant with reference to his prior convictions or adjudications of guilt. *S. v. Tuttle,* 198.

Trial court properly allowed cross-examination of defendant concerning his being in and escaping from jail. *S. v. Johnson,* 166.

Trial court properly allowed cross-examination of defendant as to prior acts of misconduct for the purpose of impeaching his character. *S. v. Clark,* 585.

§ 88. Cross-examination

Trial court properly refused to permit defense counsel to ask the witness a repetitious question on cross-examination. *S. v. Parks,* 703.

§ 89. Credibility of Witnesses; Corroboration and Impeachment

It was not error for the court to allow prior consistent declarations made by a witness though he had not been impeached. *S. v. Pierce,* 191.

§ 91. Continuance

Trial court properly denied defendant's motion for continuance to obtain private counsel. *S. v. Lowery,* 350.

§ 92. Consolidation of Counts

Pleas of not guilty by one defendant and the second defendant's contention that his actions were coerced by the first defendant's threats did not require separate trials of defendants. *S. v. Lee,* 156.

Misdemeanor charge for driving under the influence and a felony charge of manslaughter based on the same transaction were properly consolidated for trial in superior court. *S. v. Karbas,* 372.

§ 98. Custody of Witnesses

Trial court did not err in denying defendant's motion to sequester the State's witness. *S. v. Parks,* 703.

§ 99. Couduct of Court and Expression of Opinion

Trial court did not express an opinion in stating that he wanted an officer's testimony concerning defendant's confession "limited to just this robbery." *S. v. Roberts,* 194.

Trial court did not err in correcting a question concerning an inadequate statement of law which defense counsel asked prospective jurors. *S. v. Dowd,* 32.

Remarks by the trial court did not constitute an expression of opinion. *S. v. Winfrey,* 352.

The trial court did not express an opinion in violation of G.S. 1-180 when he told a witness out of the jury's presence that he would not tolerate perjury and admonished her to tell the truth. *S. v. Rhodes,* 432.

§ 102. Argument and Conduct of Counsel or Solicitor

Solicitor's improper jury argument was not prejudicial to defendant where the trial court gave curative instructions. *S. v. Mayfield,* 304.

Defendant was not prejudiced by argument of the private prosecutor that "If you let him go free, then law and order in this country might as well go, too." *S. v. Hunter,* 465.

CRIMINAL LAW — Continued

Trial court erred in refusing to allow defense counsel to argue to the jury various facts concerning the robbery victim's photographic identification of defendant. *S. v. McMillan,* 493.

§ 112. Instructions on Burden of Proof and Presumptions

The trial court's instructions as to reasonable doubt and circumstantial evidence were proper. *S. v. Stokesberry,* 96.

Trial court did not err in failing to charge on circumstantial evidence. *S. v. Jackson,* 136.

§ 113. Statement of Evidence and Application of Law Thereto

Trial court's instructions referring to "defendants or either of them" were proper. *S. v. Minor,* 85.

Trial court erred in giving the jury conflicting instructions with respect to permissible verdicts as to each defendant. *S. v. Lee,* 156.

Trial court properly instructed the jury on the law of alibi. *S. v. Harris,* 122.

Trial court's instruction on aiding and abetting in a prosecution for breaking and entering and larceny was supported by defendant's in-custody statement. *S. v. Williams,* 320.

Defendant was not prejudiced when the court instructed the jury on conspiracy after telling the jury that, although defendant was not charged with conspiracy, it was necessary for the court to define the term "conspiracy" in order for the jury to understand the instructions. *S. v. Chandler,* 441.

Trial court's instructions on aiding and abetting were proper. *S. v. Lankford,* 521.

§ 114. Expression of Opinion by Court on Evidence in the Charge

Trial court did not express an opinion in instructing the jury that the case against another person involved in possession of heroin with defendant had been continued that morning and that the jury should not speculate on the facts of some other case. *S. v. Smith,* 204.

§ 117. Credibility of Witness

Trial court's instruction as to interested witnesses for both the State and defendant was proper. *S. v. Jackson,* 136.

Trial court did not err in failing to give defendant's requested instruction that minor children "are legally competent so to testify, but you should in determining the credibility and weight to be given their testimony, consider their age and maturity." *S. v. Bolton,* 497.

An instruction on accomplice testimony is not required in the absence of timely request. *S. v. Portee,* 507.

§ 118. Charge on Contentions of the Parties

Trial court did not err in summarizing evidence of each State's witness but failing to summarize the evidence of each defense witness. *S. v. Harris,* 122.

A misstatement of the contentions of the parties must be brought to the court's attention in apt time for correction. *S. v. Lankford,* 521.

CRIMINAL LAW — Continued

§ 119. Requests for Instructions

Defendant was not prejudiced where the trial court gave his requested instruction in substance. *S. v. Portee,* 507.

Trial court in a breaking and entering case did not err in refusing to give defendant's requested instructions on being under the influence of drugs. *S. v. Scales,* 509.

§ 122. Additional Instructions after Initial Retirement of Jury

Court's instructions to the jury after they had deliberated for approximately four hours without reaching a verdict were proper. *S. v. Bolton,* 497.

§ 126. Polling of Jury and Acceptance of Verdict

Trial court did not err in accepting the verdict of guilty though one juror intially indicated some uncertainty. *S. v. Gaten,* 273.

