NORTH CAROLINA COURT OF APPEALS REPORTS

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31 N.C. App.

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OF
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[1] Appointed Chief Judge 12 April 1977 to succeed J. Phil Carlton who resigned 31 March 1977.

[2] Appointed 2 May 1977 to succeed Benjamin Beach who retired 30 March 1977.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

HAL TURNER HARGROVE v. PLUMBING AND HEATING SERVICE OF GREENSBORO, INC., AND BURLINGTON INDUSTRIES, INC.

No. 7615SC305

(Filed 6 October 1976)

1. **Negligence § 29— uncovered hole — injury to delivering truck driver — negligence**

In an action by the driver of an oil truck to recover for injuries sustained when he stepped in a hole while making a delivery to defendant manufacturer, the evidence was sufficient for the jury on the issue of negligence by defendant plumbing company and defendant manufacturer where it tended to show: the hole had been dug by defendant plumbing company for the purpose of repairing an underground steam pipe in an area near the manufacturer's oil tanks that was normally level, grassy and unobstructed; defendant manufacturer knew, and defendant plumbing company should have known, that the hole contained boiling water from the broken pipe, but neither maintained an adequate barricade around the hole; the accident occurred at night; the area was dimly lit; a fog of steam covered the hole; steam was ordinarily present around the tanks; based on previous visits, plaintiff driver had reason to expect that the area near the tanks was level and free of hazards; and plaintiff driver had no knowledge of the hole and did not see it.

2. **Negligence § 35— failure to see hole — walking into steam — contributory negligence**

The driver of an oil truck was not contributorily negligent as a matter of law in failing to see at night a hole in the ground which was open, unmarked and covered by a fog of steam near defendant manufacturer's oil tanks since the hole was not an obvious hazard; nor was the driver contributorily negligent as a matter of law in

walking into the steam where he knew from prior experience that the area was level and grassy and had no reason to expect the hole.

3. Indemnity § 2— construction of agreement

An agreement in which a plumbing company agreed to "assume entire responsibility" so that a manufacturer "shall not be liable" for injuries or damages during the course of work to be done by the plumbing company constituted an indemnity agreement requiring the plumbing company to indemnify the manufacturer for any liability arising as a consequence of the work by the plumbing company for the manufacturer, including any negligence by the manufacturer toward third persons.

APPEAL by defendants from *Walker, Judge.* Judgment entered 7 November 1975 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 25 August 1976.

Plumbing and Heating Service of Greensboro, Inc. (Plumbing), and Burlington Industries, Inc. (Burlington), codefendants in this tort action, appeal from a judgment for Hal Turner Hargrove, plaintiff. In addition, Plumbing appeals from a judgment holding it liable to indemnify Burlington for its share of the damages awarded to Hargrove.

Evidence tended to show the following:

Hargrove, driver of an oil tank truck, was injured when he stepped in a hole while making a delivery to Burlington. The accident occurred near oil storage tanks which were located at least 75 feet beyond Burlington's parking lot at the bottom of a steep grassy slope. The area in front of the tanks was smooth and grassy. Some oil tanks, and the electric pumps used to fill them, were above the ground. Other tanks were below ground. The tanks were heated with steam so that the heavy oil would flow freely. Some of this steam always escaped and hung near the ground around the oil tank area. It was common to see this fog of steam, and it could rise to the height of a man's head if the weather was right. In order for oil truck drivers to make deliveries they had to scramble down the hill, go to the pumps, turn them on and off and operate valves that directed the flow of oil. Occasionally, when several trucks were waiting to unload, the pumps remained on and the drivers did not go down the hill. Drivers frequently delivered oil at night.

Sometime in the winter of 1973 an underground steam pipe broke near the oil tanks. Burlington employed Plumbing to

make the repairs, and they entered into a contract regarding the repairs which contained an alleged indemnity agreement.

On 19 January 1974, two of Plumbing's workmen dug a hole, perhaps two feet deep and three feet by five feet across, uncovering the steam pipe. The pipe leaked water and steam into the hole and, therefore, they could not continue their work. According to their testimony they were ordered to barricade the hole and did so with three 55 gallon barrels and some lumber. Their supervisor did not examine the barricade. Thereafter Plumbing left the site and did not return until Hargrove was injured. Burlington later discovered the hole open, unprotected and full of boiling hot water. According to Burlington's evidence, its employees partly covered the open hole with a sheet of plywood and a 2" x 4", and placed a 55 gallon drum in front of it.

Hargrove delivered oil to Burlington three times after Plumbing dug the hole. Records show he was there on 29 January 1973, but he did not remember this trip. He was there again on 10 February 1973, but because the pumps were running he did not have to go down to the oil tanks and did not see the hole or the barricades.

At 5:30 a.m. on 12 February 1973, Hargrove arrived at the Burlington plant. He went down the slope to the tanks to turn on the pumps. A fog of steam hung over the area in front of the tanks. In some places the steam rose as high as Hargrove's face, and he was concerned that it would fog his glasses. Hargrove first went to the tanks on the left to check fuel capacity gauges. Then he walked across the ground in front of the tanks in order to reach the valves directing the oil flow. He walked around the area where the steam rose up to his face, and, in so doing, he stepped into the hole full of boiling water. Hargrove testified that he did not know the hole was there. He saw neither the hole nor any barricades, but he admitted he was not watching where he put his feet. The next day the plywood was found beside the hole rather than across it.

Two other drivers who delivered oil in the davs immediately before Hargrove was injured testified that they did not see any barrels or barricades. One witness who delivered oil on the night of 8 February 1973 testified that he saw the hole just in time to avoid falling into it.

Spencer B. Ennis and Latham, Wood and Cooper, by Thomas D. Cooper, Jr., for plaintiff appellee.

Smith, Moore, Smith, Schell and Hunter, by Martin N. Erwin and Robert Wicker, for Burlington Industries, Inc., defendant appellant and defendant appellee.

Perry C. Henson and Ronald G. Baker for Plumbing and Heating Service of Greensboro, Inc., defendant appellant.

ARNOLD, Judge.

[1] Both defendants assign error to the denial of their motions for directed verdicts, judgments notwithstanding the verdict and new trials. These motions require the trial court to consider the evidence in the light most favorable to the nonmoving party, Hargrove, to resolve all conflicts in his favor and to accept all inferences favorable to him. *Teachey v. Woolard,* 16 N.C. App. 249, 191 S.E. 2d 903 (1972). The evidence most favorable to Hargrove tends to show that Plumbing and Burlington controlled the area in front of Burlington's oil tanks, that the area was within the scope of the invitation to drivers such as Hargrove, and that these drivers walked across this area while performing their duties. The site of the accident was normally level, grassy and unobstructed. However, Plumbing had dug a hole there. The evidence further shows that Burlington knew, and Plumbing should have known, that the hole contained boiling water, but neither Plumbing nor Burlington maintained an adequate barricade around the hole. Finally, the evidence tends to show that the accident occurred at night, that the area was dimly lit, that a fog of steam covered the hole, that the steam was ordinarily present around the tanks, that Hargrove, based on previous visits, had reason to expect that the area in front of the oil tanks was level and free of hazards; and that he had no knowledge of the hole and did not see it before falling into it. Based on these facts there is a question presented on the issue of defendants' negligence.

[2] Burlington and Plumbing argue that plaintiff was contributorily negligent in failing to see two open and obvious conditions which he should have seen and avoided, the hole and the steam. They contend that there was no duty to warn plaintiff of such obvious dangers, and therefore they were not negligent. We disagree. The hole was open, unmarked and shrouded in fog at night. We cannot say as a matter of law that the hole was an

obvious hazard. While the steam was obvious, in itself it was not dangerous. The question is whether plaintiff was contributorily negligent as a matter of law by walking into the steam.

A person must use due care for his own safety. If he fails to do so and is injured he is contributorily negligent and cannot recover from others whose negligence also caused his injuries. A reasonable person must look out for and discover reasonably foreseeable hazards since the law is unable to protect those who have eyes and will not see. *Harrison v. North Carolina R. Co.*, 194 N.C. 656, 140 S.E. 598 (1927). Defendants cite many cases in support of this rule, but these cases are distinguishable from the case before us.

In *Holland v. Malpass*, 266 N.C. 750, 147 S.E. 2d 234 (1966), plaintiff, an automobile mechanic, fell over a jack that was on the garage floor in the aisle between cars. Plaintiff had walked through this aisle several times that day, but someone had placed the jack there while he was not looking. Plaintiff admitted that he knew, as an experienced mechanic, that garage workers leave tools lying on the floor. On the facts, the court said:

> "The plaintiff's evidence fails to support any action by the defendant or his employees creating a hazard which one walking in the work space of a repair garage should not reasonably expect and watch for. It also shows that the plaintiff, an experienced garage worker, failed to look before he stepped where he should have anticipated some obstruction was likely. Had he done so he would have seen the [jack] in the well-lighted space. The invitee must use reasonable care, commensurate with the normal activities of the type of establishment whose invitation he accepts." 266 N.C. at 752, 147 S.E. 2d at 236.

As *Holland* indicates, a person must be on the lookout for reasonably foreseeable hazards. A jack on a garage floor is common; its presence and the danger it creates are reasonably foreseeable. On the other hand, an unmarked hole in a well travelled area is abnormal. Since the hole is abnormal the invitee has no reason to foresee its presence and no reason to be on the lookout for it. Hargrove had no reason to expect the hole, and since he knew from prior experience that the area in front of the oil tanks was level and grassy, it was not unreasonable as a matter of law for him to walk through the rising steam.

Doggett v. Welborn, 18 N.C. App. 105, 196 S.E. 2d 36 (1973), *cert. den.* 283 N.C. 665, 197 S.E. 2d 873 (1973), relied on by defendants, also indicates that a plaintiff is contributorily negligent where *he confronts a reasonably foreseeable danger.* In that case, plaintiff drove her car into a dense cloud of smoke that covered the highway. She knew that a pickup truck had preceded her into the smoke. She knew that other vehicles were on the road. Because of her knowledge the court held she was contributorily negligent as a matter of law in colliding with the truck ahead of her. She blindly drove into smoke concealing a reasonably foreseeable hazard, and in this she was negligent. In the case at bar plaintiff had no knowledge of the hole which was hidden in the steam.

[3] Defendant Plumbing also appeals from the judgment allowing Burlington to recover indemnification. The agreement, as pertinent to this appeal, is as follows:

> "It is understood and agreed that in doing or causing this work to be done, you [Plumbing] are acting in the capacity of an independent contractor. You shall furnish all labor materials, equipment and supervision, except as may be otherwise noted in this contract. *You assume entire responsibility for all injuries sustained or damages arising in the course of said work,* or from the use or control of our equipment by you, regardless of its condition, and we shall not be liable for any such injuries or damages." (Emphasis added.)

Plumbing's position is that the above language does not constitute an indemnity agreement but simply establishes the relationship of contractee—independent contractor as opposed to that of master and servant. In the alternative Plumbing argues that the agreement was a mere exculpatory clause intended to exculpate Burlington from injuries arising to Plumbing's workers.

We accept Burlington's position that the language in the agreement does constitute an indemnity agreement requiring Plumbing to indemnify Burlington for any liability arising as a consequence of the work being performed by Plumbing for Burlington.

In *Markham v. Duke Land and Improvement Co.,* et al, 201 N.C. 117, 158 S.E. 852 (1931), the City of Durham allowed Duke to install glass bricks in a city sidewalk to illuminate a

basement beneath a Duke building. Duke agreed to "relieve the city from all responsibility and all liability" that might result from the construction. Seven years later a tenant occupied Duke's building, and at that time a pedestrian was injured by stepping in a hole in the sidewalk. In a suit against the tenant, the city and Duke, the jury found the tenant primarily liable and the city secondarily liable. Our Supreme Court upheld the trial court's determination that the agreement between the parties was an indemnity contract requiring Duke to reimburse the city.

The language of the agreement in *Markham* is essentially the same as the language we must construe. Duke agreed to "relieve the city from all responsibility and all liability" whereas in the agreement before us Plumbing agreed to "assume entire responsibility" so that Burlington "shall not be liable" for any injuries or damages during the course of the work. The plain language constituted an indemnity agreement.

Plumbing next contends that if it be conceded there is an indemnity agreement it does not indemnify Burlington from the consequences of its own negligence towards third persons. Plumbing argues that the plain import of the language is that Burlington shall not be liable for injuries or damages arising during the course of the work to Plumbing's employees. We cannot accept such a narrow construction of the agreement, but find that it provides for full indemnity for all negligence, including any negligence by Burlington towards third persons. We are "cognizant of the fact that in the ordinary case the occasion for [the indemnitee] seeking indemnity would not arise unless it had been guilty of some fault, for otherwise no judgment could be recovered against it." *Beachboard v. Southern Railway Co.*, 16 N.C. App. 671, 679, 193 S.E. 2d 577 (1972), *cert. den.* 283 N.C. 106, 194 S.E. 2d 633 (1973). The language employed requires Plumbing to indemnify Burlington for injuries sustained by third parties injured by the negligence of Plumbing or Burlington, or by Plumbing and Burlington.

Ultimate liability by Plumbing to Burlington is in contract, not tort, and thus we need not consider Plumbing's contention that any negligence on its part was insulated by the subsequent negligence of Burlington.

We have reviewed all the assignments of error by both appellants, including those directed to the trial court's charge to the jury. We find no error prejudicial to either appellant.

No error.

Chief Judge BROCK and Judge PARKER concur.

NORTH CAROLINA REAL ESTATE LICENSING BOARD v. DAVID AIKENS, INDIVIDUALLY AND T/A RENTEX

No. 7621SC310

(Filed 6 October 1976)

Brokers and Factors § 8; Constitutional Law § 12— seller of property lists — no real estate broker — constitutionality of statute

The amendment to G.S. 93A-2(a) enacted by Session Law 1975, c. 108 which defines a real estate broker as one who for a fee sells the names of persons or others who have real estate for rental, lease or sale is unconstitutional in that it is repugnant to Art. I, §§ 1 and 19 of the N. C. Constitution, since it is an arbitrary and irrational exercise of the police power to require a person who sells such lists to obtain a license as a real estate broker after first satisfying the Real Estate Licensing Board that he possesses the required knowledge of mortgages, suretyships, escrow agreements and other real property subjects, none of which are reasonably relevant to his business activity.

Appeal by defendant from *Rousseau, Judge.* Order entered 20 February 1976, Superior Court, FORSYTH County. Heard in the Court of Appeals 26 August 1976.

The plaintiff Board alleged that defendant Aikens was engaging in the business of a real estate broker without a license in violation of G.S. 93A-1 and sought both preliminary and permanent injunctive relief under G.S. 150-31.

The basic facts were not in dispute, and were stipulated by the parties as follows:

"1. That defendant is a resident of Forsyth County, North Carolina, trades as 'Rentex' and owns the Rentex offices at 110 West 5th Street, Winston-Salem, North Carolina.

2. That on October 10, 1975, E. H. Jenkins entered the above offices of Rentex and, in return for $20.00, pur-

chased from Rentex an agreement (policy no. 670B) entitling him to see a list of real estate for rent by others, said list belonging to Rentex.

3. That defendant does not currently hold, nor has he ever held, a real estate broker's license or salesman's license issued by the North Carolina Real Estate Licensing Board."

The Board presented an affidavit of Everette H. Jenkins, who was employed by the Board as a field representative. As set forth in the second stipulation of fact, he had purchased for $20.00 on 10 October 1975 a "policy" from Rentex. In essence the policy provided space for the prospective renter to describe the type of rental property sought, and upon presentation, it entitled the holder for three months from date of purchase to see lists of available rental property at any Rentex office. In addition to the "policy," Mr. Jenkins received two blank "rental listings" forms on which he could copy information from Rentex's master list, such as type of structure, address, phone number of landlord, rent, and whether children or pets were allowed. He also received an index of codes used on the master list, a city map, a questionnaire card, and a change of address card. On that date Mr. Jenkins was given access to eight sheets containing about 147 listings. He returned to the same office on 20 October 1975, received access to eight pages containing about 100-125 listings from which he copied information on four pieces of rental property.

The Board also presented an affidavit of Roy Campbell, an owner of rental property in Winston-Salem. He stated that he had placed an advertisement to rent his property in a Winston-Salem newspaper, that Rentex had contacted him requesting to list his property at no charge, and that he consented.

Plaintiff filed its complaint on 1 December 1975. After hearing, on 20 February 1976, the trial court issued a preliminary injunction ordering defendant "to immediately cease and desist all activities as real estate brokers . . . [including] the practice of selling for a fee lists of names or addresses of others who have real estate for rental, lease, or sale, unless and until such broker's . . . license(s) be issued by the North Carolina Real Estate Licensing Board."

On the same day an order was issued staying the preliminary injunction pending this appeal by defendant.

Attorney General Edmisten by Associate Attorney James E. Scarbrough.

Charles J. Alexander II for defendant appellant.

CLARK, Judge.

In its complaint plaintiff Board alleges that it seeks injunctive relief under G.S. 150-31. This statute was repealed by Session Laws 1973, c. 1331, s. 1, originally effective 1 July 1975, but extended to 1 February 1976 by Session Laws 1975, c. 69, s. 4. However, the repealing act excepted pending hearings. Session Laws 1973, c. 1331, s. 4. This action was instituted on 1 December 1975. We note that the new Administrative Procedure Act, enacted in part to replace former G.S. Chapt. 150, contains no authorty for injunctive relief applicable to the plaintiff Board and other boards who depended upon G.S. 150-31 for such authority.

G.S. Chapt. 93A, entitled "Real Estate Brokers and Salesmen," regulates the real estate business. The Chapter was declared constitutional in *State v. Warren,* 252 N.C. 690, 114 S.E. 2d 660 (1960). "Its purpose is to protect sellers, purchasers, lessors and lessees of real property from fraudulent or incompetent brokers and salesmen. It must be construed with a regard to the evil which it is intended to suppress." *McArver v. Gerukos,* 265 N.C. 413, 416-17, 144 S.E. 2d 277, 280 (1965).

G.S. 93A-2(a) defines a real estate broker as follows:

> "*Definitions and exceptions.*—(a) A real estate broker within the meaning of this Chapter is any person, partnership, association, or corporation who for a compensation or valuable consideration or promise thereof lists or offers to list, sells or offers to sell, buys or offers to buy, auctions or offers to auction (specifically not including a mere crier of sales), or negotiates the purchase or sale or exchange of real estate, or who leases or offers to lease, or who sells or offers to sell leases of whatever character, or rents or offers to rent any real estate or the improvement thereon, for others. *A broker shall also be deemed to include a person, partnership, association, or corporation who for a fee sells or offers to sell the name or names of persons, partnerships, associations, or corporations who have real estate for rental, lease, or sale.*" (Emphasis added.)

The last sentence of subsection (a) was added by Session Laws 1975, c. 108, and became effective upon ratification on 7 April 1975. The defendant questions the constitutionality of this amendment on the ground that it regulates an ordinary trade or occupation contrary to the provisions of the North Carolina Constitution, art. I, secs. 1 and 19.