Trial court did not err in denial of defendant's motion for mistrial when one juror commented on certain aspects of the evidence when she was polled. *S. v. Blackmon,* 255.

§ 128. Discretionary Power of Trial Court to Order Mistrial

Defendant was not entitled to a mistrial where the prosecuting attorney displayed a bloody shirt to the jury. *S. v. Barbour,* 259.

§ 134. Form and Requisites of Judgment or Sentence

Trial court was authorized by G.S. 148-30 to sentence defendant to a term of years to be served in the county jail. *S. v. Pierce,* 191.

The court did not err in failing to find defendant would not benefit from commitment as a youthful offender where the record did not show defendant was under 21 at the time of sentencing. *S. v. Moore,* 353.

§ 139. Sentence to Maximum and Minimum Terms

Imposition of a minimum and maximum sentence on a committed youthful offender is improper. *S. v. Williams,* 320.

Trial court properly entered judgment imposing prison sentence upon defendant as a committed youthful offender for a maximum term of four years without a set minimum term. *S. v. Scales,* 509.

§ 145.1. Probation

Findings that defendant misbehaved in school and that he did not attend school in lieu of working were insufficient to support revocation of his probation. *S. v. Miller,* 504.

§ 159. Form and Requisites of Transcript

Appeal was treated as an exception to the judgment where the record on appeal was inadequate. *S. v. Mills,* 219.

§ 166. The Brief

Failure to file briefs works an abandonment of appeal and assignments of error except those appearing upon the face of the record proper. *S. v. Brown,* 355.

DAMAGES

§ 3. Compensatory Damages for Injury to Person

In an action to recover damages for assault the trial court erred in instructing the jury that compensatory damages should be limited to recovery for past and present damages without including recovery for the present worth of future damages proximately resulting from the assault. *Overton v. Henderson,* 699.

§ 13. Competency and Relevancy of Evidence on Issue of Compensatory Damages

Trial court in a personal injury action properly allowed the injured employee's employer to testify concerning plaintiff's earnings. *Peterson v. Johnson,* 527.

DECLARATORY JUDGMENT ACT

§ 1. Nature and Grounds of Remedy

The Declaratory Judgment Act is not applicable to claims under the Workmen's Compensation Act. *Insurance v. Curry,* 286.

DESCENT AND DISTRIBUTION

§ 5. Adopted Chilldren

Adopted children had no remainder interest in land deeded to their natural grandmother. *Crumpton v. Crumpton,* 358.

§ 6. Wrongful Act Causing Death as Precluding Inheritance

Statute providing for disposition of property held as tenants by the entirety when one spouse is the slayer of the other spouse is constitutional. *Homanich v. Miller,* 451.

DISORDERLY CONDUCT

§ 2. Prosecutions

State's evidence was sufficient for the jury in a prosecution for failing to disperse when commanded by police officers. *State v. Thomas,* 495.

Trial court did not err in failing to define "command" and "disperse." *Ibid.*

DIVORCE AND ALIMONY

§ 14. Adultery

In an action for alimony without divorce, the wife's testimony concerning the husband's relationship with another woman was admissible in evidence. *Traywick v. Traywick,* 291.

§ 16. Alimony Without Divorce

Trial court's instructions charging what would rather than could constitute cruel and barbarous treatment constituted error. *Traywick v. Traywick,* 291.

§ 17. Alimony Upon Divorce From Bed and Board

In an action for divorce from bed and board and alimony where defendant pled adultery of plaintiff in bar, trial court erred in failing to submit the issue of plaintiff's adultery to the jury. *Owens v. Owens,* 713.

EVIDENCE — Continued

§ 39. Declarations as to Bodily Feelings

Trial court properly limited a doctor's testimony as to what plaintiff told him about her injuries received in a collision to corroborative purposes. *Tucker v. Blackburn,* 455.

§ 40. Nonexpert Opinion Evidence

Trial court in a personal injury action properly allowed the injured employee's employer to testify concerning plaintiff's earnings. *Peterson v. Johnson,* 527.

§ 42. Nonexpert Opinion Evidence as Constituting "Shorthand" Statement of Fact

Trial court in an action arising from an automobile accident properly allowed a witness's shorthand statement of fact that the automobile tilted. *Peterson v. Johnson,* 527.

§ 43. Nonexpert Opinion as to Sanity

A nonexpert may give an opinion as to a person's sanity. *In re Will of Ricks,* 649.

EXECUTION

§ 3. Issuance and Return of Execution

Execution on a personal money judgment after the death of the debtor is barred, but execution on a tax judgment after the death of the taxpayer is not barred. *Henderson County v. Osteen,* 542.

§ 15. Attack on Sale

Defendants who filed a motion in the cause seeking to set aside a tax sale of property more than four years after the execution sale were barred by the one year statute of limitations. *Henderson County v. Osteen,* 542.

§ 16. Supplementary Proceedings

Trial court properly determined that plaintiff was entitled pursuant to G.S. 1-363 to the appointment of a receiver in aid of execution. *Doxol Gas v. Howard,* 132.