The defendant's business activity consists only of selling for a modest fee the addresses of property for rent, some information about the features of the properties, and the phone numbers of the lessors. There is no indication that he counsels or advises the customers. He charged the lessor no fee for listing the property. There is no further contact with the customer. Nevertheless, this activity is clearly within the definition of real estate broker set out in the last sentence of G.S. 93A-2(a).

The exercise of the police power of the State in the regulation of certain sectors of the economy must be reasonably related to the protection of the health, morals, safety or general welfare of the public. *Roller v. Allen,* 245 N.C. 516, 96 S.E. 2d 851 (1957). When there is no reasonable relationship, the courts of this State have not hesitated to strike down regulatory legislation as repugnant to the State Constitution. *Roller v. Allen, supra,* (tile contractors); *State v. Ballance,* 229 N.C. 764, 51 S.E. 2d 731 (1949), (photography); *State v. Harris,* 216 N.C. 746, 6 S.E. 2d 854 (1940), (dry cleaning). And in *Palmer v. Smith,* 229 N.C. 612, 51 S.E. 2d 8 (1948), it was held that duplicating ophthalmic lenses and furnishing frames were purely mechanical processes which did not constitute the practice of optometry, and that the legislature could not extend the definition of a trade or occupation to include ordinary activities which do not demand those special skills for which regulation is required nor have a substantial relation to the public health, safety, or welfare.

We find significant to this case the rationale in *State v. Warren, supra,* which held valid the regulation of real estate brokering. There the court noted two aspects of real estate brokering which permitted regulation under the police power: (1) the characteristics of trust and confidence in the relationship between broker and client, which provide opportunities for collusion to extract illicit gains and which make the bond analogous to that between attorney and client; and (2) the economic significance of the real estate business, which was

similar to that of the banking industry. The court pointed out that mismanagement of either could produce widespread distress and unrest, and that the need for competence in those acting as intermediaries in either field was particularly acute.

The business activity of the defendant in the sale of a list of addresses of property for rent and the telephone numbers of the lessor does not involve a confidential relationship with the customers nor negotiations or other acts as an intermediary. An established and accepted definition of a broker is "one who is engaged for others, on a commission, to *negotiate* contracts relative to property." 12 C.J.S. Brokers, § 1 (1938). (Emphasis added.)

The key word in this and other accepted definitions of a broker is "negotiate." In his business the defendant does not negotiate; he provides information. The definition of a real estate broker in the last sentence of G.S. 93A-2(a) is a sharp and dangerous detour from any established and accepted definition and is so broad as to include the classified ad section of a newspaper and the rental guide of a municipal chamber of commerce.

It is an arbitrary and irrational exercise of the police power to require the defendant to obtain a license as a real estate broker after first satisfying the plaintiff Board that he possessed the required knowledge of mortgages, suretyships, escrow agreements and other real property subjects, none of which is reasonably relevant to his business activity. In *Real Estate Commission of Maryland v. Phares,* 268 Md. 344, 302 A. 2d 1 (1973), the court held that an information service virtually identical to that involved in the case before us did not constitute real estate brokering. Statutory amendments which explicitly defined advertisers and compilers of property information as real estate brokers were held unconstitutional in *United Interchange v. Spellacy,* 144 Conn. 647, 136 A. 2d 801 (1957), and *United Interchange, Inc. v. Harding,* 154 Me. 128, 145 A. 2d 94 (1958).

It is clear that defendant's activities do not fall within those which the legislature may constitutionally regulate as constituting the practice of real estate brokering. The reason for this conclusion is simple but profound. It has been expressed by the courts of this State many times in upholding the rights of a free people to live without undue regulation, but probably nowhere has it found a more eloquent expression than in *State*

v. Ballance, supra. In an opinion worthy of re-reading, Ervin, J., wrote that the founding fathers of this State "possessed an acute awareness of the long and bitter struggle of the English speaking race for some substantial measure of dignity and freedom for the individual. They loved liberty and loathed tyranny, and were convinced that government itself must be compelled to respect the inherent rights of the individual if freedom is to be preserved and oppression is to be prevented. In consequence, they inserted in the basic law a declaration of rights designed chiefly to protect the individual from the State." 229 N.C. at 768.

Two provisions of our State Constitution contain such protection and are relevant here. Art. I, sec. 1, declares that among the inalienable rights of the people are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness. Art. I, sec. 19 declares that no person shall be deprived of life, liberty, or property but by the law of the land. These fundamental provisions guarantee the right to pursue ordinary and simple occupations free from governmental regulation. *State v. Warren, supra.*

For the reasons set forth, we hold that the amendment to G.S. 93A-2(a) enacted by Session Laws 1975, c. 108, is unconstitutional as repugnant to art. I, secs. 1 and 19 of the North Carolina Constitution.

Reversed and remanded for dismissal of the action.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. MITCHELL WAYNE LANKFORD

No. 7630SC314

(Filed 6 October 1976)

1. Narcotics § 4.5; Criminal Law § 95— evidence admissible for restricted purpose — failure to request limiting instruction

When evidence competent for one purpose only and not for another is offered, it is incumbent upon the objecting party to request the court to restrict the consideration of the jury to that aspect of the evidence which is competent; therefore, defendant in this prosecution for possession and sale of marijuana was not entitled to a limiting

instruction with respect to an SBI agent's testimony which corroborated testimony of an undercover SBI agent, since defendant failed to request such instruction.

2. **Narcotics § 4.5— jury instructions — summary of evidence sufficient**

In a prosecution for possession and sale of marijuana where the trial court failed to summarize the evidence before the jury retired but recalled the jury after approximately two minutes to give them additional instructions, the court's summary of the evidence, though brief, was sufficient to state the evidence to the jury in conformance with G.S. 1-180.

3. **Narcotics § 1— possession and sale of same marijuana — two separate offenses**

Defendant was properly tried and convicted for two separate offenses of possession and sale of the same marijuana. G.S. 90-95.

4. **Criminal Law § 89— testimony concerning defendant's alibi — cross-examination for impeachment**

The trial court in a prosecution for possession and sale of marijuana did not err in allowing the State to cross-examine a defense witness for the purpose of impeaching the witness's testimony regarding defendant's alibi.

5. **Constitutional Law § 33; Criminal Law § 88— silence of defendant's witness — cross-examination proper**

Since a defendant's privilege against self-incrimination does not extend to defendant's witnesses as well, the trial court did not err in allowing the State to cross-examine a defense witness as to why he had remained silent concerning defendant's alibi until the trial.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 14 November 1975 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 26 August 1976.

Defendant was charged in a two-count indictment with (1) felonious sale and delivery of a controlled substance, to wit, marijuana, and (2) possession of marijuana with intent to sell and deliver. The jury returned a verdict of guilty on both counts, and the defendant was sentenced to a term of 30 months on the first count and two years suspended on the second count.

At trial, the State called two witnesses. The first witness, Howard Conard, testified, inter alia, that on 17 April 1975, he was employed as an undercover agent for the State Bureau of Investigation (S.B.I.) for the purpose of purchasing controlled substances in Haywood County. At approximately 8:15 p.m. on 17 April 1975, he went to "Greek's Place," a tavern located in the Town of Waynesville, and saw a man inside known to Conard as "Charley." Conard inquired as to whether

"Charley" had any marijuana for sale, whereupon "Charley" approached the defendant, who was sitting in a nearby booth, and began conversing with him. Defendant got up and went outside but returned shortly thereafter. Conard and "Charley" went over to the booth where defendant was seated, sat down, and for a few minutes discussed purchasing a bag of marijuana. After a while, defendant got up, nodded to Conard, and started for the exit once again. Conard also arose from his seat and went outside, followed by the defendant. Defendant walked to the rear of the parking lot, and stopped at a dark colored pickup truck. He took a set of keys from his pocket, unlocked the door to the truck, and reached inside, removing a brown paper bag. Defendant then reached in the bag and produced a plastic bag containing a green vegetable material, which he handed to Conard. Conard handed the defendant a twenty-dollar bill, and the two parted. Conard went to his home, wrote a report of the incident and called SBI Agent Dan Crawford. At approximately 11:05 p.m. that night, Conard met with Crawford at the Highway Patrol office in Clyde, filed his report and turned over the plastic bag.

Agent Crawford was the State's second witness. He testified, inter alia, that at approximately 11:05 p.m. on 17 April 1975, he met with Howard Conard at the Highway Patrol office in Haywood County. Over objection, Crawford then testified as to the substance of the meeting in which Conard told him of the incident involving the defendant.

It was stipulated that the substance in question consisted of 20.5 grams of marijuana, a Schedule VI controlled substance. Other relevant facts are set out in the opinion below.

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

Creighton W. Sossoman for defendant appellant.

MORRIS, Judge.

[1] Defendant assigns as error the failure of the trial judge to give limiting instructions to the jury as to the portions of Agent Crawford's testimony which related to his meeting with Conard. Agent Crawford's statements regarding what Conard told him on the night in question were clearly admissible to

corroborate Conard's version of the transaction involving the defendant. The record reveals that defendant made only a general objection to the introduction of the testimony and did not request a limiting instruction at trial. "It is a well recognized rule of procedure that when evidence competent for one purpose only and not for another is offered it is incumbent upon the objecting party to request the court to restrict the consideration of the jury to that aspect of the evidence which is competent." *State v. Ray*, 212 N.C. 725, 729, 194 S.E. 482, 484 (1938); Stansbury's N. C. Evidence, § 79 (Brandis Revision 1973). Without a request therefor, defendant was not entitled to a limiting instruction. This assignment of error is overruled.

[2] Defendant's next assignment of error relates to the court's instructions to the jury. In the initial portion of the charge, the judge instructed as to the law but failed to summarize the evidence before the jury retired. Apparently realizing his omission, the judge recalled the jury after approximately two minutes had passed and then gave them additional instructions. During these supplementary instructions the judge recited the evidence as follows:

> "... the State has offered evidence which it contends tends to show, that on the 17th of April 1975, Officer Conard went to the Greek's Place, here in Haywood County, and while there he met the defendant and bought from him a quantity of marijuana from the sum of $20.00. On the other hand, as the Court recalls, the defendant has offered evidence which he contends tends to show that on the 17th of April, 1975, he was not at the Greek's Place; that he never sold any marijuana to Howard Conard or anyone else, and had never sold or engaged in the sale of marijuana."

Immediately preceding this, the court told the jury:

> "Members of the jury, you were brought back from the jury room for the purpose of additional instructions. Under the laws of this State it is required that the Judge give you at least a brief summary of the evidence and then apply the law to that evidence as the Court recalls that evidence to be. Now, at this point, I simply want to give you my recollection of what a part of the evidence offered by the parties tends to show, but only to the extent necessary to enable me to explain or apply the applicable law."

Defendant maintains that the charge was insufficient on the ground that the jury was instructed only as to the contentions of the parties. It is true that North Carolina has held that the judge, in his instructions to the jury, must recite the evidence and may not rely solely on the contentions of the parties. *Faison v. Trucking Co.*, 266 N.C. 383, 146 S.E. 2d 450 (1966); *Bulluck v. Long*, 256 N.C. 577, 124 S.E. 2d 716 (1962). However, although the trial judge used language which suggests he instructed only as to the parties' contentions, the record reveals that he then went further and did in fact review the evidence presented at trial. The record further reveals that the court specifically instructed the jury that the next ensuing instructions would be his recollection of the evidence. G.S. 1-180 does not require that the trial judge state all the evidence to the jury, but only such evidence "to the extent necessary to explain the application of the law thereto. . . . " We hold that the recitation of the evidence here, though brief, was sufficient to state the evidence to the jury in conformance with G.S. 1-180.

Defendant further contends that the bifurcated instructions were so disorganized and disjointed that the jury was confused to the prejudice of the defendant. The first portion of the charge, standing alone, did not contain a recital of the evidence as required by G.S. 1-180. However, a charge to the jury must be read and considered in its entirety and not in detached fragments. *Gregory v. Lynch*, 271 N.C. 198, 155 S.E. 2d 488 (1967). We believe that the charge as a whole contained a statement of the evidence to the extent necessary to explain the application of the law arising thereon. Furthermore, the charge read as a whole was sufficiently coherent and no prejudice resulted to the defendant. "An inaccuracy in the instruction will not be held prejudicial error when it is apparent from the charge, construed contextually, that the jury could not have been misled." *Houston v. Rivens*, 22 N.C. App. 423, 427, 206 S.E. 2d 739, 742 (1974). Accordingly, defendant's assignments of error relating to the jury instructions are overruled.

[3] Defendant next argues that, despite the statutory designation of separate and distinct offenses (G.S. 90-95), the two counts of sale of marijuana and possession of marijuana for sale cannot be separate and distinct offenses where, as here, the same evidence is used to convict on each count; and, further, that because there was no separate evidence of possession with intent to distribute, defendant's motions to dismiss and to set

aside the verdict as to that count should have been allowed. The Supreme Court, in *State v. Cameron,* 283 N.C. 191, 195 S.E. 2d 481 (1973), effectively disposed of this contention. There the Court (at 199) noted the defendant's contention in *State v. Chavis,* 232 N.C. 83, 59 S.E. 2d 348 (1950), "that it is not competent to find the defendant guilty of two offenses and fix separate punishments therefor when the facts constituting the two purported crimes are identical, the possession being physically necessary to the act of transportation." The Court quoted from the opinion of Justice Seawell:

> "Two things will help us in our thinking: we are not dealing with common law crimes but with statutory offenses; and not with a single *act* with two criminal labels but with *component transactions* violative of distinct statutory provisions denouncing them as crimes. Neither in fact nor law are they the same. *State v. Midgett,* 214 N.C. 107, 198 S.E. 613. They are not related as different degrees or major and minor parts of the same crime and the doctrine of merger does not apply. The incidental fact that possession goes with the transportation is not significant in law as defeating the legislative right to ban both or either. When the distinction between the offenses is considered in the light of their purpose, vastly different social implications are involved and the impact of the crime of greater magnitude on the attempted suppression of the liquor traffic is sufficient to preserve the legislative distinction and intent in denouncing each as a separate punishable offense."

The sale of a controlled substance is a specific act and occurs only at one specific time. However, the possession of that controlled substance with the intent to sell it is a continuing offense from the time it was unlawfully obtained until the time the possessor divests himself of the possession. *State v. Cameron, supra.* The fact that a sale occurred was sufficient evidence for the jury to infer that defendant had possessed the marijuana with intent to sell it, particularly in view of the evidence that the marijuana was in defendant's truck, that he went to the truck, took the keys from his pocket, unlocked the door, and took from the truck a paper bag from which he withdrew a plastic bag containing the marijuana which he sold to the agent. He could have possessed the marijuana for an hour or less or a week or more. The length of time is immaterial. Nor did he hand the agent the paper bag. He retained the brown

paper bag and gave the agent only the plastic bag of marijuana which he took from the brown paper bag.

These contentions of defendant are without merit.

[4] Defendant's final assignment of error relates to the State's cross-examination of defense witness Jack Harris. Harris testified, inter alia, that he had been defendant's roommate on the night in question, that he had borrowed and was in possession of defendant's truck at the time the sale of marijuana took place, and that he had left defendant at home studying while he borrowed defendant's truck. On cross-examination, the State asked Harris whether he had told the authorities of defendant's alibi at any time prior to trial. The court allowed the witness to answer, over objection, and defendant contends that the admission of this testimony constituted prejudicial error. Again, we disagree.

The questions to which defendant objected were intended to impeach the witness's testimony regarding defendant's alibi. Questions designed to impeach the witness, if relevant, may cover a wide range and are permissible within the discretion of the court. *State v. Dawson,* 278 N.C. 351, 180 S.E. 2d 140 (1971); Stansbury's N. C. Evidence, § 38 (Brandis Revision 1973). "The silence of the witness in the face of another person's statement, or any other conduct inconsistent with his testimony may be used to discredit him." Stansbury's N. C. Evidence, § 46 (Brandis Revision 1973). The witness's failure to inform the authorities of facts which would have tended to absolve his roommate of any criminal wrongdoing was a proper subject for impeachment by the State during cross-examination. Accordingly, we find no abuse of discretion by the trial judge in permitting this line of questioning.

[5] Even though the line of questioning was proper for impeachment purposes, defendant further contends that the admission of the testimony regarding the witness's previous silence constitutes reversible error and cites *State v. Williams,* 288 N.C. 680, 220 S.E. 2d 558 (1975), as authority for this position. In *Williams,* the North Carolina Supreme Court held that the State could not offer defendant's silence during the police investigation as evidence of his guilt or for the purpose of impeaching defendant as a witness. This holding was based on the defendant's right against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments to the United States Con-

stitution and by Article I, Section 23, of the North Carolina Constitution. Defendant urges us to extend the rule of *Williams* to the instant case. Here, however, the questions were being asked not of the defendant, but of the defendant's witness. Obviously, the defendant's privilege against self-incrimination does not extend and apply to defendant's witnesses as well. Therefore, this assignment of error is overruled.

No error.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. JACK P. AUSTIN AND JOSEPH P. THORNE

No. 7611SC236

(Filed 6 October 1976)

1. **Criminal Law § 9— aiding and abetting — necessity for evidence of principal's guilt**

Where there is insufficient evidence to convict a specifically named principal defendant of the crime charged, another person may not be convicted of aiding and abetting him.

2. **Narcotics § 1; Physicians, Surgeons and Allied Professions § 2— dispensing of prescription drugs by non-pharmacist — conviction under Controlled Substances Act**

When a drug is sold under circumstances which render the sale unlawful under Article 4 of G.S. Ch. 90, which governs the practice of pharmacy, there is also a violation of Article 5, the Controlled Substances Act, if the drug involved is a controlled substance; therefore, a defendant who was not a pharmacist could be convicted under the Controlled Substances Act for the sale of a controlled substance although the drugs sold were exactly those called for by prescriptions which appeared regular in all respects.

3. **Criminal Law § 16— indictment for felonies — prior warrants for misdemeanors — jurisdiction**

The trial court properly denied defendant's motion to dismiss indictments charging the felonious sale of narcotics on the ground that warrants charging defendant with misdemeanors of unlawfully dispensing pharmaceutical preparations based on the same drug sale had been issued and served before the indictments charging the felonies were returned, since the outstanding misdemeanor warrants did not prevent the superior court from exercising its jurisdiction over the felonies.

4. **Criminal Law § 73; Searches and Seizures § 3— admission of affidavit for search warrant**

The trial court committed prejudicial error in admitting into evidence an affidavit to obtain a search warrant since the affidavit was based in substantial part on hearsay statements and referred to other pending criminal charges against defendant without showing that he had been convicted of those offenses.

5. **Narcotics § 4— aiding and abetting sales of narcotics — insufficiency of evidence**

The State's evidence was insufficient for the jury in a prosecution for aiding and abetting in felonious sales of controlled substances where there was no evidence that defendant was physically present, that he gave any encouragement, or that he did anything else to assist or encourage the perpetrator in making those sales.

6. **Physicians, Surgeons, and Allied Professions § 2— pharmacist — false information on records — insufficiency of evidence**

The State's evidence was insufficient for the jury in a prosecution of a pharmacist for feloniously furnishing false and fraudulent information on records required to be kept under Article 5 of G.S. Ch. 90 where the State's own handwriting expert testified that he was unable to identify any of the entries on the records as having been written by defendant.

APPEAL by defendants from *Brewer, Judge.* Judgments entered 21 October 1975 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 15 June 1976.

The defendant, Jack P. Austin, was charged in separate bills of indictment as follows:

In case no. 75CR3586B he was charged with feloniously selling and delivering on 9 January 1975 to K. C. McDaniel, a Special Agent of the State Bureau of Investigation, the controlled substance Secobarbital, in the form of Seconal capsules, which is included in Schedule II of the North Carolina Controlled Substances Act.

In Case No. 75CR3588B he was charged with feloniously selling and delivering on 11 December 1974 to K. C. McDaniel a codeine preparation in the form of Phenaphen # 3 capsules, which is included in Schedule III of the Controlled Substances Act.

In Case No. 75CR3589B he was charged with feloniously selling and delivering on 9 January 1975 to K. C. McDaniel a codeine preparation in the form of Phenaphen # 3 capsules.

In Case No. 75CR5405 he was charged with aiding and abetting on 28 March 1975 Joseph Phillip Thorne in feloniously

and intentionally furnishing false and fraudulent material information on records required to be kept under Article 5 of Ch. 90 of the General Statutes, in that he did aid and abet Thorne in entering the date of dispensing and the signature of Thorne on the face of two prescriptions, pursuant to which Phenaphen # 3 and Seconal had been dispensed, not by Thorne, but illegally by Austin.

The defendant, Joseph P. Thorne, was charged in separate bills of indictment as follows:

In Case No. 75CR3584B he was charged with aiding and abetting Austin on 9 January 1975 in the felonious sale to McDaniel of Secobarbital.

In Case No. 75CR3579 he was charged with aiding and abetting Austin on 9 January 1975 in the felonious sale to McDaniel of Phenaphen # 3 capsules.

In Case No. 75CR3585 he was charged with aiding and abetting Austin on 11 December 1974 in the felonious sale to McDaniel of Phenaphen # 3 capsules.

In Case No. 75CR5423 he was charged with feloniously and intentionally furnishing false and fraudulent material information on records required to be kept under Article 5 of Ch. 90 of the General Statutes, in that he did enter the date of dispensing and write his signature on the face of two prescriptions, pursuant to which Phenaphen # 3 and Seconal had been dispensed, not by him, but instead by Austin.

All of the cases were consolidated for trial, and each defendant pled not guilty to all charges against him.

The State presented evidence to show the following: The defendant Austin is the owner of Austin's Drug Store in the town of Four Oaks in Johnston County. He is not a pharmacist. The defendant Thorne is a registered pharmacist and is employed by Austin. On 15 October 1974 P. M. Boulus of the State Bureau of Investigation secured from Dr. Francis Fallon, in Dunn, N. C., prescriptions in the name of "Carolyn Wilson, Route 2, Benson, N. C." The name "Carolyn Wilson" is a fictitious name. Prescription # 84175 was dated 21 October 1974 and was for "phenaphen # 3—one for cramps." Prescription # N-5963 was dated 9 January 1975 and was for "seconal 100 mg—one for sleep." On 5 November 1974 Michael H. Kelly, an

employee of the State Bureau of Investigation, took Prescription # 84175 to Austin's Drug Store and asked defendant Austin if he could fill it. Austin replied that he could not but that the pharmacist would be in later. Kelly left the prescription to be filled, returning to the store later to pick it up. On 11 December 1974 K. C. McDaniel, also an employee of the SBI, using the name "Carolyn Wilson," went to Austin's Drug Store and obtained from Austin a refill of Prescription # 84175, for which she paid $4.90. On 9 January 1975 McDaniel returned to the store and obtained from Austin a second refill of Prescription # 84175 for phenaphen. On that date she also delivered to Austin prescription # N-5963 for seconal, and Austin also filled this prescription for her. On none of the occasions referred to above was the defendant Thorne present in the store. Phenaphen # 3 is manufactured by A. H. Robertson Company and is a Schedule III controlled substance containing codeine. Seconal is manufactured by Eli Lilly Company and is a Schedule II controlled substance containing a barbiturate, secobarbital. Both drugs are manufactured by the pharmaceutical firms in capsules ready for sale, and neither is compounded in any way by a pharmacy. In filling a prescription, all that is involved is for the pharmacist to get the capsules out of the bottle in which they came from the manufacturer.

On 28 March 1975 SBI Agent Boulus, after securing a search warrant, obtained from Austin's Drug Store the prescriptions # 84175 and # N-5963. These prescriptions had a date and initials on the back written in ink, and there had been overwriting in a darker ink. The State's handwriting expert was not able to identify the writing on the back of the prescriptions with the handwriting of either defendant.

Neither defendant presented evidence. Each was found guilty in all of the cases against him as listed above. Judgments imposing prison sentences were entered in all cases. Each defendant appealed.

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

L. Austin Stevens for defendant appellant, Jack P. Austin.

T. Yates Dobson, Jr. for defendant appellant, Joseph P. Thorne.

PARKER, Judge.

APPEAL BY DEFENDANT, JACK P. AUSTIN

[1] Defendant Austin assigns error to the denial of his motions, made at the conclusion of the evidence, to dismiss all charges against him. As to Case No. 5405, in which Austin was charged with aiding and betting Thorne in furnishing false information in violation of G.S. 90-108(a)(11), there was insufficient evidence to support a jury verdict finding Thorne guilty of that offense. Where there is insufficient evidence to convict a specifically named principal defendant of the crime charged, another person may not be convicted of aiding and abetting him. *State v. Gainey*, 273 N.C. 620, 160 S.E. 2d 685 (1968). Therefore, defendant Austin's motion to dismiss Case No. 5405 should have been allowed.

[2] As to the remaining cases against Austin, Nos. 3586B, 3588B, and 3589B, in which he was charged with selling and delivering controlled substances, we find the evidence sufficient to withstand defendant's motions for dismissal. We do not agree with defendant's contention that, since the drugs sold were exactly those called for by prescriptions which appeared regular in all respects, he could at most be guilty of a violation under Article 4 of G.S. Ch. 90, which governs the practice of pharmacy, and not under Article 5, the North Carolina Controlled Substances Act. G.S. 90-71, which appears in Art. 4, makes it unlawful for any person not licensed as a pharmacist to dispense or sell at retail any drug or pharmaceutical preparation "upon the prescription of a physician or otherwise, or to compound physicians' prescriptions except as an aid to and under the immediate supervision of a person licensed as a pharmacist or assistant pharmacist" under Article 4. On the evidence presented in the present case, defendant Austin might indeed have been guilty of the unlawful conduct proscribed by G.S. 90-71 and its companion statute, G.S. 90-72. *See Board of Pharmacy v. Lane*, 248 N.C. 134, 102 S.E. 2d 832 (1958). That fact, however, does not insulate him from prosecution for violation of the more serious offense proscribed by G.S. 90-95(a)(1), the statute under which he was convicted. That statute makes it a criminal offense to sell or deliver a controlled substance except as authorized by Article 5 of G.S. Ch. 90, and nowhere in Article 5 do we find authority for a sale which is clearly made unlawful under Article 4. We hold, therefore, that when a drug is sold under circumstances which render the

sale unlawful under Article 4, there is also a violation of Article 5, if, as in the present case, the drug involved is a controlled substance.

[3] The bills of indictment on which defendant Austin was tried were returned by the grand jury as true bills on 2 June 1975. Prior thereto, on 7 May 1975, three warrants had been issued and served on defendant Austin charging him with the misdemeanors of unlawfully dispensing pharmaceutical preparations in violation of G.S. 90-72. These warrants were based on the same sales of drugs as were alleged in the bills of indictment in Cases 75CR3586B, 3588B, and 3589B. Defendant Austin contends that because these misdemeanor warrants had been issued and served prior to the time of the return of the bills of indictment, his motion to dismiss the indictments, made prior to entry of his pleas of not guilty, should have been allowed. Citing *State v. Parker,* 234 N.C. 236, 66 S.E. 2d 907 (1951), for the rule "that where two courts have concurrent jurisdiction of a case, the court which first acquires jurisdiction over the case retains it to the exclusion of the other court," defendant Austin contends the District Court acquired prior jurisdiction by reason of the warrants and for that reason the Superior Court had no jurisdiction to proceed to try him under the bills of indictment. The rule cited by defendant has no application to the present case. Here, the Superior and District Courts did not have concurrent jurisdiction. The indictments charged defendant with commission of felonies, over which the Superior Court has exclusive original jurisdiction. The outstanding misdemeanor warrants, on which defendant has never been brought to trial, did not prevent the Superior Court from exercising its jurisdiction over the felony offenses. The motion to dismiss the indictments was properly denied.

[4] Defendant Austin assigns as error the admission in evidence over his objection of the affidavit of SBI Agent Boulus on the basis of which the search warrant dated 28 March 1975 was issued. Agent Boulus was called as the first witness for the State. Over defendant's objections he was permitted to recount to the jury the contents of his affidavit, and the affidavit itself was received in evidence before the jury. In this there was error. In *State v. Spillars,* 280 N.C. 341, 185 S.E. 2d 881

(1972), Justice Branch, speaking for our Supreme Court, said (p. 351, 352):

> "The validity of a search warrant, the legality of a search, and the admissibility of evidence obtained by the search are matters of law to be determined by the trial judge. Determination of these questions is not for the jury's consideration. *State v. Reams,* 277 N.C. 391, 178 S.E. 2d 65; *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755; *State v. Myers,* 266 N.C. 581, 146 S.E. 2d 674; *State v. Moore,* 240 N.C. 749, 83 S.E. 2d 912.
>
> It is error to allow a search warrant together with the affidavit to obtain search warrant to be introduced into evidence because the statements and allegations contained in the affidavit are hearsay statements which deprive the accused of his rights of confrontation and cross-examination. See *State v. Oakes,* 249 N.C. 282, 106 S.E. 2d 206."

We need only determine if the error was prejudicial. *State v. Jackson,* 287 N.C. 470, 215 S.E. 2d 123 (1975); *State v. Spillars, supra.*

The affidavit of Agent Boulus was clearly based in substantial part on hearsay statements of Agents Kelly and McDaniel. If this was its only vice, we might be able to consider the admission of the affidavit as nonprejudicial error, since both Kelly and McDaniel subsequently testified and were subject to cross-examination. The affidavit, however, went further and referred to a number of other pending criminal charges against defendant Austin without showing that he had been convicted of those offenses, and "[i]t is well recognized in this jurisdiction that in a prosecution for a particular crime the State cannot offer evidence tending to show that the accused has committed another distinct, independent or separate offense." *State v. Spillars, supra* at 352. Considering the entire affidavit, we are unable to say that the error in its admission was non-prejudicial. For this error, defendant Austin is entitled to a new trial in Cases 75CR3586B, 3588B, and 3589B.

APPEAL BY DEFENDANT, JOSEPH P. THORNE

Defendant Thorne points out, and the State concedes, that the indictment against him in Case No. 75CR3585, which was returned as a true bill on 15 April 1975, was dismissed by the

trial court on motion of defendant prior to arraignment. For that reason the judgment entered in that case must be vacated.

[5] In Cases No. 75CR3584B and 3579, in which Thorne was charged with aiding and abetting Austin in making felonious sales of controlled substances to Agent McDaniel on 9 January 1975, there was no evidence to show that Thorne was physically present, that he gave any encouragement, or that he did anything else to assist or encourage Austin in making those sales. Indeed, the State's entire case against Austin was predicated on the theory that his pharmacist, Thorne, was *not* present when those sales were made. Thorne's motions for dismissal of those cases should have been allowed.

[6] In Case No. 75CR5423, in which Thorne was charged with feloniously and intentionally furnishing false and fraudulent information, the State also failed to present evidence sufficient to warrant submission of the case to the jury. The State's own handwriting expert testified that he was unable to identify any of the entries on the records as having been written by Thorne. There was no evidence from which the jury could find Thorne guilty of the offense charged.

The result is:

As to defendant, Jack P. Austin:

In Case No. 75CR5405, the judgment is vacated.

In Cases Nos. 75CR3586B, 3588B, and 3589B, defendant is entitled to a new trial.

As to defendant, Joseph P. Thorne, the judgments in all cases against him, being Nos. 75CR3584B, 3579, 3585, and 5423, are vacated.

Chief Judge BROCK and Judge ARNOLD concur.

STATE HIGHWAY COMMISSION v. T. W. ROSE AND WIFE, ETTA ROSE; REECE COCKERHAM AND WIFE, OPAL COCKERHAM, LESSEES; WAYNE M. MAYES AND WIFE, DELLA MAYES, LESSEES; J. N. SPEAS, LESSEE

No. 7623SC337

(Filed 6 October 1976)

1. **Eminent Domain § 7— issues other than compensation — traffic islands — authority of court to decide**

Pursuant to G.S. 136-108 the trial court had authority to pass upon the question whether certain traffic islands on defendants' property constituted a substantial interference with access to the remaining property which required the payment of compensation.

2. **Eminent Domain § 2— abutting landowner on highway — right of easement for access purposes**

An abutting landowner on a public highway has a special right of easement and user in the public road for access purposes, and this is a property right which cannot be damaged or taken from him without due compensation. While entire access may not be cut off, an owner is not entitled, as against the public, to access to his land at all points in the boundary between it and the highway.

3. **Eminent Domain § 2— access to public highway interfered with — ingress and egress required**

Where the State interferes with the access of a property owner to a public highway the question is usually whether reasonable means of ingress or egress remain or are provided.

4. **Eminent Domain § 2— construction of traffic islands — access to defendants' property — sufficiency of evidence**

Evidence was sufficient to support the finding of the trial court that even after the construction of traffic islands, defendants retained reasonable means of ingress and egress to and from their property; therefore, the court properly concluded that there had been no substantial interference by plaintiff with defendants' access to their property.

5. **Eminent Domain § 7— traffic islands constructed — no compensation due defendants — protective order for subsequent trial improper**

Though the trial court's ruling that defendants were not entitled to receive compensation from plaintiff for any diminution in value to their remaining land caused by the construction of traffic islands was proper, and though that part of the court's protective order prohibiting defendants, their witnesses and counsel at trial from mentioning the islands in oral testimony or in arguments to the jury was appropriate, the court erred in prohibiting defendants from introducing any map, photographs or other exhibit depicting the islands, since it is the rule in this jurisdiction that witnesses may use maps or photographs to illustrate their testimony and the trial court could in this case by appropriate instructions prevent the jury from con-

sidering the islands as an element of damage to defendants' remaining property; moreover, keeping from the jury maps and photographs depicting the islands would have little or no effect should the presiding judge permit a jury view of the property in question pursuant to G.S. 1-181.1.

APPEAL by defendants Rose from *Graham, Judge.* Judgment entered 13 February 1976 in Superior Court, YADKIN County. Heard in the Court of Appeals 2 September 1976.

Plaintiff instituted this action on 24 April 1972 for purpose of condemning and appropriating certain lands belonging to defendants Rose needed to widen and improve N. C. Highway 67 and U. S. Highway 21 Business in the Town of Jonesville in Yadkin County. Defendants other than defendants Rose were made parties because of their leasehold interests in portions of the land.

On 3 November 1975 plaintiff, following other proceedings not pertinent to this appeal, filed a motion pursuant to G.S. 136-108 for a determination by the court, sitting without a jury, of certain issues other than the issue of just compensation. The issue pertinent to this appeal is whether the construction of certain traffic "islands" on the property of plaintiff at the point where said property intersects with the remaining property of defendants is a legitimate exercise of the police power for which no compensation is required to be paid; or, stated differently, whether said islands constitute a substantial interference with access to the remaining property which requires the payment of compensation.

In said motion plaintiff also asked that if the court determined the issue in its favor that it enter a protective order directing defendants, their counsel and their witnesses to make no mention of said islands during the course of their testimony before the jury when the issue of amount of compensation would be tried.

At a hearing on the motion, evidence by way of oral testimony, maps and photographs tended to show:

The property of defendants Rose consists of a four-acre tract of land located on the south side of N.C. 67 and U.S. 21 intersections. Located on the tract and fronting on N.C. 67 are a one-story building occupied by a Firestone retail store, a service station and a restaurant; located behind those buildings and

not fronting on the highway are buildings housing a garage and a motel. Prior to the taking defendants had approximately 406.09 feet of unobstructed frontage, not including a twenty-foot wide alley which defendants do not own and excepting a sidewalk 75 feet long. Prior to the taking cars could enter and leave defendants' property at almost any point along N.C. 67.

In order to expand N.C. 67 plaintiff appropriated an additional right-of-way across the front of defendants' land and constructed along the southern edge of the right-of-way one soil and five concrete islands to regulate the points of entry and exit to defendants' property. The islands are located within plaintiff's right-of-way and create five points of entry; three of the points of entry have widths of 35 feet and two have widths of 29 feet. The islands are ten feet wide and six inches high.

Defendants' evidence tended to show that presently there is no access to the immediate front of the Firestone building or the service station so that cars must park on the side of those buildings; that the parking in front of the restaurant is as good as before the taking.

The court made findings of fact which include findings substantially as set forth in the evidence hereinabove summarized. It concluded that construction of the islands was an exercise of plaintiff's authority under the police power to make reasonable regulations as to the manner and points of entry to and from the remaining property of defendants Rose; that there has been no substantial interference with defendants' rights of access; and defendants are not entitled to receive compensation as a result of the construction of said islands by plaintiff.

The court adjudged that defendants are not entitled to receive compensation from plaintiff for any diminution in value of their remaining land caused by the islands. It further granted the protective order requested by plaintiff and ordered that defendants, their counsel and their witnesses, when the action is tried before a jury on the issue of damages, make no mention of any of said structures (islands) in oral testimony, introduce no map, photograph or other exhibit which depicts said structures in any manner, and make no mention of said structures in any opening or closing argument to the jury.

Defendants Rose appealed.

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

Franklin Smith, and Folger & Folger, by Fred Folger, for defendant appellants.

BRITT, Judge.

[1] Defendants contend first that the trial court did not have authority to pass upon the question whether defendants are entitled to compensation because of the construction of the islands adjacent to their property. We reject this contention.

G.S. 136-108 provides: "After the filing of the plat, the judge, upon motion and 10 days' notice by either the Board of Transportation or the owner, shall, either in or out of term, hear and determine any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, if controverted, questions of necessary and proper parties, title to the land, interest taken, and area taken."

We hold that the trial court had authority to pass upon the question.

Defendants contend that the trial court's findings of fact were not supported by the evidence. This contention has no merit. Not only was the oral testimony sufficient to support the findings but it was buttressed with maps, plats and photographs depicting the *locus in quo* both before the taking and following the construction of the islands in question.

Defendants contend that the conclusions of law that (1) the construction of the islands was a reasonable exercise of authority under the police power of the state, (2) there has been no substantial interference with their abutter's rights of access, and (3) defendants are not entitled to receive compensation as a result of the construction of said structures, are not supported by applicable North Carolina law. We find no merit in this contention.

[2] " . . . [A]n abutting landowner on a public highway has a special right of easement and user in the public road for access purposes, and this is a property right which cannot be damaged or taken from him without due compensation. While entire access may not be cut off, an owner is not entitled, as against the public, to access to his land at all points in the boun-

dary between it and the highway; if he has free and convenient access to his property and to the improvements thereon, and his means of ingress and egress are not substantially interfered with by the public, he has no cause of complaint." 39 C.J.S., Highway § 141, p. 1081.