EXECUTORS AND ADMINISTRATORS

§ 5. Attack on Appointment of Personal Representative

Upon appeal from an order of the clerk, petitioners were entitled to a de novo hearing by the judge of superior court on both the right of respondent to qualify as administratrix and her right to share in the estate, although petitioners had made no exceptions to specific findings of fact of the clerk. *In re Estate of Adamee,* 229.

FIRES

§ 3. Negligence in Causing Fires

Plaintiffs' evidence was sufficient for the jury to find that an employee of defendant's motorcycle shop was negligent in lighting an oxy-acetylene torch and causing a fire. *Fidelity and Guaranty Co. v. Motorcycle Co.,* 638.

FORGERY

§ 2. Prosecution

Evidence was sufficient for the jury in a prosecution for forgery and uttering a forged check. *S. v. Freeman,* 346.

FRAUDS, STATUTE OF

§ 5. Contracts to Answer for the Default of Another

Attorney's oral guaranty to pay a corporation's obligation if the corporation defaulted did not come within the main purpose exception to the statute of frauds. *Howard v. Hamilton,* 670.

GAS

§ 3. Delivery of Gas to Consumer

Evidence was sufficient for the jury on the issue of defendant's negligence in failing to terminate delivery of gas after notice of a leak. *Moore v. Gas Co.,* 333.

HABEAS CORPUS

§ 1. Nature of Writ, Issuance

Writ of habeas corpus was the improper remedy for respondent in a disciplinary proceeding by the Department of Corrections. *In re Stevens,* 471.

HIGHWAYS AND CARTWAYS

§ 9. Actions Against the Commission

Plaintiff's claim for additional compensation for the building of two sections of highway was properly denied where plaintiff failed to satisfy the notice and record keeping requirements of the parties' contract. *Construction Co. v. Highway Comm.,* 593.

HOMICIDE

§ 9. Self-Defense

One is not required to retreat when he is assaulted while in his dwelling house or within the curtilage thereof by either an intruder or another lawful occupant of the premises. *S. v. Browning,* 376.

§ 12. Indictment

Where defendant was indicted for first degree murder and was awarded a new trial upon appeal from conviction of second degree murder, defendant was properly retried for second degree murder upon the original indictment. *S. v. Castor,* 336.

§ 14. Presumptions and Burden of Proof

The Mullaney decision does not prohibit the presumption of malice and unlawfulness created when the State proves a death was caused by the intentional use of a deadly weapon. *S. v. Castor,* 336.

HOMICIDE — Continued

§ 21. Sufficiency of Evidence

Evidence was sufficient to be submitted to the jury in a second degree murder prosecution. *S. v. Shores*, 323.

Evidence was sufficient to be submitted to the jury in a murder prosecution where death resulted from a shooting. *S. v. Barbour*, 259.

Trial court in a second degree murder case properly denied defendant's motion for nonsuit though the State had offered into evidence exculpatory statements of defendant. *S. v. Burleson*, 578.

Evidence was sufficient for the jury to find that defendant murdered his wife and buried her in a shallow grave in woods. *S. v. Jensen*, 436.

§ 24. Instructions on Presumptions and Burden of Proof

Trial court in a first degree murder prosecution properly instructed the jury as to presumption of malice arising from a showing of intentional use of a deadly weapon. *S. v. Barbour*, 259.

Trial court erred in failing to instruct the jury it must find that the victim's death resulted proximately from gunshot wounds inflicted by defendant in order to find defendant guilty of manslaughter. *S. v. Sherrill*, 311.

Since the Mullaney decision is not retroactive, it was not erroneous for the court to place on defendant the burden of showing the absence of malice and that he acted in self-defense. *S. v. Poole*, 344; *S. v. Johnson*, 265; *S. v. Walker*, 389; *S. v. Shores*, 323; *S. v. Hunter*, 465; *S. v. Jensen*, 436; *S. v. Burke*, 469; *S. v. Burleson*, 578.

The presumption arising from intentional killing with a deadly weapon was not invalidated by *Mullaney v. Wilbur*, 421 U.S. 684. *S. v. Burleson*, 578.

§ 28. Instructions on Defenses

Trial court's error in failing to include in its instructions on self-defense the right of defendant to defend himself in his own home was harmless. *S. v. Walker*, 389.

Defendant was entitled to an instruction that he had no obligation to retreat from or leave his own home in the face of an assault by his brother who was an occupant of the same house. *S. v. Browning*, 376.

Defendant is entitled to a new trial since the trial court failed to include not guilty by reason of self-defense in its final mandate to the jury. *S. v. Hunt*, 486.

§ 30. Submission of Question of Guilt of Lesser Degrees of the Crime

Trial court did not err in failing to submit involuntary manslaughter although defendant testified he thought the gun was empty. *S. v. Hancock*, 149.

Trial court in a murder prosecution erred in failing to instruct the jury on involuntary manslaughter. *S. v. Graves*, 500.

HOSPITALS

§ 3. Liability of Hospital to Patient

Plaintiff's evidence was insufficient for the jury in an action against a hospital for damages from burns received as a patient during surgery. *Starnes v. Hospital Authority*, 418.

HUSBAND AND WIFE

§ 2. Antenuptial Agreement

An antenuptial contract providing that a wife would receive $10,000 as her share of the husband's estate did not affect the wife's right to receive proceeds of a joint bank account. *Harden v. Bank*, 75.