In *Haymore v. Highway Commission,* 14 N.C. App. 691, 189 S.E. 2d 611, *cert. denied,* 281 N.C. 757, 191 S.E. 2d 355 (1972), this court held:

> "The question as to what constitutes a taking of a landowner's right to access has been the subject of numerous decisions in this jurisdiction, all to the effect that while a substantial or unreasonable interference with an abutting landowner's access constitutes the taking of a property right, the restriction of his right of entrance to reasonable and proper points so as to protect others who may be using the highway does not constitute a taking. Such reasonable restriction is within the police power of the sovereign and any resulting inconvenience is *damnum absque injuria.*" (Citations omitted.)

The North Carolina Supreme Court has further held that the construction of a median strip so as to limit landowner's ingress and egress to lanes for southbound travel when he formerly had direct access to both the north and southbound lanes was a valid traffic regulation adopted by the Highway Commission in the exercise of the police power vested in it by the statutes. *Barnes v. Highway Commission,* 257 N.C. 507, 126 S.E. 2d 732 (1962). In *Barnes* the court stated that: "While entire access may not be cut off, an owner is not entitled, as against the public, to access to his land at all points in the boundary between it and the highway . . . . " 257 N.C. at 517, 126 S.E. 2d at 739.

"It is clear under the principles of the cases cited herein that when access has been interfered with by the state the question involved is one of 'degree.' If the interference is not substantial and if reasonable means of ingress and egress remains or is provided, there has been a legitimate exercise of the police power. If the interference is substantial and no reasonable means of ingress or egress remains or is provided, there has been a taking of a property right under the power of eminent domain." *Highway Commission v. Yarborough,* 6 N.C. App. 294, 170 S.E. 2d 159 (1969).

[3, 4] Where the State interferes with the access of a property owner the question is usually whether reasonable means of ingress or egress remain or are provided. *Highway Commission v. Yarborough, supra.* In the present case, this question has been resolved against the defendants and the trial court's findings were supported by competent evidence. Even after the construction of the islands, the defendants retained reasonable means of ingress and egress. The trial court's conclusion that there had been no substantial interference with access was proper.

[5] Defendants contend that the restrictive order entered by the trial court is *too* restrictive and deprives them of the right to present adequately to the jury their case with respect to the issue of just compensation. We think this contention has merit.

In view of the trial court's ruling that defendants are not entitled to receive compensation from plaintiff for any diminution in value to their remaining land caused by the traffic islands, and our affirmance of that ruling, we think that part of the protective order prohibiting defendants, their witnesses and counsel, at trial from mentioning the islands in oral testimony or in arguments to the jury is appropriate. However, we hold that the court erred in prohibiting defendants from introducing any map, photograph or other exhibit which depicts the islands.

For decades it has been permissible in this jurisdiction for a witness to use a map, diagram or photograph of a place or object to illustrate his testimony and make it more intelligible to the court and jury. See 1 Stansbury, N. C. Evidence § 34 (Brandis Rev. 1973), and cases therein cited. These aids have been particularly helpful in condemnation cases in providing the court and jury with better understanding with respect to the subject property before and after the taking.

In the instant case any photographs and accurate maps of the subject property, made since the taking and changes brought about pursuant thereto, would have to depict the islands in front of defendants' property; but we perceive no reason why the judge presiding at the trial will not be able by appropriate instructions to prevent the jury from considering the islands as an element of damage to defendants' remaining property.

There is an additional reason for our ruling regarding maps and photographs. G.S. 1-181.1 authorizes the judge presiding

at the trial of any action or proceeding involving the condemnation of real property, in his discretion, to permit the jury to view the property which is the subject of condemnation. It goes without saying that if the presiding judge should permit a jury view in this case, keeping from the jury maps and photographs depicting the islands would have little or no effect.

For the reasons stated, that portion of the protective order forbidding the introduction of any map, photograph or other exhibit depicting the islands in any manner is nullified. Except for said portion, the judgment appealed from is affirmed.

Modified and affirmed.

Judges PARKER and CLARK concur.

STATE OF NORTH CAROLINA v. GIRADEAU HALL

No. 7618SC359

(Filed 6 October 1976)

1. **Assault and Battery § 15— self-defense — jury instructions proper**

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court's instruction on self-defense which followed closely the pattern jury instructions of the superior court judges was proper.

2. **Assault and Battery § 8— self-defense pleaded — violent nature of victim — evidence improperly excluded**

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury where defendant claimed self-defense, the trial court erred in sustaining the State's objection to defendant's testimony that the victim of the assault had previously told defendant that he had shot somebody with his pistol, since the evidence was admissible as bearing on the reasonableness of defendant's apprehension that the victim would harm him; however, since defendant's testimony was not stricken and the jury was not instructed to disregard the answer, the error was not sufficiently prejudicial to require a new trial.

3. **Assault and Battery § 15— victim as violent man — defendant's plea of self-defense — failure to correlate in instructions**

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury where defendant claimed self-defense, the trial court erred in not correlating, in its instructions to the jury, the evidence indicating that the victim was a dangerous and violent man with defendant's plea of self-defense.

4. Assault and Battery § 15— self-defense — insufficiency of instructions

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court erred in failing to include in its instructions to the jury a proper and *final* mandate on the issue of self-defense.

APPEAL by defendant from *Albright, Judge.* Judgment entered 3 December 1975 in Superior Court, GUILFORD County. Heard in the Court of Appeals 14 September 1976.

Upon a plea of not guilty defendant was tried on a bill of indictment charging him with assaulting Oliver Jamieson with a deadly weapon with intent to kill, inflicting serious injuries. The offense allegedly occurred on 25 April 1975 and evidence presented by the State tended to show:

In the early afternoon on said date defendant and Jamieson engaged in a fight at the home of Butch Fox in Greensboro. Following the fight defendant drove away from the Fox home and Jamieson also left. Some twenty or thirty minutes later, while Jamieson was standing on the side of Asheboro Street talking to some friends, defendant drove up and shot him in his leg with a rifle. The bullet shattered Jamieson's left femur, necessitating hospitalization for two months.

Defendant offered evidence tending to show: Jamieson often carried a pistol and prior to the date in question had been arrested for possession of two pounds of marijuana. Jamieson accused defendant of telling the police about the marijuana. After the fight at the Fox residence and defendant had entered his car to leave, Jamieson stepped between the car door and seat and said: "Nigger, if you close the door on me, I will kill you." Defendant succeeded in closing the door and began driving to his father's restaurant on Asheboro Street. While driving he noticed that Jamieson was following him. Remembering that Jamieson had threatened to kill him, defendant went to his brother's home and obtained a gun. He then drove back to Asheboro Street and, as he stopped to make a left turn, he saw Jamieson walking out into the street with his hand in his pocket. Thinking Jamieson was reaching for a gun, he stepped out of the car and shot Jamieson in self-defense but did not intend to kill him.

The court charged the jury that they could return one of five verdicts: Guilty of assault with a deadly weapon with

intent to kill inflicting serious injury; guilty of assault with a deadly weapon inflicting serious injury; guilty of assault with a deadly weapon with intent to kill; guilty of assault with a deadly weapon; or, not guilty.

The jury found defendant guilty of assault with a deadly weapon inflicting serious injuries and from judgment imposing prison sentence of not less than five nor more than ten years, defendant appealed.

Attorney General Edmisten, by Associate Attorney Elisha H. Bunting, Jr., for the State.

Smith, Patterson, Follin, Curtis & James, by Michael K. Curtis, for defendant appellant.

BRITT, Judge.

[1] Defendant assigns as error the following instructions given by the trial court to the jury:

> "If you find from the evidence beyond a reasonable doubt that the defendant Hall assaulted Oliver Jamieson with intent to kill, that assault would be excused as being in self-defense only if the circumstances at the time he acted were such as would create in the mind of a person of ordinary firmness a reasonable belief that such action was necessary to protect himself from death or great bodily harm, and the circumstances did create such belief in the defendant's mind. It is for you, the jury, to determine the reasonableness of the defendant's belief from the circumstances as they appeared to him at the time.
>
> "If you find from the evidence beyond a reasonable doubt that the defendant assaulted Oliver Jamieson but do not find that he had an intent to kill, that assault would be excused as being in self-defense if the circumstances at the time he acted were such 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 the circumstances did create such belief in the defendant's mind, even though he was not thereby put in actual or apparent danger of death or great bodily harm. However, even if the defendant did not intend to kill, the force used cannot have been excessive. This means that the defendant had the right to use

only such force as reasonably appeared to him to be necessary under the circumstances to protect himself from bodily injury or offensive physical contact. Again, it is for you, the jury, to determine the reasonableness of the defendant's belief from the circumstances as they appeared to him at the time."

We note that the challenged instructions follow very closely those on the subject recommended by the N. C. Conference of Superior Court Judges in its *Pattern Jury Instructions for Criminal Cases*. While the wording of the instructions could be improved upon, we believe they are supported by the case law of this jurisdiction.

In *State v. Anderson*, 230 N.C. 54, 55-56, 51 S.E. 2d 895, 896-897 (1949), in an opinion by Justice Ervin, we find:

"It is undoubted law that a person cannot excuse taking the life of an adversary upon the ground of self-defense unless the killing is, or reasonably appears to be, necessary to protect himself from death or great bodily harm. *S. v. Hand*, 170 N.C. 703, 86 S.E. 1005. The defendant has not taken human life. It is alleged in the indictment, however, that he committed a felonious assault and battery upon the prosecuting witness with a deadly weapon in an unsuccessful attempt to kill the prosecuting witness contrary to G.S. 14-32. Both authority and logic declare that the law of self-defense in cases of homicide applies also in cases of assault with intent to kill, and that an unsuccessful attempt to kill cannot be justified unless the homicide would have been excusable if death had ensued. 40 C.J.S., Homicide, section 89. It follows that where an accused has inflicted wounds upon another with intent to kill such other, he may be absolved from criminal liability for so doing upon the principle of self-defense only in case he was in actual or apparent danger of death or great bodily harm at the hands of such other. *S. v. Elmore*, 212 N.C. 531, 193 S.E. 713; *S. v. Bridges*, 178 N.C. 733, 101 S.E. 29.

* * *

"The law does not compel any man to submit in meekness to indignities or violence to his person merely because such indignities or violence stop short of threatening him with death or great bodily harm. If one is without fault in provoking, or engaging in, or continuing a difficulty

with another, he is privileged by the law of self-defense to use such force against the other as is actually or reasonably necessary under the circumstances to protect himself from bodily injury or offensive physical contact at the hands of the other, even though he is not thereby put in actual or apparent danger of death or great bodily harm." (Numerous citations.)

State v. Anderson, supra, has been quoted from and cited with approval in numerous cases including the recent cases of *State v. Pearson,* 288 N.C. 34, 39, 215 S.E. 2d 598 (1975); and *State v. Lewis,* 27 N.C. App. 426, 432-3, 219 S.E. 2d 554, *cert. den.* 289 N.C. 141, 220 S.E. 2d 799 (1975).

The assignment of error is overruled.

[2] Defendant assigns as error the court's sustaining an objection to his testimony that Jamieson had told him he had shot at someone with his pistol.

While defendant was on redirect examination he stated that prior to the occasion in question Jamieson had threatened him; that during the time he was sharing a room or apartment with Jamieson he observed a pistol on Jamieson's person on numerous occasions. Defendant was then asked if Jamieson ever told him that he shot at somebody with his pistol. The district attorney objected, defendant answered "Yes," the court then sustained the objection but there was no motion to strike the answer or any instruction to the jury to disregard it.

In *State v. Johnson,* 270 N.C. 215, 219-20, 154 S.E. 2d 48, 51-52 (1967), we find:

"In the case of *Nance v. Fike,* 244 N.C. 368, 93 S.E. 2d 443, the Court, speaking through Bobbitt, J., stated: 'Ordinarily, evidence of prior threats and of incidents of violence on prior unrelated occasions are competent only if the defendant was present or had knowledge thereof prior to the alleged assault. *S. v. Blackwell,* 162 N.C. 672, 78 S.E. 316.'

"The rationale of this rule is that a jury should, as far as is possible, be placed in defendant's situation and possess the same knowledge of danger and the same necessity for action, in order to decide if defendant acted under reasonable apprehension of danger to his person or his life. We

know of no better way to impart the knowledge of fear or apprehension on the part of defendant than by giving the jury the benefit of specific incidents tending to show the dangerous and violent character of the deceased. It remains in the province of the jury to decide whether the incidents occurred or whether defendant's apprehension was a reasonable one. Here, it was error for the trial judge to limit defendant's testimony, *as a matter of law,* to his own experiences with the deceased. He should have been allowed to relate specific acts of violence which occurred when he was present or of which he had knowledge prior to the homicide."

See also Stansbury's N. C. Evidence 2d § 106 (Brandis Rev. 1973).

While recognizing the rule restated in *State v. Johnson, supra,* the State argues that there was no evidence that defendant was present at the time Jamieson allegedly shot at someone with his pistol or that defendant had personal knowledge of the incident. We think Jamieson's telling defendant was sufficient to vest defendant with "knowledge" of the incident.

We hold that the trial court erred in sustaining the objection. However, since defendant's answer was not stricken and the jury was not instructed to disregard the answer, we do not think this error standing alone was sufficiently prejudicial to defendant to warrant a new trial.

[3] Closely related to defendant's assignment of error just discussed is his assignment that the trial court erred in failing to correlate the evidence indicating that Jamieson was a dangerous and violent man with defendant's plea of self-defense.

In *State v. Rummage,* 280 N.C. 51, 54-55, 185 S.E. 2d 221, 224 (1971), we find:

"In instant case there was plenary evidence that deceased was a dangerous and violent man when he was intoxicated. There was also evidence that he was intoxicated at the time he was fatally shot. The trial judge failed to charge as to the bearing the reputation of deceased as a violent man might have had on defendant's reasonable apprehension of death or great bodily harm at the time deceased allegedly attacked or threatened to attack defendant. This was error.

"Nevertheless, we are reluctant to hold that this error, standing alone, constituted reversible error, since the trial judge had otherwise fully charged on self-defense. . . ."

See also *State v. Riddle,* 228 N.C. 251, 45 S.E. 2d 366 (1947), and *State v. Covington,* 9 N.C. App. 595, 176 S.E. 2d 872 (1970).

Along with our holding that the trial court erred in sustaining the objection to defendant's testimony that Jamieson had told him about shooting at some third party, we hold that the court erred in not correlating, in its instructions to the jury, the evidence indicating that Jamieson was a dangerous and violent man.

[4] Finally, defendant assigns as error the failure of the court to include in its instructions to the jury a proper and final mandate on the issue of self-defense.

In support of this assignment defendant relies on *State v. Dooley,* 285 N.C. 158, 203 S.E. 2d 815 (1974); we quote from the opinion by Justice Moore (pages 165-166):

"We agree with defendant that a specific instruction on self-defense should have been given by the trial judge in his final mandate to the jury. Defendant's defense rested solely on self-defense. Although the court prior to the final mandate explained the law relating to self-defense, in his final instruction he omitted any reference to self-defense other than to say 'but [if] you are satisfied that the defendant killed Thomas without malice, or that he killed him in the heat of a sudden passion, and that in doing so, that he used excessive force in the exercise of self-defense, it would be your duty to return a verdict of manslaughter.' Here in the final mandate the court gave special emphasis to the verdicts favorable to the State, including excessive use of force in self-defense as a possible verdict. At no time in this mandate did the court instruct the jury that if it was satisfied by the evidence that defendant acted in self-defense, then the killing would be excusable homicide and it would be their duty to return a verdict of not guilty.

"The failure of the trial judge to include not guilty by reason of self-defense as a possible verdict in his final mandate to the jury was not cured by the discussion of the

law of self-defense in the body of the charge. By failing to so charge, the jury could have assumed that a verdict of not guilty by reason of self-defense was not a permissible verdict in the case. . . ."

In the case at hand, the trial judge in the mandate in his principle charge did not include a specific instruction on self-defense. After the jury had deliberated for some period of time they returned to the courtroom and requested further instructions on self-defense and "inflicting serious injury." Thereupon, the court repeated its previously given instructions on self-defense after which it restated the elements of the offenses of (1) assault with a deadly weapon with intent to kill inflicting serious injury, (2) assault with a deadly weapon inflicting injury, (3) assault with a deadly weapon with intent to kill, and (4) assault with a deadly weapon, and gave a mandate following each offense. In none of the mandates, or thereafter, did the court again refer to self-defense. We hold that the court erred.

While none of the errors found by us, standing alone, might be sufficiently prejudicial to justify a new trial, we conclude that the errors when considered collectively did constitute error sufficiently prejudicial to justify that relief.

New trial.

Judges PARKER and CLARK concur.

LOTTIE LEE WILLIAMS v. MARGARET LEE MULLEN AND JAMES L. TALTON, CO-ADMINISTRATORS OF THE ESTATE OF LUCY LEE BARBEE

No. 7611SC317

(Filed 6 October 1976)

1. **Trusts § 13— express trust — essentials**

The essentials of a valid express trust are: (1) sufficient words to create it; (2) a definite subject matter; (3) an ascertained object; and (4) designated beneficiaries.

2. **Trusts § 13— parol trust in personalty — enforceability**

It is well established in this jurisdiction that a trust in personalty may be created by parol, and that no particular form of words is required for the purpose, and that the same will be recognized and enforced whenever it is manifest that a trust is intended.

3. Trusts § 19— oral express trust alleged — insufficient intention shown

In an action to recover certain bonds or proceeds therefrom allegedly due plaintiff under an oral express trust, the trial court erred in failing to grant defendants' motion for directed verdict, since the evidence did not show a sufficient intention to create a trust, but at most tended to show an ineffective gift of the bonds by intestate to plaintiff.

APPEAL by defendants from *Brewer, Judge.* Judgment entered 16 November 1975 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 31 August 1976.

In this action plaintiff seeks to recover certain bonds or proceeds therefrom allegedly due her under an oral express trust. In her complaint she alleges that decedent, her sister, died intestate on 7 June 1973 and defendants are serving as administrators of the estate; that prior to her death intestate gave plaintiff an interest in certain bonds issued by the Pentecostal Holiness Church Extension Loan Fund, Inc. (Pentecostal), either as owner, as joint tenant with right of survivorship, or as the beneficiary of a trust; and that she was entitled to possession of the bonds upon decedent's death.

Plaintiff asked the court to adjudge that defendants hold the bonds "as constructive trustees by operation of law" for the beneficial use of plaintiff; to declare plaintiff the owner of the bonds, or the proceeds therefrom, by virtue of a gift from intestate; and to require defendants to deliver possession of the bonds, or render an accounting for the proceeds therefrom, to plaintiff.

Defendants filed answer alleging that the bonds were the property of the estate and that plaintiff was not entitled to them.