§ 3. Agency of One Spouse for the Other

Evidence was sufficient to establish defendant's wife as the agent of her husband in charging clothes purchased to his account. *Men's Wear v. Harris*, 153.

§ 4. Conveyances Between Husband and Wife

Trial court erred in determining that a resulting trust arose upon the conveyance by defendant of a tract of land to plaintiff and herself as tenants by the entirety. *Skinner v. Skinner*, 412.

§ 12. Rescission of Separation Agreement

Separation agreement is rescinded where husband and wife thereafter become reconciled. *In re Estate of Adamee*, 229.

INDICTMENT AND WARRANT

§ 9. Charge of Crime

Warrant was sufficient to charge defendant with operating a massage parlor without a license in violation of a city code. *S. v. Preine*, 502.

§ 10. Identification of Accused

Defendant was not entitled to quashal of the indictment against him on the ground that his nickname was used in the indictment. *S. v. Spooner*, 203.

§ 17. Variance Between Indictment and Proof

There was no fatal variance between the indictment and proof as to the house broken and entered. *S. v. McNeil*, 125.

INFANTS

§ 10. Commitment of Minor for Delinquency

Respondent was not denied right to counsel nor notice in a hearing in which a second determination of delinquency was made. *In re Williams*, 462.

Trial court erred in ordering a 13 year old incarcerated for 10 days without making findings justifying detention. *Ibid.*

INSANE PERSONS

§ 1. Commitment of Insane Persons to Hospitals

Order committing respondent to a mental health care facility was erroneous where the court failed to record facts which supported its findings. *In re Crouch*, 354.

Evidence was insufficient to support trial court's findings that respondent was imminently dangerous to himself or others. *In re Neatherly*, 659.

INSURANCE

§ 8. Modification, Waiver and Estoppel

For a denial of a claim on a specified ground to work a waiver of all other grounds for denial, it is necessary at the time of such denial that the company be in possession of all facts upon which it could have specified all grounds then existing for denial. *Bynum v. Blue Cross and Blue Shield,* 515.

A waiver of limitation in an insurance policy by insurer's employee had no binding effect on insurer. *Ibid.*

§ 27.5. Credit Life Insurance

The Commissioner of Insurance was without authority to set rates for credit life insurance. *Comr. of Insurance v. Insurance Co.,* 7.

Appeal from an order of the Commissioner of Insurance setting regulations for credit life and credit accident and health insurance lies in the Superior Court of Wake County. *Ibid.*

§ 87. "Omnibus" Clause; Drivers Insured

An employee who had taken his employer's truck home over the weekend was in lawful possession of the truck when it was involved in an accident during the weekend, and the employee was thus covered under the omnibus clause of the employer's liability policy. *Packer v. Insurance Co.,* 365.

§ 91. Persons Whose Injuries are Covered or Excepted

Employer's provision of transportation for employees was a gratuity, and an automobile accident en route to work was not within the scope of the employees' employment and was not excluded from coverage by a policy of insurance issued defendant by plaintiff. *Insurance Co. v. Curry,* 286.

JUDGES

§ 5. Recusation of Judge

A district court judge did not err in refusing to disqualify himself in a bank's action to collect notes executed by defendant. *Bank v. Gillespie,* 237.

Trial judge did not err in failing to disqualify himself from post-trial contempt proceedings against an attorney. *In re Paul,* 610.

JUDGMENTS

§ 8. Nature and Essentials of Judgment by Consent

A consent judgment for payment of alimony had no binding effect on parties who did not sign the judgment. *Moore v. Moore,* 381.

§ 25. What Conduct Justifies Setting Aside Judgment; Imputation to Party Litigant

Failure of defendant's attorney immediately to appeal to the court for continuance upon receipt of a doctor's statement that defendant was unable to appear for trial constituted neglect not imputable to defendant which was sufficient to support an order setting aside the judgment against defendant. *Jim Walter Homes, Inc. v. Peartree,* 709.

JUDGMENTS — Continued

§ 51. Foreign Judgments

Defendant made a general appearance in a New Jersey annulment action when he filed an acknowledgment of service of process in that action, but defendant was entitled to notice before default judgment for counsel fees and court costs could be entered against him. *Reisdorf & Jaffe v. Langhorne,* 175.

KIDNAPPING

§ 1. Elements of the Offense and Prosecutions

State's evidence was sufficient to support jury finding that defendant's conduct constituted such a threat as to put an ordinary prudent person in fear for her life or personal safety so as to secure control of her person against her will. *S. v. Ballard,* 146.

Evidence was sufficient for the jury in a prosecution for kidnapping at knifepoint. *S. v. Johnson,* 166.

LABORERS' AND MATERIALMEN'S LIENS

§ 7. Sufficiency of Claim of Lien

Plaintiff was bound by its statement in its claim of lien that materials and labor were last furnished on 16 November 1972 where there was nothing on the face of the claim of lien to indicate that such date was erroneous, and plaintiff was not entitled to show that labor and materials were last furnished on 12 December 1972. *Builders, Inc. v. Bank,* 80.

LARCENY

§ 3. Degrees of the Crime

Trial court in a felonious larceny prosecution erred in submitting to the jury as a possible verdict defendant's guilt of the unlawful taking of a vehicle. *S. v. Kaerner,* 223.