At trial the parties stipulated that between 1962 and 1965 intestate purchased forty $1,000 bonds from Pentecostal. (The forty bonds were issued to Mrs. Lucy L. Barbee.) In January 1966 Pentecostal issued a $2,000 bond in the names of "Mrs. Lucy L. Barbee or Lottie Lee Williams." Plaintiff presented as a witness Alton Bridgers, a nephew of intestate and of plaintiff, whose testimony is summarized in pertinent part as follows:

From 1956 until her death in 1973, he would occasionally advise intestate with respect to her financial affairs. On sev-

eral occasions intestate talked with him about giving the bonds in question to plaintiff. He advised intestate "that I would never give anything away that I had until I was assured that I did not need it." Shortly before January of 1966 intestate told him she was going to write Pentecostal (whose office was in Georgia) and have a bond issued in her name and plaintiff's name and also have plaintiff's name put on the other bonds. Later, intestate told him she had received a letter from Pentecostal but that "she wasn't about to send $40,000 in an envelope for them to stamp somebody's name on it."

Several weeks later intestate obtained a short printed form made out to Pentecostal with a statement thereon to the effect "that Lottie Lee Williams was the owner of any interest, any bonds, that she might cash if the need was to arise" to meet medical expenses or other needs due to sickness; "that she could cash any or all of these bonds that was in Georgia at that time and if any interest or any money was left at Mrs. Barbee's death it would automatically [show] Mrs. Lottie Lee Williams the beneficiary." (On cross-examination it was established that this form was never discovered and that Pentecostal had no copy of it on file.)

On direct examination he stated that he had observed the form signed by intestate and on the same date she told him: "As of this date I am making Lottie Lee Williams an owner—that any interest, any holdings that I have in this Pentecostal Holiness Fund will be hers to use at anytime that she wanted to if the need was to arise and at my death what is left, if any, of the $42,000 bonds, which $40,000 at that time was not shown with Mrs. Williams name but the $2,000 one was—that any and all remaining funds at her death would be Lottie Lee Williams."

Prior to 1966 intestate received from Pentecostal semi-annual interest checks in her name alone. After January of 1966 the interest checks were made payable to intestate and plaintiff. Over objection he testified that the net worth of intestate's estate in 1966 was approximately $150,000 to $160,000; he estimated the estate at the time of her death to be approximately $192,000.

On cross-examination he identified intestate's signature on a 1969 tax form mailed to Pentecostal stating that "all bonds with the following exception are in the name of Lucy Lee Bar-

bee, the exception being 24-10, $2,000, Lucy Lee Barbee and Lottie Lee Williams." He also identified intestate's signature on a letter written in November 1969 to Rev. A. D. Beacham of Franklin Springs, Georgia, in which intestate stated: "This is to request that you forward to me the interest on *my* bonds each six months as it becomes due." (Emphasis added.)

Defendant presented as a witness John A. Wilson, an accountant, who testified that he had filed appropriate income and intangible tax returns for intestate from 1961 until her death in 1973; that he had never prepared for intestate a gift tax return pertaining to the bonds or income therefrom.

Issues were submitted to and answered by the jury as follows:

"1. Did Lucy Lee Barbee create an express, oral trust of the church bonds in the amount of Forty Thousand ($40,000.00) Dollars for the use and benefit of Lottie Lee Williams?

ANSWER: Yes.

"2. Did Lucy Lee Barbee create an express, oral trust of the church bond in the amount of Two Thousand ($2,000.00) Dollars for the use and benefit of Lottie Lee Williams?

ANSWER: Yes."

From judgment predicated on the verdict providing that plaintiff recover $42,000, plus interest and costs, defendants appealed.

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

L. Austin Stevens and R. E. Batton for defendant appellants.

BRITT, Judge.

Defendants assign as error the failure of the trial court to grant their motions for directed verdict interposed at the close of plaintiff's evidence and renewed at the close of all the evidence. We think the assignment has merit.

The question presented is whether the evidence was sufficient to show that intestate created an express, oral trust in the

bonds for the use and benefit of plaintiff. We hold that it was not.

[1] " 'Express,' or as they sometimes are called, 'direct,' trusts are those trusts intentionally created by the direct and positive act of the settlor, by some writing, deed, or will, or an oral declaration. . . ." 76 Am. Jur. 2d, Trusts § 15, p. 263. The essentials of a valid express trust are: (1) sufficient words to create it; (2) a definite subject matter; (3) an ascertained object; and (4) designated beneficiaries. Lee, North Carolina Law of Trusts § 1a, p. 2.

[2] Concerning an express parol trust, the North Carolina Supreme Court has stated that: "The declaration of a trust in personalty is not required to be in writing, and if in writing, it may be contained in letters or other writings. . . . No technical terms need be used. It is sufficient if the language used shows the intention to create a trust, clearly points out the property, the disposition to be made of it, and the beneficiary." *Witherington v. Herring,* 140 N.C. 495, 497, 53 S.E. 303, 304 (1906). "It is well established in this jurisdiction that a trust in personalty may be created by parol, and that no particular form of words is required for the purpose, and that the same will be recognized and enforced WHENEVER IT IS MANIFEST THAT A TRUST IS INTENDED. . . ." (Emphasis added.) *Rousseau v. Call,* 169 N.C. 173, 85 S.E. 414 (1915).

[3] Where competent evidence is introduced to establish a parol trust, it is the duty of the trial court to submit it to the jury, and it is for the jury to say whether the evidence is "clear, strong, cogent and convincing." *Taylor v. Wahab,* 154 N.C. 219, 70 S.E. 173 (1911). In the instant case, a sufficient intention to create a trust was not shown by the evidence. "The intention to create a trust must be sufficiently expressed, and the declaration of trust must show the intention with reasonable certainty. It must be clear that a trust was intended. It is necessary that there be a definite, unequivocal, explicit declaration of trust, or circumstances which show with reasonable certainty . . . that a trust was intended to be created. The declaration must show a desire to pass benefits through the medium of a trust and not through some related or similar instrumentality." 89 C.J.S., Trusts § 43, pp. 776-778.

In *Buffaloe v. Barnes,* 226 N.C. 313, 38 S.E. 2d 222 (1946), the testator purchased certain stock with his own funds and

had the certificates issued to himself and his niece as joint tenants with the rights of survivorship. At his death testator was in exclusive possession of the stock certificates. The court held that the transaction was not sufficient to create a gift or a trust. As stated by Professor Lee, "equity will not convert an imperfect gift into a declaration of trust." Lee, North Carolina Law of Trusts § 1d, p. 4. Intestate in the present case at most made an ineffective gift of the bonds.

In *Wescott v. Bank,* 227 N.C. 39, 40 S.E. 2d 461 (1946), the decedent attempted to create a trust fund for his grandfather by the deposit of money in a savings account in decedent's name. The court stated (p. 42): "Here the essentials of an express trust are lacking. There was no evidence of a transfer or assignment of a present beneficial interest in the fund deposited in the defendant bank. There was only evidence of a desire that in the event of the depositor's death the grandfather should be the beneficiary."

In *Sinclair v. Travis,* 231 N.C. 345, 353, 57 S.E. 2d 394, 400 (1949), the court quoted with approval from *Wescott* as follows: "An express trust . . . is a fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it . . . The term signifies the relationship resulting from the equitable ownership of property in one person entitling him to certain duties on the part of another person holding the legal title . . . To constitute this relationship there must be a transfer of the title by the donor or settlor for the benefit of another."

The trial court erred in denying defendants' motion for directed verdict. The question with respect to plaintiff's interest in the $2,000 bond because of its issuance to intestate or plaintiff was not raised on this appeal, therefore, we render no decision on that question.

For the reasons stated, the judgment is

Reversed.

Judges HEDRICK and MARTIN concur.

Mazzucco v. Board of Medical Examiners

MARY FRANCES MAZZUCCO AND GERALDINE PATTON McCLELLAND, PLAINTIFFS v. THE NORTH CAROLINA BOARD OF MEDICAL EXAMINERS, CONSISTING OF THE FOLLOWING INDIVIDUAL MEMBERS: DR. JOSEPH W. HOOPER, DR. BRYANT L. GALUSHA, DR. CORNELIUS T. PATRICK, DR. VERNON W. TAYLOR, JR., DR. FRANK EDMONDSON, DR. E. WILSON STAUB, DR. CHARLES B. WILKERSON, JR., AND MR. BRYANT D. PARIS, JR., DEFENDANTS

No. 7610SC326

(Filed 6 October 1976)

1. State § 4— action against Board of Medical Examiners — sovereign immunity

An action for defamation against the N. C. Board of Medical Examiners, an agency of the State, was properly dismissed on the ground that the defense of sovereign immunity appeared on the face of the complaint.

2. Public Officers § 9— personal liability to individuals

While no action lies against a public officer for an honest, though erroneous, exercise of his discretion, such officer may be made to respond in damages to an individual injured by a corrupt or malicious exercise of discretion.

3. Public Officers § 9; State § 4— members of Board of Medical Examiners — alleged malicious conduct — sovereign immunity

The defense of sovereign immunity was not available to individual members of the N. C. Board of Medical Examiners in a defamation action where plaintiffs alleged that the individual members acted maliciously and wantonly in defaming plaintiffs.

4. Libel and Slander § 11— absolute privilege — applicability to administrative agency

The privilege attending communications made in the course of judicial proceedings will be extended to protect communications in an administrative proceeding only where the administrative officer or agency is exercising a judicial or quasi-judicial function.

5. Libel and Slander § 11— Board of Medical Examiners — notice of charges against doctor — absolute privilege

The doctrine of absolute privilege applied to protect individual members of the N. C. Board of Medical Examiners from an action for defamation based on statements in a notice of charges against a licensed doctor accusing the doctor of conspiracy with and subornation of plaintiffs to say falsely that they had heard a newspaper reporter attempt to extort money from the doctor.

APPEAL by plaintiffs from *Clark, Judge.* Judgment entered 18 December 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 1 September 1976.

In this action for defamation against The North Carolina Board of Medical Examiners and its individual members, plaintiffs allege that the defendant Board mailed to Dr. Harold Hoke in Charlotte a notice of charges dated 20 September 1974 as follows:

> "(12) On or about November 29, 1973, he [sic] complained to the Police Department of Charlotte that Bradley Martin (an Observer reporter) had attempted to extort from you the sum of Ten Thousand Dollars ($10,000.00) in exchange for his declining to publish a news story which Martin was preparing concerning your medical practice and activities, whereas in fact and in truth, Martin had not attempted to obtain any sum of money from you, and in an effort to support your contention that Martin had attempted to extort such sums from you, you conspired with and suborned two female employees to say and testify that they heard Martin request that you pay him money in exchange for his not publishing such story."

The complaint further alleges that though plaintiffs were not named as the two employees, their identity was known because of a newspaper account published in November, 1974. Plaintiffs also allege that the statements were made "maliciously, wantonly, knowingly, and intentionally."

In their answer defendants moved to dismiss for failure of the complaint to state a cause of action. From judgment dismissing the action plaintiffs appeal.

William H. Elam for plaintiff appellants.

Smith, Anderson, Blount & Mitchell by John H. Anderson for defendant appellees.

CLARK, Judge.

The defendants' motion under G.S. 1A-1, Rule 12(b)(6) to dismiss for failure of the complaint to state a claim upon which relief can be granted will only be allowed when, under former practice, a demurrer would have been sustained because the complaint affirmatively discloses that the plaintiff had no cause of action against the defendant. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970); *Brown v. Brown*, 21 N.C. App. 435, 204 S.E. 2d 534 (1974).

The Board of Medical Examiners of the State of North Carolina was created by the General Assembly in 1859 "to properly regulate the practice of medicine and surgery." G.S. 90-2. These regulatory statutes now contained in Chap. 90, Art. 1, General Statutes of North Carolina, have been held to be a constitutional exercise of the police power of the State. *State v. Van Doran,* 109 N.C. 864, 14 S.E. 32 (1891); *State v. Call,* 121 N.C. 643, 28 S.E. 517 (1897); *State v. Siler,* 169 N.C. 314, 84 S.E. 1015 (1915); *Hoke v. Board of Medical Examiners,* 395 F. Supp. 357 (W.D. N.C. 1975).

The defendant Board was created by statute as an agency of the State. An action against an agency of the State is in fact an action against the State. *Insurance Co. v. Unemployment Compensation Comm.,* 217 N.C. 495, 8 S.E. 2d 619 (1940). It is settled law in this State that neither the State nor any of its institutions or agencies can be sued without its premission. *Insurance Co. v. Gold, Commissioner of Insurance,* 254 N.C. 168, 118 S.E. 2d 792 (1961); *Etheridge v. Graham, Comr. of Agriculture,* 14 N.C. App. 551, 188 S.E. 2d 551 (1972).

All defendants contend that the action should be dismissed because of the doctrine of sovereign immunity. Plaintiffs allege defamation, a cause of action in tort. Jurisdiction of tort claims against the State and its agencies is vested in the Industrial Commission under the Tort Claims Act, G.S. Chap. 143, Art. 31. But plaintiffs have no remedy under the Tort Claims Acts as it is applicable only to neglect acts of employees and other agents of the State. G.S. 143-291. Nor does this tort action come within the exception to the doctrine of sovereign immunity for contract actions recently announced in *Smith v. State,* 289 N.C. 303, 222 S.E. 2d 412 (1976), *affg* 23 N.C. App. 423, 209 S.E. 2d 336 (1974).

[1] We find that the action against the Board of Medical Examiners was properly dismissed on the ground that the defense of sovereign immunity appeared on the face of the complaint.

[2, 3] However, this defense cannot be applied to the individual defendants because of the allegations that they acted maliciously and wantonly. Where state officials exceed or abuse their lawful authority, and thereby violate or invade rights of others, in an action to redress these injuries, the State's immunity does not extend to them. 72 Am. Jur. 2d, States, Territories and Dependencies, § 115 (1974). No action lies against a public officer

for an honest exercise of his discretion, though erroneous, but for a corrupt or malicious exercise of discretion such officer may be made to respond in damages to an individual injured thereby. *State v. Swanson,* 223 N.C. 442, 27 S.E. 2d 122 (1943). The allegations in the complaint alleging that the individual members of the Board of Medical Examiners acted "maliciously, wantonly, knowingly and intentionally" without justification are sufficient to prevent the individual defendants from prevailing on the defense of sovereign immunity on a motion to dismiss under G.S. 1A-1, Rule 12(b)(6).

In considering a motion to dismiss for failure to state a claim upon which relief can be granted the allegations of the complaint are taken as true. *Sutton v. Duke, supra.* A claim should not be dismissed under Rule 12(b)(6) unless it appears that the plaintiff is entitled to no relief under any statement of facts which could be proved in support of the claim. *Clouse v. Motors, Inc.,* 14 N.C. App. 117, 187 S.E. 2d 398 (1972); Shuford, N. C. Civil Practice and Procedure, § 12-10 (1975).

All defendants also contend that the alleged defamatory statements are absolutely privileged. Absolute privilege attending communications made in the course of judicial proceedings was recognized at common law. *Bailey v. McGill,* 247 N.C. 286, 100 S.E. 2d 860 (1957); *Jarman v. Offutt,* 239 N.C. 468, 80 S.E. 2d 248 (1954). This common law immunity was extended to judges, prosecutors and witnesses. This absolute immunity applies only to actions for defamation and malicious prosecution, and the immunity is justified only insofar as is necessary to protect the judicial process. *Imbler v. Pachtman,* 424 U.S. 409, 44 U.S.L.W. 4250 (1976).

Judicial and prosecutorial immunity rests on the principle that if not so protected, our judicial and prosecutorial officers, even though honest and conscientious, would labor under the constant threat of civil suit and judicial proceedings would be seriously hindered. *Imbler v. Pachtman, supra; Bouligny, Inc. v. Steelworkers,* 270 N.C. 160, 154 S.E. 2d 344 (1967).

[4] The broad general principle deducible from the cases is that the privilege attending communications made in the course of judicial proceedings will be extended to protect communications in an administrative proceeding only where the administrative officer or agency, in the proceeding in question, is exercising a judicial or quasi-judicial function. Annot. 45 A.L.R. 2d

1296 (1956); 5 Strong, N. C. Index 2d, Libel and Slander, § 11 (1968).

One of the first duties of government is the protection of public health. No other object sought by governmental laws is more important. The General Assembly of North Carolina in creating and conferring regulatory power upon the Board of Medical Examiners recognized this sovereign duty and acted upon it. The public policy which supports the doctrine of absolute privilege fully supports the application of the doctrine to the Board of Medical Examiners and the individual members in the performance of their quasi-judicial statutory duties.

[5] G.S. 90-14.2 requires the Board of Medical Examiners to give to the licensee "a written notice indicating the general nature of the charges against him" before revoking, restricting, or suspending any license. This is certainly a quasi-judicial function. It is clear from the Complaint that the notice of charges containing the alleged defamatory statements was the notice required by G.S. 90-14.2. The charges included conspiracy with and subordination of two female employees to say falsely that they had heard a newspaperman attempt to extort money from the licensee. These allegations were relevant to the further charge that the licensee had falsely complained to the Police Department of Charlotte that the newspaperman had attempted to extort money from him in exchange for withholding from publication a news story relating to the licensee's medical activities. Both the false accusation about the newspaperman and the related conspiracy and subordination could constitute "unprofessional or dishonorable conduct" in violation of G.S. 90-14.

We find that the action against all defendants was properly dismissed on the ground that the defense of absolute privilege appeared on the face of the Complaint, and the judgment of the trial court is

Affirmed.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. EUGENE THOMAS

No. 7620SC252

(Filed 6 October 1976)

1. **Safecracking— opening safe by turning combination dial — conviction under safecracking statute improper**

Defendant's motion for dismissal upon a charge of safecracking under G.S. 14-89.1 should have been granted where the evidence tended to show that defendant unlawfully opened a safe, but there was no evidence that this was done by the use of explosives, drills or tools; rather, the evidence tended to show that the safe was opened simply by turning the dial on the safe combination, thereby releasing the lock and freeing the door handles so that they could be turned and the doors could be pulled open.

2. **Safecracking— charge of safecracking — use of explosives, drills, tools required for conviction**

Evidence of the use of explosives, drills or tools is essential to sustain a conviction for violation of G.S. 14-89.1, the safecracking statute.

Chief Judge BROCK concurring part and dissenting in part.

APPEAL by defendant from *Graham, Judge.* Judgments entered 29 October 1975 in Superior Court, ANSON County. Heard in the Court of Appeals 16 June 1976.

In Case No. 75CR4924 the bill of indictment charged that defendant "unlawfully and wilfully did feloniously pick the combination of a safe of Scarborough Hardware Company, a corporation, used for storing chattels, money, and other valuables." In Case No. 75CR4925 the bill of indictment charged that defendant did feloniously steal money, checks, and other personal property of Scarborough Hardware Company, having a value of more than $200.00. The cases were consolidated for trial, and defendant pled not guilty to both charges.

The State presented evidence to show the following: The office of Scarborough Hardware Company, a corporation, is located at the rear of the store and is elevated some seven feet above the floor, being reached by a stairway. In the office there is a large safe used for storing money and valuables. On 23 September 1975 the safe contained, among other valuables, a deposit book containing a $50.00 check, two $30.00 money orders, and $200.00 in cash, consisting of 10 twenty dollar bills. There were also six metal cash boxes in the safe, each of which con-

tained $100.00 petty cash. The safe had two large outer doors which were locked by a combination lock. These could be opened by turning the dial on the combination lock to the proper settings, which then made it possible to turn the door handles and pull the doors open. To open the safe after it was fully locked, it was necessary to turn the dial backwards and forwards to the correct settings for at least three operations. At night, the safe was fully locked. During the day, when it was necessary to go in and out of the safe from time to time, it was not fully locked. Instead, the dial was set in such manner that to open the safe it was only necessary that the dial be turned one-half turn back to zero.