§ 6. Competency and Relevancy of Evidence

Trial court properly considered incompetent evidence of value in ruling on defendant's motion for nonsuit in a prosecution for felonious larceny. *S. v. Haney,* 222.

Stolen items found in a car in which defendant had been riding were properly admitted in evidence. *S. v. Adams,* 186.

§ 7. Sufficiency of Evidence and Nonsuit

Evidence was sufficient to be submitted to the jury in a prosecution for larceny of items from a home. *S. v. Putnam,* 70.

Evidence of defendant's possession of recently stolen property was sufficient to be submitted to the jury. *S. v. Stokesberry,* 96.

Evidence was sufficient to be submitted to the jury in a prosecution for breaking into coin operated machines. *S. v. Barrington,* 215.

§ 8. Instructions

Error, if any, in instructing the jury on the doctrine of possession of recently stolen property on the ground defendant was not in possession of property found in a car of which he was neither the owner nor the driver was harmless beyond a reasonable doubt. *S. v. Adams,* 186.

LIMITATION OF ACTIONS

§ 4. Accrual of Right of Action and Time From Which Statute Begins to Run

Action by a limited partnership against a law firm based on breach of contract and fraud was barred by the three-year statute of limitations where two general partners had knowledge of the transactions in question more than three years before the action was commenced. *Howard v. Hamilton,* 670.

§ 10. Nonresidence

Pursuant to G.S. 1-21 plaintiff properly commenced its action against nonresident defendants more than three years after the cause of action arose even though plaintiff could have acquired personal jurisdiction over the defendants under the authority of G.S. 1-15.4(5) from the time the cause of action accrued. *Duke University v. Chestnut,* 568.

§ 13. Part Payment on Account

Payment on an account starts the running of the statute of limitations anew as to all items not barred at time of payment. *Steel Corp. v. Lassiter,* 406.

MARRIAGE

§ 2. Validity and Attack

In a workmen's compensation proceeding, deceased employee's first wife failed to overcome the presumption of the validity of deceased's second marriage. *Denson v. Grading Co.,* 129.

MASTER AND SERVANT

§ 10. Duration of Employment and Wrongful Discharge

Petitioner was not entitled to due process rights in her dismissal as an employee of the Employment Security Commission; however, she was given adequate notice and an opportunity to be heard before and after her dismissal. *Nantz v. Employment Security Comm.,* 626.

§ 33. Liability of Employer for Injuries to Third Persons

An employer was not responsible for an assault on a third person by his employee since the assault was not committed while the employee was performing any duty of his employment. *Overton v. Henderson,* 699.

§ 56. Workmen's Compensation — Causal Relation Between Employment and Injury

Evidence was sufficient to support the Industrial Commission's determination that a radio station employee did not sustain an injury by accident resulting in his death arising out of and in the course of his employment. *Atwater v. WJRI,* 397.

Defendant's injury sustained while he repaired a vehicle during his lunch hour on the employer's premises was compensable since it was sustained during a reasonable activity. *Watkins v. City of Wilmington,* 553.

§ 62. Injuries On the Way to or From Work

Plaintiff's accident did not arise in the course of her employment where plaintiff had clocked out at the end of her shift and was struck

MASTER AND SERVANT — Continued

by an automobile as she attempted to cross a public street in front of her employer's factory. *Taylor v. Shirt Co.*, 61.

Employer's provision of transportation for employees was a gratuity, and an automobile accident en route to work was not within the scope of the employees' employment and was not excluded from coverage by a policy of insurance issued defendant by plaintiff. *Insurance Co. v. Curry*, 286.

§ 79. Persons Entitled to Payment

In a workmen's compensation proceeding, deceased employee's first wife failed to overcome the presumption of the validity of deceased's second marriage. *Denson v. Grading Co.*, 129.

§ 80. Workmen's Compensation Rates

The Commissioner of Insurance erred in disapproving a workmen's compensation rate filing without holding a hearing. *Comr. of Insurance v. Rating Bureau*, 409.

MINES AND MINERALS

§ 1. Nature and Incidents of Title to Mines and Minerals

An 1899 deed conveying the "Mineral Right" in a three-acre tract of land did not give the owner of the mineral estate the right to sell permits to rockhounds to come upon the land to search for mineral specimens. *Baltzley v. Wiseman*, 678.

MORTGAGES AND DEEDS OF TRUST

§ 9. Release of Part of Land from Mortgage Lien

Summary judgment was properly entered for defendants in an action for specific performance of release provisions of a purchase money deed of trust instituted after plaintiffs paid the first installment on the underlying note and then defaulted. *Barefoot v. Lumpkin*, 721.

§ 39. Actions for Damages for Wrongful Restraint of Foreclosure

Damages awarded for wrongful restraint of a foreclosure sale should have been the cost of readvertising the sale, not the cost of the original advertisement of the sale. *Barefoot v. Lumpkin*, 721.

MUNICIPAL CORPORATIONS

§ 8. Validity of Ordinances

City ordinance prohibiting indecent exposure was invalid since the field was preempted by a state-wide statute. *S. v. Wajna*, 661.

§ 30. Zoning Ordinances and Building Permits

Board of Adjustment could not lawfully grant a conditional use or nonconforming use permit where applications designated the proposed use of the property as a "family campground" but the actual intended use was a nudist camp. *Freewood Associates v. Board of Adjustment*, 717.

NARCOTICS

§ 1. Elements and Essentials of Statutory Offenses

Transportation of a controlled substance is not a separate substantive criminal offense, and allegations concerning transportation will be treated as surplusage in an indictment for possession of heroin. *S. v. Rogers,* 110.

§ 3. Competency and Relevancy of Evidence

Trial court did not err in admission of opinion testimony by a deputy sheriff that a substance contained heroin. *S. v. Rogers,* 110.

§ 4. Sufficiency of Evidence and Nonsuit

Evidence was sufficient to be submitted to the jury in a prosecution for possession of marijuana with intent to distribute and for manufacturing marijuana. *S. v. Minor,* 85.

Evidence was sufficient for the jury in a prosecution for possession of LSD and marijuana. *S. v. Shaw,* 207.

Evidence was sufficient for the jury on the issue of defendant's guilt of possession of heroin found in the car defendant was driving. *S. v. Rogers,* 110.

§ 4.5. Instructions

Trial court's instructions in a prosecution for multiple offenses of possession of narcotics for sale were proper. *S. v. Shaw,* 207.

Trial court sufficiently instructed the jury on the question of defendant's knowledge of possessing marijuana. *S. v. Mason,* 218.

Trial court erred in instructing the jury on transportation of heroin as a substantive offense. *S. v. Rogers,* 110.

NEGLIGENCE

§ 22. Pleadings in Negligence Actions

Although plaintiff's complaint was based on defendant's breach of his contract with the State in an action to recover for injuries received when plaintiff fell through an unguarded elevator shaft in a building under construction, the complaint was sufficient to state a claim for relief on the ground of negligence by defendant. *Benton v. Construction Co.,* 91.

§ 29. Sufficiency of Evidence of Negligence

Plaintiffs' evidence was sufficient for the jury to find that an employee of defendant's motorcycle shop was negligent in lighting an oxy-acetylene torch and causing a fire. *Fidelity and Guaranty Co. v. Motorcycle Co.,* 638.

NOTICE

§ 1. Necessity of Notice

Notice to the original defendant was required before joinder of an additional party defendant. *Pask v. Corbitt,* 100.

OBSCENITY

Warrant was sufficient to charge defendant with operating a massage parlor without a license in violation of a city code. *S. v. Preine,* 502.

City ordinance prohibiting indecent exposure was invalid since the field was preempted by a state-wide statute. *S. v. Wajna,* 661.

PARENT AND CHILD

§ 5. Right of Parents to Recover for Injuries to Child

Trial court erred in denying defendants' motion for summary judgment in plaintiff mother's action for loss of services of her minor child who drowned in defendants' swimming pool. *Gibson v. Campbell,* 653.

§ 10. Uniform Reciprocal Enforcement of Support Act

The district court had exclusive original jurisdiction to entertain a proceeding under the Uniform Reciprocal Enforcement of Support Act. *Amaker v. Amaker,* 558.

Evidence was sufficient to support the trial court's conclusions that respondent was the father of a minor child and was obligated to support the child. *Ibid.*

PARTITION

§ 8. Sale for Partition

Trial court properly determined that petitioners had no interest in one of the tracts for which partition sale was sought. *White v. Askew,* 225.

PARTNERSHIP

§ 7. Actions by Partners Against Third Person

Action by a limited partnership against a law firm based on breach of contract and fraud was barred by the three-year statute of limitations where two general partners had knowledge of the transactions in question more than three years before the action was commenced. *Howard v. Hamilton,* 670.

PERJURY

§ 5. Sufficiency of Evidence and Nonsuit

State's evidence in a perjury trial was insufficient for the jury where all of the evidence was indirect and circumstantial. *S. v. Horne,* 475.

PHYSICIANS AND SURGEONS

§ 12. Liability of Anesthetist

Plaintiff's evidence as to negligence of an anesthetist in warming plaintiff during surgery was sufficient for the jury. *Starnes v. Hospital Authority,* 418.

§ 16. Sufficiency of Evidence in Malpractice Action

Evidence was insufficient for the jury on the issue of the negligence of defendant doctor who performed the operation during which plaintiff was burned. *Starnes v. Hospital Authority,* 418.

PLEADINGS

§ 8. Verification

Trial court erred in allowing defendant's motion to strike the verification to plaintiff's complaint where plaintiff himself did not read the complaint but had it read to him. *Skinner v. Skinner,* 412.

PROCESS

§ 9. Personal Service on Nonresident Individuals in Another State

Pursuant to G.S. 1-21 plaintiff properly commenced its action against nonresident defendants more than three years after the cause of action arose even though plaintiff could have acquired personal jurisdiction over the defendants under the authority of G.S. 1-75.4(5) from the time the cause of action accrued. *Duke University v. Chestnut,* 568.

While the N. C. long arm statute was applicable in this action which related to goods shipped from N. C. to a nonresident, due process prohibited the exercise of in personam jurisdiction over defendant who did not have even minimal contacts with this State. *Andrews Associates v. Sodibar Systems,* 663.