At 2:00 p.m. on 23 September 1975 everything was in order and the safe was locked. At that time the combination lock was set so that the safe could be opened by making the correct one-half turn of the dial. At 2:00 p.m. Mr. Scarborough left the office area and went to the front of the store to wait on customers. After being away from the office for fifteen to twenty minutes, he heard a clicking noise in the vicinity of the nail bin, which was located about twenty feet from the staircase which led up to the office. On investigation, Mr. Scarborough found the defendant in the aisle near the nail bin. Defendant was on his knees astraddle one of the cash boxes and was trying to open it with a tenpenny nail. Defendant fled from the store, but was captured by the police a short time later.

After the police came, it was found that the doors to the safe had been opened, the drawers on the left hand side had been pulled out, and the deposit book which contained the $200.00 was missing. The safe was not damaged in any manner, and no burglary tools were seen around the safe. Mr. Scarborough had never before seen defendant and had not given him permission to enter the safe.

On cross-examination Mr. Scarborough testified that the closest anyone ever saw defendant to the safe "was thirty feet with a box that came out of the safe." He also testified: "I did have suspicions that someone else might have been with the defendant because three months prior five people were in the store with the same type operation, and it dawned on me since he knew how to turn the safe and get it opened, he might have been one of the five involved before. . . . "

The defendant did not present evidence. The jury found him guilty in each case, and from judgments in each case imposing concurrent prison sentences, defendant appealed.

Attorney General Edmisten by Associate Attorney Cynthia J. Zeliff for the State.

H. P. Taylor, Jr. for defendant appellant.

PARKER, Judge.

[1] In Case No. 75CR4924 defendant was tried and convicted for violation of our "safecracking" statute, G.S. 14-89.1. This statute, originally enacted by Ch. 653 of the 1961 Session Laws and subsequently amended by Ch. 235 of the 1973 Session Laws, is as follows:

> "G.S. 14-89.1. *Safecracking and safe robbery.*—Any person who shall, by the use of explosives, drills, or tools, unlawfully force open or attempt to force open or 'pick' the combination of a safe or vault used for storing money or other valuables, shall, upon conviction thereof, receive a sentence, in the discretion of the trial judge, of not less than two years nor more than 30 years imprisonment in the State penitentiary."

There was evidence in this case that defendant unlawfully opened the safe, but there was no evidence that this was done "by the use of explosives, drills, or tools." On the contrary, the only reasonable inference which may be drawn from the evidence is that the safe was opened simply by turning the dial on the combination "one-half turn back to zero," thereby releasing the lock and freeing the door handles so that they could be turned and the doors could be pulled open. The question presented is whether such evidence was sufficient to support the verdict in Case No. 75CR4924. We hold that it was not and that defendant's motion for dismissal in that case should have been allowed.

Initially, we note that when the statute, G.S. 14-89.1, is considered from the point of view of grammatical construction, the phrase "by the use of explosives, drills, or tools" qualifies all that follows in the sentence. The same is true of the word "unlawfully," as that word appears in the statute. Certainly, it seems clear that the General Assembly intended that the word "unlawfully" modify not only the phrase, "force open or attempt

to force open," but that it also modify the phrase which follows, "or 'pick' the combination of," a safe or vault. When the same normal rules of grammatical construction are applied, it seems equally clear, from the position of the words in the sentence, that the General Assembly intended the phrase, "by the use of explosives, drills, or tools," to apply to both phrases which follow. This interpretation is also supported when customary rules of statutory construction are applied. The offense described in G.S. 14-89.1 is a creature of the statute, and it is a well established rule of statutory construction that "[s]tatutes creating criminal offenses must be strictly construed." *State v. Ross,* 272 N.C. 67, 69, 157 S.E. 2d 712, 713 (1967). Strictly construed, G.S. 14-89.1 makes it a criminal offense to "pick" the combination of a safe or vault *by the use of drills or tools.* Indeed, the very word "pick," standing alone, strongly suggests the use of a tool. Used as a transitive verb with a lock as its object, the word "pick" is defined in Webster's Third New International Dictionary as meaning, "to turn (a lock) *with a wire or a pointed tool* instead of the key esp. with intent to steal." (Emphasis added.) Thus, dictionary definition, as well as application of normal rules of grammatical and statutory construction, leads to the conclusion that the statutory offense created by G.S. 14-89.1 is committed only when the acts proscribed are committed "by the use of explosives, drills, or tools." The very severity of the penalty which was authorized for a conviction of violating the statute, originally life imprisonment and now 30 years imprisonment, strongly suggests that the General Assembly did not intend the statute to apply to one who, though acting unlawfully, somehow acquires knowledge of the combination to a safe and opens it simply by turning the dial.

The State in this case has relied upon the following language which appears in the opinion in *State v. Pinyatello,* 272 N.C. 312, 314, 158 S.E. 2d 596, 597-8 (1968):

> "Construing G.S. 14-89.1, it is manifest that the statute condemns (1) the felonious opening or attempting to force open a safe or vault used for storing money or other valuables by explosives, drills, or other tools, or (2) to pick feloniously the combination of a safe or vault used for storing money or other valuables. The felonious picking of a combination of a safe or vault is a safe robbery condemned by our statute. The word 'pick' has a distinct meaning well understood by policemen, laymen, and courts alike."

In *State v. Pinyatello, supra,* the indictment charged that the defendant forced open a safe "by the use of an axe and two crowbars and other tools," and the evidence showed that the door to the safe had been torn off and that both the interior and exterior of the safe were totally demolished. The language in the opinion quoted above was directed toward the appellant's contention that the offense created by G.S. 14-89.1 could only occur if the safe opened was one which had a combination. The court rejected that contention and held the statute applicable whether or not the safe involved had a combination. The court was not called upon to decide, and did not hold, that the offense created by the statute could be committed without "the use of explosives, drills, or tools." Moreover, in making the statement that "[t]he word 'pick' has a distinct meaning well understood by policemen, laymen, and courts alike," the court did not intimate that the "well understood" meaning was different from that contained in the dictionary.

[2] G.S. 14-89.1 has been in effect since 1961. During the ensuing years our Supreme Court has had occasion to consider approximately 14 cases, and this Court approximately 10 cases, in which a violation of the statute was involved. We have carefully reviewed all of these cases and have not found one in which conviction was sustained where the evidence failed to show use of "explosives, drills, or tools." We now hold that such evidence is essential to sustain a conviction for violation of G.S. 14-89.1.

As to Case No. 75CR4925, in which defendant was convicted of felonious larceny, we find the evidence ample to sustain the verdict. We have carefully examined all of defendant's assignments of error, and find no error such as to warrant disturbing the judgment entered in that case.

The result is:

In Case 75CR4924 the judgment is vacated.

In Case 75CR4925, no error.

Judge ARNOLD concurs.

Chief Judge BROCK concurring in part and dissenting in part: I concur in the finding of no error in Case 75CR4925 (felonious larceny).

I dissent from the resolution of Case 75CR4924. The majority holding that a conviction of safecracking under G.S. 14-89.1 must be supported by evidence of the use of "explosives, drills, or tools" ascribes to the General Assembly an intent to punish for damage to the safe. In my opinion the General Assembly intended by G.S. 14-89.1 to protect the property which a person has taken the care to store and lock in a safe. The combination dial on a safe is by its nature intended to be turned by hand. Therefore, I do not think the dictionary definition of "pick," as used by the majority, can be applied to the turning of the combination dial on a safe. For this reason I think the General Assembly used the word "pick" in a sense broad enough to cover the unlawful turning of the combination dial on a safe to a position which allows the door to be opened. It is my opinion that evidence of the unlawful "picking" of a combination by turning the combination dial by hand is sufficient, without the use of "explosives, drills, or tools," to support a conviction under G.S. 14-89.1.

IN THE MATTER OF MARY LOUISE SALEM
IN THE MATTER OF CLYDE McWHIRTER
IN THE MATTER OF LEON MILES
IN THE MATTER OF AUDREY HOLT

Nos. 7626DC278, 7626DC279

7626DC280, 7626DC281

(Filed 6 October 1976)

1. Insane Persons § 1— involuntary commitment statutes — constitutionality

G.S. 122-58.1 *et seq.*, N. C.'s involuntary commitment statutes, are not unconstitutionally vague because they require that a person's imminent danger to himself or others be shown by "clear, cogent and convincing evidence" rather than by the "commission of overt acts."

2. Insane Persons § 1— involuntary commitment proceedings — evidence improperly allowed — harmless error

The trial court in four involuntary commitment proceedings did not abuse its discretion in considering respondents' prior hospitalizations, though it was error to admit evidence of prior voluntary admissions in disregard of G.S. 122-56.6; however, this error was harmless when there was other competent evidence to support the commitment.

3. Insane Persons § 1— involuntary commitment — imminent danger of respondents — no clear, cogent, convincing evidence

The trial court in two involuntary commitment proceedings erred in determining that respondents were imminently dangerous to themselves or others, since evidence that one respondent appeared "mentally unable [to] care for self & *probably* of imminent danger to self," and evidence that the other respondent appeared "unable to cope with daily living" did not amount to clear, cogent and convincing evidence of imminent danger.

APPEAL by respondents from *Black, Judge.* Judgments entered 7 November 1975 in District Court, MECKLENBURG County. Heard in the Court of Appeals 24 August 1976.

This appeal consolidates four involuntary commitment proceedings heard in the District Court. Each appeal is from an order pursuant to G.S. 122-58.7 adjudging the respondent "mentally ill" and "imminently dangerous to himself or others" and committing respondents to a mental health facility.

In the case of Mary Louise Salem the court heard the testimony of two witnesses for the State and admitted the written diagnoses and evaluations of two qualified physicians who examined Salem pursuant to G.S. 122-58.6. Evidence tended to show that Salem required medication but had thrown it away, that she demanded sexual favors from her brother and that she violently attacked her brother causing injury to him and to herself. The diagnoses and evaluations of the physicians reported that respondent was physically filthy, obscene, incoherent and loud, that she threatened her brother, and that she had sometimes become violent without cause. The doctors diagnosed her condition as an acute and chronic psychotic state and concluded that she could be dangerous to herself and to others. The court adopted the physicians' reports as its findings of fact and, in addition, noted that previously Salem had been twice voluntarily admitted and three times involuntarily committed to a mental health hospital.

In the case of Audrey Holt the court heard one witness who testified that respondent was under medical supervision and on medication. Further, the witness testified that Holt stopped taking her medicine and that "whenever she begins to get off her medication . . . she is rather belligerent . . . and begins to use profanity against her mother and then she begins to push and shove." The witness also testified that Holt threatened to kill her mother, but the time when this threat occurred

was sometime after 1970 and not within the two months preceding the hearing. The witness also testified that Holt was unemployed but received income from the Social Security Administration. The court also admitted two physicians' reports, one of which included the allegations of Holt's family that she was violent and hostile toward her mother. The doctors diagnosed her condition as paranoid schizophrenia. One doctor reiterated that she was very paranoid. The court incorporated the physicians' statements as its findings of fact, and noted that Holt had on four previous occasions been admitted to a hospital for the mentally ill.

In the case of Clyde McWhirter no witnesses appeared. The evidence consisted of two physicians reports similar to those introduced in the other hearings. One report described McWhirter as cooperative and well mannered but confused, talkative, and impaired in his judgment and reasoning. The other physician noted that McWhirter was old, confused and lacking in judgment and control, but that he also was friendly and put up a pleasant joking front. The doctor concluded that McWhirter "appears mentally unable [to] care for self & probably of imminent danger to self." Both doctors identified McWhirter's condition as chronic brain syndrome. The District Court adopted these reports as its findings of fact. In addition the court noted seven prior instances of voluntary admission to hospitals.

In the case of Leon Miles doctors' reports were admitted which said that Miles was disoriented, confused and irrational but well behaved. Further, the reports said he was apathetic, unwilling to work, vaguely hostile and paranoid toward everyone. One doctor definitely diagnosed the condition as schizophrenia. The other doctor was less certain, writing only "Acute & Chronic Psychotic state? Schizophrenia?" Once again, the judge incorporated the findings of the doctors as his own and noted three prior voluntary admissions.

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

Assistant Public Defender James Fitzgerald for Clyde McWhirter, Leon Miles, Audrey Holt and Mary Louise Salem, respondent appellants.

ARNOLD, Judge.

Under the statute as it existed prior to June 1974 a person could be involuntarily committed when determined "by reason

of the commission of overt acts [that] the person is violent and of imminent danger to himself or others, or is gravely disabled." [G.S. 122-58.6(a) (1973)] The present statute 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." G.S. 122-58.7(i).

[1] Respondents assert the unconstitutionality of North Carolina's involuntary commitment statutes, G.S. 122-58.1 et seq. The difference in the present law and the old is that the requirement of "overt acts" under the former law has been replaced by a requirement of "clear, cogent and convincing evidence." Respondents argue that the definitions of "mental illness" and "inebriety" found in G.S. 122-36 are vague and arbitrary unless read in conjunction with a requirement that "imminent danger" be shown or evidenced by some "overt act."

In support of their position that some overt act is required in order for an involuntary commitment to be constitutional respondents cite *Lessard v. Schmidt,* 349 F. Supp. 1078 (1972). That case holds that "imminent danger," as used in Wisconsin's involuntary commitment act, implicitly requires "a finding of a recent overt act, attempt or threat to do substantial harm to oneself or another," and without making such findings there can be no involuntary commitment.

G.S. 122-58.2 provides that the definition of mental illness under Chap. 122, Art. 5A means "mental illness" as defined in G.S. 122-36(d), which is as follows:

> "The words 'mental illness' shall mean an illness which so lessens the capacity of the person to use his customary self-control, judgment, and discretion in the conduct of his affairs, and social relations as to make it necessary or advisable for him to be under treatment, care, supervision, guidance, or control. The words 'mentally ill' shall mean a person with a mental illness."

The definition of mental illness in G.S. 122-36(d) is certainly capable of being understood and objectively applied with the help of medical experts. In a recent case attacking the constitutionality of the statutory procedure for sterilization of mentally ill persons our Supreme Court held that "mental illness" as defined by G.S. 35-1.1 was not vague and arbitrary.

In re Moore, 289 N.C. 95, 221 S.E. 2d 307 (1976). The definition contained in G.S. 35-1.1 is virtually the same definition contained in G.S. 122-36(d).

The words "imminently dangerous" simply mean that a person poses a danger to himself or others in the immediate future. An overt act may be clear, cogent and convincing evidence which will support a finding of imminent danger, but we cannot agree that there must be an overt act to establish imminent dangerousness.

We hold that G.S. 122-58.1 et seq., and the related definition of mental illness, is not unconstitutionally vague.

[2] Respondents next contend that the trial court abused its discretion by indiscriminately considering their prior hospitalizations. We find no abuse of discretion. The State, however, concedes that it was error to admit evidence of prior voluntary admissions in disregard to G.S. 122-56.6, but contends that the error is harmless where there is other competent evidence to support the commitment. We agree.

[3] We now consider respondent's assignments of error to the court's finding of mental illness and imminent danger to self or others. Respondents McWhirter and Miles argue that there is no evidence to support this finding.

The district court must make separate and distinct findings of (1) mental illness and/or inebriacy and (2) imminent danger to self or others. We see no problem in the cases before us relating to the finding of mental illness. There is clear, cogent and convincing evidence of mental illness in the case of McWhirter and in the case of Miles. However, we agree with both respondents' contentions that there is not clear, cogent and convincing evidence to support a finding of imminent danger.

In the case of Clyde McWhirter the only evidence tending to show dangerousness was provided by a doctor who indicated that McWhirter "appears mentally unable [to] care for self & *probably* of imminent danger to self." [Emphasis added.] Such evidence is not clear, cogent and convincing.

In the case of Leon Miles the doctor's affidavit stated that Miles "appears unable to cope with daily living." Again the evidence fails to present clear, cogent and convincing evidence of imminent danger.

Respondents Holt and Salem set out no reasons or arguments in support of their assignments of error to the court's findings of mental illness and imminent danger. These assignments of error are therefore taken as abandoned. Rule 28(b)(3), Rules of Practice in the Court of Appeals. *Higgins v. Builders and Finance, Inc.*, 20 N.C. App. 1, 200 S.E. 2d 397 (1973).

As to respondents McWhirter and Miles the judgment is vacated. As to respondents Holt and Salem the judgment is affirmed.

Affirmed in part and vacated in part.

Chief Judge BROCK and Judge PARKER concur.

FORMAN & ZUCKERMAN, P.A. v. DONALD SCHUPAK, ERIC D. ROSENFELD, AND PETER D. FISCHBEIN, INDIVIDUALLY, AND PARTNERS TRADING AS SCHUPAK, ROSENFELD AND FISCHBEIN

No. 7618SC308

(Filed 6 October 1976)

1. **Process § 9; Rules of Civil Procedure § 4— nonresident defendant — contract to be performed in N. C. — in personam jurisdiction**

Defendants, who were attorneys practicing in N. Y., were subject to the *in personam* jurisdiction of the courts of this State if they promised to pay for legal services to be rendered by plaintiff or if those services were actually performed for defendants with their authorization or ratification, and defendants' contention that they, as attorneys, were acting solely in their representative capacity and that their client was the party responsible for payment to plaintiff is without merit. G.S. 1-75.4(5)a. and b.

2. **Constitutional Law § 24; Process § 9; Rules of Civil Procedure § 4— nonresident defendant — minimum contacts with N. C. — exercise of in personam jurisdiction proper**

Where defendants sought out plaintiff to assist them in performance of professional services for one of their clients by handling litigation in courts located in N. C., defendants supervised the work product of plaintiff, and on at least three occasions one of the defendants came to N. C. where he attended hearings and otherwise directly participated in the legal services being performed, defendants through their course of conduct had sufficient minimum contacts with N. C. to give the N. C. courts *in personam* jurisdiction over them without offending traditional notions of fair play and substantial justice.

Forman & Zuckerman v. Schupak

APPEAL by defendants from order of *Wood, Judge.* Order entered 30 January 1976 in Superior Court, GUILFORD County. Heard in the Court of Appeals 26 August 1976.

On 6 October 1975, plaintiff commenced this action against individuals defendants, who are attorneys licensed to practice in the State of New York, and their partnership, to recover attorney fees for services allegedly performed for defendants. All defendants were served in New York City by mail. On 6 November 1975, defendants appeared *pro se* and moved to dismiss the action on the grounds that the North Carolina courts did not have in personam jurisdiction over them. Both parties supplied briefs and affidavits and submitted the motion to the Superior Court without oral argument.