RAPE

§ 4. Relevancy and Competency of Evidence

In a prosecution for second degree rape, trial court's error in limiting cross-examination of the prosecutrix concerning prior sexual conduct was harmless. *S. v. Tuttle,* 198.

RECEIVERS

§ 1. Nature and Grounds of Receivership

Trial court properly determined that plaintiff was entitled pursuant to G.S. 1-363 to the appointment of a receiver in aid of execution. *Doxol Gas v. Howard,* 132.

ROBBERY

§ 1. Nature of the Offense

Defendant's armed robbery of each of six persons was a separate and distinct offense. *S. v. Lewis,* 212.

§ 3. Competency of Evidence

Evidence that checks taken in a robbery and an automobile registration card issued to defendant's wife were found together on a city street was relevant in this robbery prosecution. *S. v. Jackson,* 136.

§ 4. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient for the jury to find that defendant was a principal in the offense of armed robbery and felonious assault. *S. v. Dowd,* 32.

Proof of ownership of the property taken is not necessary in order to prove armed robbery. *S. v. Bozeman,* 404.

State's evidence was sufficient for the jury on the issue of defendant's guilt of armed robbery of a store proprietor. *S. v. Chandler,* 441.

Evidence was sufficient for the jury in a prosecution for armed robbery of a store. *S. v. Lankford,* 521.

Evidence in a common law robbery case was sufficient for the jury where it tended to show that defendant put his victim in fear and took money from a cash register. *S. v. Hammonds,* 583.

ROBBERY — Continued

§ 5. Instructions and Submission of Lesser Degrees of the Crime

Trial court did not err in failing to instruct the jury on aiding and abetting. *S. v. Pierce*, 191.

Trial court in an armed robbery case did not err in failing to submit lesser offenses of assault with a deadly weapon and simple assault. *S. v. Blackmon*, 255.

The trial court's instruction in a common law robbery prosecution that the taking of money must be "by the use of force or threatened use of immediate force" was proper. *S. v. Hammonds*, 583.

RULES OF CIVIL PROCEDURE

§ 4. Process

While the N. C. long arm statute was applicable in this action which related to goods shipped from N. C. to a nonresident, due process prohibited the exercise of in personam jurisdiction over defendant who did not have even minimal contacts with this State. *Andrews Associates v. Sodibar Systems*, 663.

§ 8. Pleading Special Matters

Defense of usury must be raised in the pleadings. *Men's Wear v. Harris*, 153.

§ 11. Verification of Pleadings

Trial court erred in allowing defendant's motion to strike the verification to plaintiff's complaint where plaintiff himself did not read the complaint but had it read to him. *Skinner v. Skinner*, 412.

§ 15. Amended and Supplemental Pleadings

Trial court properly denied defendants' motion to amend their answer to include certain counterclaims where the court determined that the counterclaims were not compulsory. *Properties, Inc. v. Ko-Ko Mart, Inc.*, 532.

§ 21. Procedure Upon Nonjoinder

Notice to the original defendant was required before joinder of an additional party defendant. *Pask v. Corbitt*, 100.

§ 26. Depositions in a Pending Action

Trial court in a personal injury action properly allowed the use of a deposition of a doctor who lived outside the county where the trial was held. *Peterson v. Johnson*, 527.

§ 51. Instructions to Jury

Trial court erred in discrediting defendants' counsel's argument and expressing an opinion in his jury instructions. *Board of Transportation v. Wilder*, 105.

§ 54. Judgments

Appeal from an order not adjudicating all claims is premature. *Hall v. Hall*, 217; *Investments v. Housing, Inc.*, 385; *Beck v. Beck*, 488.

§ 56. Summary Judgment

Summary judgment was improperly entered in favor of defendant who had the burden of proof. *Landrum v. Armbruster*, 250.

RULES OF CIVIL PROCEDURE — Continued

§ 60. Relief from Judgment or Order

An additional medical examination is not newly discovered evidence. *Grupen v. Furniture Industries,* 119.

Motion for new trial on the ground of newly discovered evidence was properly denied where it was not made within the one year limitation. *Ibid.*

Failure of defendant's attorney immediately to appeal to the court for continuance upon receipt of a doctor's statement that defendant was unable to appear for trial constituted neglect not imputable to defendant which was sufficient to support an order setting aside the judgment against defendant. *Jim Walter Homes, Inc. v. Peartree,* 709.

§ 65. Injunctions

Trial court's order continuing a temporary restraining order did not meet the requirements of Rule 65(d) where it failed to set out acts enjoined and reasons therefor. *Gibson v. Cline,* 657.

SALES

§ 6. Implied Warranties

The builder-vendor of a house impliedly warrants to the initial purchaser that a well constructed on the premises by the builder-vendor will provide an adequate and usable supply of water for the house under normal use and conditions. *Lyon v. Ward,* 466.

SEARCHES AND SEIZURES

§ 1. Search Without Warrant

Trial court did not err in admitting evidence obtained pursuant to a warrantless search of an apartment basement. *S. v. Putman,* 70.

Officer's warrantless search of defendant's person as an incident of a lawful arrest was proper. *S. v. Weddington,* 269.

Warrantless search of defendant's residence with his consent was not unconstitutional. *S. v. Carlton,* 573.

Trial court in an armed robbery case did not err in failing to conduct a voir dire to pass upon the legality of a warrantless search of defendant's automobile. *S. v. West,* 689.

§ 2. Consent to Search Without Warrant

An officer lawfully searched a zipper bag found in the trunk of a car where the car owner claimed ownership of the bag and consented to a search of the bag, although the bag belonged to defendant. *S. v. VanDyke,* 619.

TAXATION

§ 25. Ad Valorem Taxes

Trial court properly determined that goods stored in a public warehouse were not goods designated to an out-of-state destination within the meaning of G.S. 105-275(4). *Scoville Mfg. Co. v. Guilford County,* 209.

UNIFORM COMMERCIAL CODE — Continued

§ 15. Warranties

Trial court erred in finding an implied warranty of fitness for a particular purpose in the sale of a truck and in concluding that defendant breached that implied warranty. *Robinson v. Storage Co.*, 244.

In an action for damages resulting from defective equipment purchased from defendant, there was no breach of an implied warranty of merchantability, an implied warranty of fitness of the equipment, or an express warranty. *Construction Co. v. Hajoca Corp.*, 684.

§ 16. Title; Good Faith Purchasers

G.S. 25-2-403 allows a person who has obtained delivery of goods under a transaction of purchase to transfer a good title to a good faith purchaser for value even though such person obtained delivery in exchange for a check which is later dishonored. *Landrum v. Armbruster*, 250.

§ 17. Performance

Plaintiff's evidence was sufficient to support a jury finding that a seller of a mobile home had agreed to install it before full payment was received and that tender of payment was not a condition precedent to the seller's duty of delivery. *Berube v. Mobile Homes*, 160.

§ 20. Breach, Repudiation and Excuse

Seller of a mobile home did not make a conforming delivery within a reasonable time or within the contract time and the buyer within a reasonable time revoked his acceptance of the mobile home. *Davis v. Mobile Homes*, 13.

In an action to recover damages for defendant farmer's failure to deliver corn and soybeans under an alleged oral contract, the trial court erred in entering summary judgment for defendant on the ground that he was a nonmerchant within the meaning of the Uniform Commercial Code and that he was entitled to the defense of the statute of frauds. *Currituck Grain Inc. v. Powell*, 563.

§ 29. Signatures

Parol evidence was admissible to show defendant signed a note and security agreement, "LaFayette Transportation Service," with defendant's name signed thereunder, as agent for a corporation and not in his individual capacity. *Equipment Co. v. DeBruhl*, 330.

§ 76. Transfer of Collateral

In an action to recover on a promissory note which was executed by defendants to a bank and which the bank sold to plaintiff, defendant's answer and affidavit were insufficient to raise issues of fact with respect to impairment of collateral by the bank. *Properties, Inc. v. Ko-Ko Mart, Inc.*, 532.

USURY

§ 2. Waiver and Estoppel

Defense of usury must be raised in the pleadings. *Men's Wear v. Harris*, 153.

UTILITIES COMMISSION

§ 3. Carriers

The Utilities Commission properly granted an application for common carrier authority to transport heavy commodities between all points within the State. *Utilities Comm. v. Transportation Co.*, 340.

VENDOR AND PURCHASER

§ 6. Condition of Property and Fraud in Representations

The builder-vendor of a house impliedly warrants to the initial purchaser that a well constructed on the premises by the builder-vendor will provide an adequate and usable supply of water for the house under normal use and conditions. *Lyon v. Ward*, 446.

WILLS

§ 21. Undue Influence

Testimony by the sole beneficiary under a will as to conversations and transactions with testatrix involving the drafting and signing of the will was improperly admitted by the court, although the court limited consideration of the testimony to testatrix's mental capacity, since it tended to rebut the charge of undue influence. *In re Will of Ricks*, 649.

§ 22. Mental Capacity

Trial court in a caveat proceeding erred in permitting witnesses who had not seen decedent within a month of the date the will was executed to express opinions as to decedent's mental capacity on the date the will was executed. *In re Will of Rose*, 38.

A nonexpert may give an opinion as to a person's sanity. *In re Will of Ricks*, 649.

§ 23. Instructions in Caveat Proceedings

Trial court erred in giving the jury an instruction which placed on caveators the burden of showing that testator lacked all elements of mental capacity essential to the making of a will. *In re Will of Rose*, 38.

§ 46. Gift to "Next of Kin"

Where testator's will provided that at the death of the life tenant "½ of my estate shall be given to my nearest of kin on my father's side, and the other ½ to the nearest of kin on my mother's side, and this shall include the children of my two deceased uncles," it was testator's intent that one-half of the estate would go to the nearest of kin on his father's side without application of the doctrine of representation. *Pritchett v. Thompson*, 458.

§ 48. Whether Adopted Children Take as Members of Class

Children of testator's son adopted by the son after testator's death in 1936 are entitled to share in the distribution of trust principal under a will provision providing for distribution of the principal to testator's "issue." *Stoney v. MacDougall*, 178.

WITNESSES

§ 1. Competency of Witness

Trial court erred in determining that a 12 year old child could not testify because of his lack of understanding of divine punishment. *Davis v. Insurance Co.*, 44.

WORD AND PHRASE INDEX

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