Plaintiff's evidence tended to show that in August 1974, defendants retained plaintiff law firm to perform legal services in cases then pending in United States District Court for the Middle District of North Carolina and in the United States Court of Appeals for the Fourth Circuit; that these services involved litigation between The Munchak Corporation (hereinafter called "Munchak"), a client of defendants, and William John Cunningham, a professional basketball player; that plaintiff's representation of Munchak continued through 19 December 1974; that during the entire period of representation, defendants solely directed all phases of the services performed and aided in the determination of what services were to be performed; that all motions, pleadings, briefs and responses were reviewed by defendants; that the work product resulting from plaintiff's services was approved and ratified by defendants; that on three separate occasions, defendant Peter D. Fischbein came into and remained in North Carolina, where he actively participated in the performance of legal services with plaintiff and attended hearings in this State; that all statements for plaintiff's services and costs were mailed to defendants pursuant to defendants' instructions; that on 3 September 1974, defendants paid to plaintiff the sum of $2,293.50 by a check drawn on the partnership account and thereafter caused a Form 1099 to be filed with the Internal Revenue Service evidencing that defendants had in fact paid said sum and a copy of that form was attached to the affidavit as an exhibit; that all legal services were performed at the express request of the defendants and no other person, firm or corporation; and that following partial payment by defendants, plaintiff is still entitled to

the sum of $5,734.62 representing the balance due for services performed.

Defendants' evidence tended to show that Munchak needed North Carolina counsel to represent it in certain litigation; that Munchak asked defendants to retain North Carolina counsel; that defendants contacted plaintiff and requested representation in said litigation; that plaintiff accepted the engagement and agreed to bill Munchak in care of the defendants' address; that plaintiff did in fact send its statement to Munchak, care of defendants' address; that Munchak had advanced monies in 1974 to defendants, who in turn forwarded $2,293.50 to plaintiff for services rendered; that at no time did defendants ever promise to pay plaintiff for services performed for Munchak; and that plaintiff knew at all times that defendants were not responsible for fees for plaintiff's services.

On 30 January 1976, defendants' motion was denied by order of Wood, Judge, in Guilford County Superior Court. Defendants appeal from that order.

Forman & Zuckerman, P.A., by William Zuckerman, for plaintiff appellee.

Schupak, Rosenfeld and Fischbein, by Peter D. Fischbein, appearing pro se *and for defendant appellants.*

MORRIS, Judge.

[1] Defendants contend that their activity does not bring them within the scope of G.S. 1-75.4, one of North Carolina's so-called "long arm" statutes. We disagree.

G.S. 1-75.4 sets forth the general grounds for personal jurisdiction by the courts of North Carolina over a nonresident defendant and reads in pertinent part:

> "A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j) of the Rules of Civil Procedure under any of the following circumstances:
>
> . . .
>
> (5) Local Services, Goods or Contracts.—In any action which:
>
> a. *Arises out of a promise, made anywhere to the plaintiff* or to some third party for the plaintiff's benefit, *by*

> *the defendant* to perform services within this State or *to pay for services to be performed in this State by the plaintiff; or*
>
> b. *Arises out of* services actually performed for the plaintiff by the defendant within this State, or *services actually performed for the defendant by the plaintiff within this State if such performance was authorized or ratified by the defendant. . . .* " (Emphasis supplied.)

Thus, if defendants promised to pay for plaintiff's services or if these services were actually performed for defendants with their authorization or ratification, the provisions of G.S. 1-75.4 would apply, and defendants would be subject to the in personam jurisdiction of the courts of this State. Defendants, however, deny that they requested or promised to pay for plaintiff's services and that services were performed *for them.* In other words, defendants maintain that they, as attornevs, were acting solely in their representative capacity and that their client was the party responsible for payment to plaintiff. We cannot agree.

In *Burt v. Gahan,* 351 Mass. 340, 220 N.E. 2d 817 (1966), a partnership of stenographic reporters employed to transcribe a pre-trial hearing sued the attorney personally to recover for services rendered. The issue was whether the attorney could be held responsible for such services ordered by him but without explicit agreement as to payment. In holding the attorney personally liable for these costs, the Court stated that

> "While in a broad sense counsel may be an agent and his client a principal there is much more involved than mere agency. The relationship of attorney and client is paramount, and is subject to established professional standards. In short, the attorney, and not his client, is in charge of litigation, and is so recognized by the court.
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> . . .
>
> We therefore deem the just and equitable rule of law thus established to be that, in the absence of express notice to the contrary, court officials and persons connected, either directly or indirectly, with the progress of litigation, may safely regard themselves as dealing with attorney, instead of with the client." 351 Mass. at 342-43, 220 N.E. 2d at 818-19.

We also find the case of *Meany v. Rosenberg,* 28 Misc. 520, 59 N.Y.S. 582 (1899), to be particularly enlightening on this point. In *Meany,* plaintiff's assignor was a Washington, D. C., attorney who was hired by defendant, a New York attorney, to defend one of defendant's clients in a lawsuit brought in Washington. The New York court held that an attorney, employed directly by another lawyer to defend a case for the latter's client, may recover for such services from the lawyer, even though the client would also have been liable. See also *Morris v. Silver,* 312 Ill. App. 472, 38 N.E. 2d 840 (1942). Applying these rules to the case now before us, we are of the opinion that plaintiff's claim arose out of a promise *made by the defendants* and involved services actually *performed for the defendants* which they authorized and ratified. Consequently, the contract between these parties falls within the provisions of G.S. 1-75.4(5)a. and b.

[2] Defendants nonetheless contend that even if their activity comes within G.S. 1-75.4, application of that statute to them in this instant violates the due process requirements guaranteed by the United States Constitution. Again, we disagree. The constitutional limitation on the power of a court to acquire in personam jurisdiction over a nonresident defendant was set out in the landmark case of *International Shoe Co. v. Washington,* 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945), where it was held that "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 minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'." 326 U.S. at 316, 90 L.Ed. at 102, 66 S.Ct. at 158. Provisions of the North Carolina long arm statutes represent a legislative attempt to assert in personam jurisdiction to the full extent permitted by the due process clause. *First-Citizens Bank & Trust Co. v. McDaniel,* 18 N.C. App. 644, 197 S.E. 2d 556 (1973). Here, defendants sought out plaintiff to assist them in performance of professional services for one of their clients by handling litigation in courts located in North Carolina; defendants supervised the work product of plaintiff; on at least three occasions, one of the defendants came to North Carolina where he attended hearings and otherwise directly participated in the legal services being performed. We believe that defendants, through their course of conduct, had sufficient minimum con-

tacts with North Carolina and that this lawsuit "does not offend 'traditional notions of fair play and substantial justice.'" The order is

Affirmed.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. JOHNNY OTIS HARDY

No. 7621SC286

(Filed 6 October 1976)

Arrest and Bail § 3; Searches and Seizures § 1— warrantless arrest — probable cause — search incident to arrest

An officer had probable cause to believe that defendant had committed a criminal offense in the officer's presence and that defendant had committed the felony of possessing LSD, and the officer's arrest of defendant without a warrant was lawful, where the officer received information from an informant whose reliability he did not know that someone was dealing in drugs at a certain location; the officer directed a second informant, who had previously furnished reliable information, to go to the location to find additional information; the second informant told the officer that a described person was at that time at the location engaged in selling LSD; the officer went to the scene accompanied by another officer and there found defendant, dressed in the manner described by the second informant; the officers observed defendant for several minutes, during which time his actions were consistent with the activity of selling LSD; and when the officers approached, defendant started walking rapidly away. Consequently, the officer's search of defendant incident to the arrest was lawful, and defendant's motion to suppress LSD and marijuana found during the search was properly denied.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 19 January 1976 in Superior Court, FORSYTH County. Heard in the Court of Appeals 24 August 1976.

Defendant was indicted for felonious possession of LSD. His motion to suppress all evidence obtained by a warrantless search of his person was denied. Defendant pled guilty and now appeals from judgment sentencing him to prison.

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

Stephens, Peed & Walker by Herman L. Stephens for defendant appellant.

PARKER, Judge.

By this appeal defendant contests the validity of the order denying his motion to suppress evidence. Appellate review is authorized by G.S. 15A-979(b).

At the voir dire hearing held on defendant's motion, the State presented the testimony of R. S. Inscore, a narcotics investigator for the City of Winston-Salem. Inscore testified he received information by telephone from an informer, with whom he had talked in the past but whose reliability he did not know, that a man called "Johnny" was dealing in drugs in the sixteen hundred block of North Liberty Street. Based on this information Officer Inscore contacted a second informer, gave him the information he had received from the first informant, and directed him to go to the sixteen hundred block of North Liberty Street to find additional information. The second informer was a person with whom Officer Inscore talked two or three times a week, and every time this informer had given information Inscore had "checked it and found it to be totally true and accurate." At 10:45 p.m. on 13 November 1975, about three hours after Officer Inscore had sent the second informer on his mission, the second informer phoned Inscore back and told him that "a black male with a blue and orange toboggan and a brown leather jacket was in front of Verdie's Grill selling LSD." Officer Inscore and Sergeant Tise then drove to a location near Verdie's Grill, arriving there ten or fifteen minutes after receiving the telephone call from the second informant. As a narcotics investigator, Officer Inscore knew the area in and around Verdie's Grill to be "probably the hottest place in town to buy drugs." Upon arriving in the area, Inscore observed a man wearing the toboggan hat and leather jacket described to him by the second informant. Officer Inscore recognized the man from the description given him, but he did not know the defendant and had never before met him. The defendant was standing in front of Verdie's Grill, and two or three other black males were standing next to him. The officer could see their hands moving, but could not say there was anything in their hands. After observing for five or ten minutes, Inscore got out of the car. As he did so, the defendant turned and started walking rapidly down Liberty Street. Officer Inscore hollered for the defendant to stop. Inscore testified, "He (the defendant) did not break into a run because I grabbed him." Inscore identified himself, and told defendant he had received

information that defendant possessed LSD. The officers then searched defendant and found in the front of his jacket a brown paper bag which contained eight envelopes of marijuana and a plastic vial which contained forty-two foil wrapped packages of what was later determined to be LSD.

Defendant offered no evidence at the voir dire hearing. The court entered an order finding that Officer Inscore had probable cause to stop and search defendant and that the search did not violate any of defendant's constitutional rights. Accordingly, the court denied defendant's motion to suppress the evidence. The validity of this ruling is the only question presented by this appeal. We find no error in the court's ruling.

"A police officer may search the person of one whom he has lawfully arrested as an incident of such arrest. . . . In the course of such search, the officer may lawfully take from the person arrested any property which such person has about him and which is connected with the crime charged or which may be required as evidence thereof. If such article is otherwise competent, it may properly be introduced in evidence by the State." *State v. Roberts*, 276 N.C. 98, 102, 171 S.E. 2d 440, 443 (1970). The question thus becomes whether the warrantless arrest of defendant was lawful under all of the circumstances disclosed by the evidence in this case. We hold that it was.

An officer may arrest without a warrant any person who the officer has probable cause to believe (1) has committed a criminal offense in the officer's presence, or (2) has committed a felony. G.S. 15A-401(b). The evidence in the present case supports the conclusion that Officer Inscore had probable cause to believe both that defendant had committed a criminal offense in the officer's presence and that defendant had committed a felony. Probable cause to believe either would have sufficed to make the warrantless arrest lawful.

"Probable cause and 'reasonable ground to believe' are substantially equivalent terms." *State v. Harris*, 279 N.C. 307, 311, 182 S.E. 2d 364, 367 (1971). The reasonable ground for belief, which is an element of the officer's right to arrest without a warrant, "may be based upon information given to the officer by another, the source of such information being reasonably reliable. Upon this question it is immaterial that such information, being hearsay, is not, itself, competent in evidence

at the trial of the person arrested." *State v. Roberts, supra* at 107.

In the present case, the first information coming to the officer was from an informant whose reliability he did not know. Quite properly the officer did not rely on that information to make an arrest. Instead, he used the information solely as the basis for making a further investigation. He did this initially by seeking and obtaining the assistance of an undercover informant who, on previous contacts, had consistently furnished him information which, when checked, was found to be "totally true and accurate." When he received information from this informant of known reliability that a described person was at that time at a particular location engaged in selling LSD, he went to the scene accompanied by another officer. There they found the defendant, dressed in the manner described by the second informant. The officers observed the defendant for several minutes, during which time his actions were consistent with the activity of selling LSD. When the officers approached, defendant started walking rapidly away. Thus, the officer's own observations and defendant's activities in the officer's presence served to verify the information furnished by the reliable informant.

Lysergic acid diethylamide (LSD) is a Schedule I controlled substance. G.S. 90-89(c). Except as authorized by Article 5 of G.S. Ch. 90, possession of LSD is a felony. G.S. 90-95(d)(1). In our opinion, and we so hold, under all of the circumstances disclosed by the record in this case, the officer had probable cause to believe that defendant committed the felony of possessing LSD. Under G.S. 15A-401(b) it was lawful for the officer to arrest the defendant without a warrant. There was no violation of defendant's Fourth Amendment rights. *See United States v. Watson*, 423 U.S. 411, 46 L.Ed. 2d 598, 96 S.Ct. 820 (1976).

Affirmed.

Chief Judge BROCK and Judge ARNOLD concur.

WILLIAM THOMAS MITCHELL AND BRENDA L. MITCHELL AND DAVID LEE HOWELL AND JUDITH H. HOWELL v. CITY OF HIGH POINT, A MUNICIPAL CORPORATION

No. 7618SC176

(Filed 6 October 1976)

Municipal Corporations § 20— flooding of creek during rainfall — creek not part of city drainage system

In an action to recover for damages to plaintiff's property caused by flooding during a rainstorm resulting from defendant's alleged negligence in failing to maintain its drainage system in good condition, the trial court erred in admitting evidence as to the condition of those portions of a creek bed located on private property and in instructing the jury that defendant had adopted the creek as part of its drainage system, since defendant did not "adopt" the stream by virtue of the fact that drainage from the defendant's streets entered the creek, there was no evidence that defendant augmented the flow in the creek to the point of overloading the stream or causing an overflow, and controlling and maintaining culverts at the intersection of two streets did not mean that defendant "adopted" the stream nor did it constitute a dedication of a private stream to public use.

APPEAL by defendant from *Walker, Judge.* Judgment entered 24 October 1975, Superior Court, GUILFORD County. Heard in the Court of Appeals 28 May 1976.

Plaintiffs alleged in their complaint that they owned property in the City of High Point which was flooded and heavily damaged during a rainstorm because of defendant's negligence in failing to maintain its drainage system in good condition.

Plaintiffs' evidence tended to show that a creek flows more or less north and south in the City of High Point, passing through culverts under Cedrow Drive and farther downstream through culverts under the Southern Railway. The two culverts under Cedrow Drive are maintained by defendant and are circular with a diameter of 80 inches. The two culverts under the railroad are maintained by the railroad and are rectangular, measuring about 30 by 50 inches at each end. Plaintiffs' homes are near the creek a short distance upstream from Cedrow Drive. On 17 July 1973 there was a heavy rainfall and water backed up behind the culverts at Cedrow Drive and flooded plaintiffs' homes. The water reached a level higher than Cedrow Drive, and it flowed over Cedrow Drive. After the flood waters

receded, it was found that there was a great deal of debris in and around the Cedrow Drive culverts and the railroad culverts. One of the Cedrow Drive culverts was partially obstructed with a large quantity of silt and sand. Before and after the flood the creek bed was overgrown with vegetation, and there were trees growing in the creek and sandbars that had accumulated in the creek bed. Prior to the flood, construction work was in progress on Manor Drive, a street located near the creek, and curbs and gutters were being installed.

Defendant offered evidence tending to show that the flood was caused by the extremely heavy volume of rainfall on 17 July 1973 and the inadequate size of the railroad culverts. After the flood waters had subsided there were cross-ties, leaves, limbs and logs found in the intake side of the two box culverts lying under the Southern Railway tracks.

The jury found that plaintiffs were injured as a result of defendant's negligence, and plaintiffs Mitchell were entitled to damages of $3,800 while plaintiffs Howell were entitled to damages of $1,000. Judgment was entered accordingly and defendant appealed.

Floyd & Baker, by Walter W. Baker, Jr., for plaintiffs.

Henson & Donahue, by Daniel W. Donahue and Ronald G. Baker, for defendant.

MARTIN, Judge.

By defendant's eighth argument it contends the court erred in admitting evidence as to the condition of those portions of the creek bed located on private property and in instructing the jury that defendant had adopted the creek as part of its drainage system. We think the assignment has merit.

It was stipulated and agreed by the parties that:

"(a) All the culverts, drainage ditches and stream beds lying between Orville Drive to the northwest and the Southern Railway track to the southeast were present when the area was annexed by the City of High Point in 1960.

(b) That all property lying along the drainage ditch or stream bed between Orville Drive and the Southern Railway tracks is privately owned with the exception of that por-

tion of the property which lies within the City of High Point's 30 foot right-of-way to each side of the center line of Cedrow Street.

(c) That the twin-pipe culvert located near the intersection of Cedrow Street and Manor Drive is controlled, inspected and maintained by the City of High Point and lies within the City's street right-of-way.

(d) That the double-barrel culvert lying under the Southern Railway tracks is controlled, inspected and maintained by the Southern Railway and lies within the railroad's 100 foot right-of-way.

(e) That William Thomas Mitchell and Brenda L. Mitchell are the owners or are in possession of certain real property located at 603 Manor Drive, High Point, Guilford County, North Carolina.

(f) That David Lee Howell and Judith H. Howell are the owners or are in possession of certain real property located at 703 Manor Drive, High Point, Guilford County, North Carolina."

Plaintiffs contend that defendant had "adopted" the natural waterway in question such that it had a duty to inspect and maintain it. They contend that by virtue of the fact that drainage from the defendant's streets entered the natural waterway in question, the defendant thereby "adopted" the stream. In *Eller v. Greensboro,* 190 N.C. 715, 718, 130 S.E. 851, 852 (1925) the Court quoted with approval the following language from *Yowmans v. Hendersonville,* 175 N.C. 575, 96 S.E. 45 (1918):

" 'The right to change the grade of the streets and improve the same, according to modern and generally approved methods, passed to the municipality in the original dedication and may be exercised by the authorities as the good of the public may require. It is held in this jurisdiction, however, that the right referred to is not absolute, but is on condition that the same is exercised with proper skill and caution, and if, in a given case, or as it may affect the property of some abutting owner, there is a breach of duty in this respect, causing damage, the municipality may be held responsible. . . . It is very generally held here and elsewhere that while municipal authorities may pave and

grade their streets and are not ordinarily liable for an increase of surface water naturally falling on the lands of a private owner, where the work is properly done, they are not allowed, from this or other cause, to concentrate and gather such waters into artificial drains and throw them on the lands of an individual owner in such manner and volume as to cause substantial injury to the same.' . . ."

The Court in *Eller v. Greensboro, supra* at 720, 130 S.E. at 853 went on to say:

". . . The city can only be liable for negligence in not exercising skill and caution in the construction of its artificial drains and watercourses. It is bound to exercise ordinary care and prudence. If they are so constructed as to collect and concentrate surface water that such an unnatural flow in manner, volume and mass is turned and diverted onto the lower lot, so as to cause substantial injury, the city is liable."

There is no evidence that the City augmented the flow of water to the point of overloading the stream or causing an overflow.

Controlling and maintaining culverts at the intersection of Cedrow and Manor Drive does not mean that the City adopted the stream nor did it constitute a dedication of a private stream to public use.

In *Johnson v. Winston-Salem,* 239 N.C. 697, 707, 81 S.E. 2d 153, 160 (1954) it was stated that:

". . . [T]he general rule is that a municipality becomes responsible for maintenance, and liable for injuries resulting from a want of due care in respect to upkeep of drains and culverts constructed by third persons when, and only when, they are adopted as a part of its drainage system, or the municipality assumes control and management thereof. (Citations omitted.) Accordingly, there is no municipal responsibility for maintenance and upkeep of drains and culverts constructed by third persons for their own convenience and the better enjoyment of their property unless such facilities be accepted or controlled in some legal manner by the municipality. (Citations omitted.) . . . Moreover, the fact that a private line of drainage is connected with a municipal culvert under circumstances involving no

dedication by the private owner or control by the municipality, ordinarily does not make the latter liable for damages to private property caused by a break in the private line. (Citations omitted.)"

Except for those portions of the stream bed in the defendant's street right-of-way the plaintiffs have failed to show that the defendant exercised legal control and management of the stream bed or adopted it in any manner. That being so, the court erred in charging the jury that the defendant "adopted" the stream bed. Further, since the defendant had not adopted any portion of the stream and had no duty with respect to any of the stream bed which was not within its streets' rights-of-way, evidence of the condition of the stream bed outside of the right-of-way was inadmissible and the trial court committed error in admitting such evidence. The admission of incompetent evidence and the related portion of the charge constituted prejudicial error, necessitating a new trial.

Since the other challenged rulings may not recur on the retrial of the cause, we omit consideration of same.

New trial.

Judges VAUGHN and CLARK concur.

E. HENRY CONRAD; BERNHARD CONRAD EMBROIDERY CO.; A. B. EMBLEM CORP.; CHENEY BIGELOW, INC., AND NEW-FOUND INDUSTRIES, A DIVISION OF SHAW INDUSTRIES, INC. v. RILEY L. JONES AND MARY E. JONES; CRAIG L. JONES AND ELAINE H. JONES; AND LATTIE L. JONES, JR., AND MRS. LATTIE L. JONES, JR.

No. 7628SC320

(Filed 6 October 1976)

1. Injunctions § 7— continuing trespass — permanent injunction

Equitable relief in the form of a permanent injunction is the proper remedy in cases of continuing trespass in order to avoid a multiplicity of actions at law for damages.

2. Injunctions § 7— injunction against use of sewer line — ownership of line — necessity for findings

In an action for an injunction directing defendants to disconnect their sewer line from an eight-inch sewer line allegedly owned by

plaintiffs and restraining defendants permanently from reconnecting their sewer line to plaintiffs' sewer line, the trial court erred in failing to make findings of fact as to the nature and extent of plaintiffs' interest in the eight-inch sewer line since, without such findings, the court could not properly determine whether plaintiffs were entitled to a permanent injunction against defendants' alleged continuing trespass.

APPEAL by plaintiffs E. Henry Conrad, Bernhard Conrad Embroidery Co., and A. B. Emblem Corp., from *Martin, Judge (Harry C.)*. Judgment entered 15 January 1976 in Superior Court, BUNCOMBE County. Heard in Court of Appeals 31 August 1976.

This is a civil action wherein the plaintiffs seek to have the court issue a mandatory injunction directing the defendants to disconnect a sewer line constructed by them from an eight-inch sewer line allegedly owned by the plaintiff, E. Henry Conrad, and a permanent injunction restraining the defendants from reconnecting their sewer line to the plaintiff's sewer line.

The evidence offered at trial without a jury tends to show the following:

On 7 January 1963 plaintiff, E. Henry Conrad, contracted with Southeastern Construction Co. (Southeastern) to construct a manufacturing plant for him on property owned by Southeastern in Buncombe County. The original specifications in the contract required Southeastern to construct a septic tank or a subsurface absorption waste disposal system, but due to regulations of the State of North Carolina a sewer line system of waste disposal was necessitated in substitution.

Southeastern did construct a sewer line that includes a six-inch line running from the plant to a point near the western margin of US Business 19-23 where it ties into the eight-inch line which runs northwardly along the right-of-way of US Business 19-23 approximately 3,150 feet where it ties into the sewer system of Weaverville, North Carolina. Southeastern had obtained on 21 July 1963 the approval of the North Carolina State Highway Commission to encroach on the Commission's right-of-way to lay the eight-inch sewer line.

By deed dated 26 August 1963 Southeastern conveyed by metes and bounds the land and building served by the sewer line together with "all appurtenances thereto belonging" to plaintiff Conrad. Prior to April 1973 all the corporate plain-

tiffs had tapped onto the eight-inch sewer line with the express permission of plaintiff Conrad.

Defendants own certain real property south of plaintiff Conrad's premises and south of the sewer line constructed by Southeastern. On 11 September 1972 defendants obtained approval from the North Carolina State Highway Commission to encroach on the Commission's right-of-way northwardly along US Business 19-23 to install an eight-inch sewer line to the beginning point of the then existing eight-inch line constructed by Southeastern. On 14 April 1973 defendants connected their line to the line constructed by Southeastern. By quitclaim deed dated 11 July 1973 Southeastern conveyed to defendants Lottie L. Jones and Riley L. Jones all of its right, title and interest in and to the eight-inch sewer line constructed by it.

Based upon a conservative estimate of the capacity of the eight-inch sewer line, the peak hourly flow to which the line is subjected by its combined use by plaintiffs and defendants is only twelve and one-half (12.5%) per cent of its capacity.

The court made findings of fact with regard to plaintiffs' claim, including detailed findings as to the capacity and usage of the sewer line, and concluded the following:

> "There was no evidence adduced at the trial of this matter which would support the invocation by the Court of its equitable powers and the plaintiffs are not entitled to the equitable relief prayed for in their complaint."

From an order denying plaintiffs injunctive relief, plaintiffs E. Henry Conrad, Bernhard Conrad Embroidery Co. and A. B. Emblem Corp. appealed.

Riddle and Shackelford by John E. Shackelford for plaintiff-appellants.

Bruce A. Elmore by John A. Powell for defendant appellees.

HEDRICK, Judge.

Plaintiffs contend the court erred in not determining who had title to the eight-inch sewer line. They base their contention upon the court's failure to make any finding or conclusion

as to what interest, if any, they have in the sewer line, and the court's following announcement:

> "[I]t was not necessary for the Court to decide the question of title to the sewer line built by Southeastern in order to resolve this case. That without deciding the question of title with respect to the sewer line, the one built by Southeastern, but assuming that the plaintiff is the owner of it, the plaintiff has failed to produce evidence sufficient to support their prayer for equitable relief in the form of a mandatory injunction or otherwise."

[1] From the findings of fact, conclusions of law, judgment, and the announcement quoted above, it appears that the trial judge believed that the court had no authority to grant equitable relief unless the plaintiffs offered evidence of irreparable injury. However, plaintiffs' claim is based upon "continuing trespass," and equitable relief in the form of a permanent injunction is the proper remedy in such cases in order to avoid a mu'tiplicity of actions at law for damages. *Young v. Pittman,* 224 N.C. 175, 29 S.E. 2d 551 (1944); *Collins v. Freeland,* 12 N.C. App. 560, 183 S.E. 2d 831 (1971); 47 N.C. L. Rev. 334, 359 (1969); Annot., 60 A.L.R. 2d 310 (1958); Annot., 76 A.L.R. 2d 1329 (1961) (injunction for unauthorized use of sewer line).

[2] Obviously there can be no determination as to whether the plaintiffs are entitled to equitable relief until there has been a finding as to the nature and extent of plaintiffs' interest in the eight-inch sewer line. At trial plaintiffs offered evidence tending to show that the property served by the sewer line, together with "all appurtenances thereto belonging" was conveyed to Conrad by Southeastern by deed dated 26 August 1963; yet, the court made no finding regarding this conveyance. Whatever interest or title plaintiffs have in the sewer line was derived from Southeastern by this conveyance.

In all actions tried without a jury it is the duty of the trial judge to find the facts specially, state separately its conclusions of law, and enter the appropriate judgment. G.S. 1A-1, Rule 52(a)(1). It is also the duty of the trial judge to make findings of fact determinative of the issues raised by the pleadings and the evidence. *McCormick v. Proctor,* 217 N.C. 23, 6 S.E. 2d 870 (1940); *Dunn v. Wilson,* 210 N.C. 493, 187 S.E. 802 (1936); *Lawing v. Jaynes* and *Lawing v. McLean,* 20 N.C. App. 528,

202 S.E. 2d 334 (1974); Modified on other grounds, 285 N.C. 418, 206 S.E. 2d 162 (1974); *Peoples v. Peoples*, 10 N.C. App. 402, 179 S.E. 2d 138 (1971); 1 Strong, N. C. Index 3d, Appeal and Error, § 57, p. 340.

In our opinion, the trial court erred in not making findings of fact sufficient to determine what interest, if any, plaintiffs have in the sewer line. Until such findings are made, the court cannot determine whether plaintiffs are entitled to a permanent injunction against the alleged continuing trespass.

For the reasons stated the judgment appealed from is vacated and the cause is remanded to the superior court for a new trial.

Error and remanded.

Judges BRITT and MARTIN concur.

ETHEL M. WIGGINS AND RUBY M. COLE v. HARRY TAYLOR

No. 763SC332

(Filed 6 October 1976)

1. **Adverse Possession § 25— known and visible boundaries — sufficiency of evidence**

In an action by plaintiffs to have themselves declared owners of and entitled to possession of a particularly described tract of land, evidence was sufficient to support a finding that plaintiffs held the land in question under known and visible boundaries continuously for more than twenty years where such evidence tended to show that three of the boundaries were streams and the fourth began at a concrete marker and ran along a line of marked trees to a clearly witnessed corner, and the marks along the line were between thirty-five and fifty years old.

2. **Adverse Possession § 25— continuous possession for more than 20 years — sufficiency of evidence**

In an action by plaintiffs to have themselves declared owners of and entitled to a particularly described tract of land, evidence supported a finding that plaintiffs had been in continuous possession of the land for more than twenty years where such evidence tended to show that the plaintiffs' predecessor (their father through whom they claimed by will) regularly cut timber and wood from the land, raked straw and hunted on the land from 1910 to 1938, from 1938 until the alleged trespass in 1974 by defendant the plaintiffs peri-

odically cut wood from the land, plaintiffs listed the land and paid taxes thereon until the year of the alleged trespass, and there was no evidence of a claim of title or estate in the land by anyone other than plaintiffs and their predecessor except for defendant's listing the land for taxes in 1974.

APPEAL by defendant from *Lanier, Judge.* Judgment entered 24 November 1975 in Superior Court, CRAVEN County. Heard in the Court of Appeals 1 September 1976.

Plaintiffs instituted this action to have themselves declared owners of and entitled to possession of a particularly described tract of land and to recover damages for trespass by defendant thereon. Defendant admitted the entry upon the described tract but alleged that he was the owner thereof. The case was tried before the judge without a jury.

Plaintiffs' evidence tended to show the following: the tract of land in controversy was known as the Haity land and was bounded on the north by Spring Branch, on the west and south by Cahooque Creek, and on the east by land belonging to the United States (formerly the Carl Morton tract). The line between the old Carl Morton tract and the Haity land (the eastern boundary of the Haity land) runs from near the head of Spring Branch at point four on the map (Plaintiffs' Exhibit A) to point five in Cahooque Creek. The line then follows Cahooque Creek to the mouth of Spring Branch and up Spring Branch to its head. The chops and blazes along the line from point four to point five were forty to fifty years old. There were witness trees at both point four and point five in which the chops were thirty-five to forty years old. There is an old concrete marker at point four.

Hunter Moore was the father of plaintiffs and lived on a tract of land near the Haity land. They claim title under their father's will. The Haity land has not been cultivated and has been timberland for sixty-five years. Hunter Moore regularly cut timber and firewood, raked straw, and hunted on the Haity land from 1910 until his death in 1938. Since 1938 his sons have periodically cut timber from the Haity land for their sisters, the plaintiffs. The plaintiffs have paid taxes on the Haity land through the year 1974. Defendant first listed the Haity land for taxes in 1974 and used a bulldozer on a portion of the land in April 1974, precipitating this lawsuit.

Defendant's evidence tended to show the following: A map dated 1917 shows a concrete corner at point four, witness trees at point five, and a marked line between point four and point five. In 1957 the Hunter Moore heirs claimed the Haity land lying to the west of the line between point four and point five. One defense witness testified that there was no line visibly marked between point four and point five. Another defense witness testified that there is an old marked line between points four and five.

The trial judge found facts and concluded:

> "That the plaintiffs and their predecessors in title have been in actual, open, hostile, exclusive and continuous possession of the land described in the complaint, in the character of owner, and they have exercised exclusive dominion over the land and have made such use thereof and have taken such profits therefrom as the land was ordinarily susceptible of in its then condition, and that such possession has been under known and visible lines and boundaries for more than twenty years next preceding the institution of this cause of action."

He further concluded that the defendant has no right, title, interest, or estate in the land described in the complaint. He thereupon entered judgment decreeing that plaintiffs are the owners and entitled to immediate possession of the particularly described tract of land (the Haity land); that defendant has no right, title, interest, or estate in the particularly described land; and rendered judgment against defendant for damages for trespass upon the land.

Defendant appealed.

Lee, Hancock and Lasitter, by C. E. Hancock, Jr., for the plaintiffs.

Beaman, Kellum, Mills & Kafer, by James C. Mills, for the defendant.

BROCK, Chief Judge.

[1] The main point of defendant's appeal is his contention that plaintiffs' evidence is not sufficient to support a finding that plaintiffs held the land in question under known and visible boundaries continuously for more than twenty years.

Plaintiffs' evidence shows that the land in question is bounded on two sides by Cahooque Creek and on a third side by Spring Branch. Clearly these three boundaries are known and visible. The fourth boundary begins at a concrete marker near the head of Spring Branch and runs along a line of marked trees to a clearly witnessed corner in Cahooque Creek. According to plaintiffs' witness, who was admitted to be an expert surveyor, the marks at point four and point five and along the line between are thirty-five to fifty years old. One of defendant's witnesses testified that there was an old marked line between points four and five. Another of defendant's witnesses, a former adjoining landowner, said he had a map dated 1917 that showed a concrete marker at point four, marked witness trees at point five, and a marked line of trees in between. This evidence is clearly sufficient to support a finding of a known and visible boundary of long standing from point four to point five, the only boundary not evidenced by water.

[2] The remaining question raised by defendant is whether the evidence supports a finding that plaintiffs have been in continuous possession of the Haity land for more than twenty years.

The evidence is uncontradicted that plaintiffs' predecessor (their father through whom they claim by will) regularly cut timber and wood from the Haity land, raked straw for his stables, and hunted on the Haity land from 1910 until his death in 1938. The evidence is likewise uncontradicted that from 1938 until the alleged trespass by defendant, the plaintiffs periodically cut timber and wood from the Haity land, listed the Haity land, and paid the taxes thereon through the year 1974—the year of the alleged trespass. The record is devoid of evidence of a claim of title or estate in the Haity land by anyone other than plaintiffs and their predecessor except for defendant's listing the land for taxes in 1974. The evidence supports the finding that the land was not cultivated but was held for the production of wood and timber.

It would appear that the possession of plaintiffs' predecessor from 1910 to 1938 is sufficient to support plaintiffs' claim to title. "The possession need not have been during the period next preceding the commencement of the suit; but if the title ripened by adverse possession at any time prior thereto; it will be sufficient for a recovery, unless subsequent to its

vesting it had in some way been divested." *Alexander v. Cedar Works,* 177 N.C. 138, 98 S.E. 312 (1919). There is no evidence of a divesting of title since the death of plaintiffs' predecessor in 1938. Be that as it may, in our opinion the evidence supports a finding that plaintiffs have used, occupied, and claimed title to the Haity land in their own right from 1938 to 1974 sufficiently to establish title in them. Actual possession with the intent to hold solely for the possessor to the exclusion of others "is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser." *Locklear v. Savage,* 159 N.C. 236, 74 S.E. 347 (1912). "The possession need not be unceasing, but the evidence should be such as to warrant the inference that the actual use and occupation have extended over the required period." *Alexander v. Cedar Works, supra.*

We have reviewed defendant's assignment of error to the admission into evidence of an aerial photograph and a map depicting the land in controversy and find it to be without merit. Likewise, defendant's argument that the court erred in finding that defendant had no interest in the land is untenable.

In our opinion the evidence supports the findings of fact, the findings of fact support the conclusions of law, and the conclusions of law support the judgment.

Affirmed.

Judges VAUGHN and MARTIN concur.

EVA FORESTER v. ZELLA FREEMAN MARLER, ADMINISTRATRIX, C.T.A., OF THE ESTATE OF ELMER FREEMAN, DECEASED; ZELLA FREEMAN MARLER, INDIVIDUALLY; RUBY RICE FREEMAN; LINDA GAIL MARLER; LISA DALE MARLER; THE UNKNOWN HEIRS OF ELMER R. FREEMAN AND ALL UNBORN PERSONS RELATED TO ELMER R. FREEMAN, AND THE UNKNOWN HEIRS OF JACK FREEMAN, AND ALL UNBORN PERSONS RELATED TO JACK FREEMAN

No. 7624SC242

(Filed 6 October 1976)

1. **Wills § 66— lapse of legacy or devise — property passes as if testator died intestate — intent of testator appearing in will**

Where testator devised and bequeathed all of his property to his brother "absolutely and in fee simple forever," but the brother predeceased testator, the trial court properly directed distribution of the entire estate to testator's surviving parent, since G.S. 31-42(c) provides that where a legacy or devise lapses, it shall pass under the applicable residuary clause or, if there be none, then as if testator had died intestate with respect thereto, unless a contrary intent appears in the will, and no such intent appeared in testator's will.

2. **Wills § 28— intent of testator — determination from will itself**

In a declaratory judgment action brought by testator's mother to determine the proper disposition of testator's estate where the evidence tended to show that testator devised and bequeathed all of his property to his brother but the brother predeceased testator, evidence concerning the extent of the testator's association and affection for his brother's family as compared with his association and feelings toward his mother was not relevant, as the intention of the testator must be determined from the will itself; and where the language of the will is not ambiguous, no evidence outside the instrument is competent in determining the intent of the testator.

3. **Wills § 66— lapse of legacy or devise to brother — no substitution of brother's issue**

Where testator devised and bequeathed his entire estate to his brother but the brother predeceased him, the provisions of G.S. 31-42(a) did not apply so as to pass to the issue of the brother by substitution the devise made to him under testator's will, since the brother's issue would not have been heirs of the testator under the provisions of the Intestate Succession Act had there been no will.

APPEAL by respondents from *Baley, Judge.* Judgment entered 16 December 1975 in Superior Court, MADISON County. Heard in the Court of Appeals 15 June 1976.

This is an action for a declaratory judgment to determine the proper disposition of the estate of Elmer R. Freeman, deceased, who died 9 April 1974 leaving a will, dated 20 June

1959, which was duly admitted to probate in Madison County on 22 April 1974. Item Two of the will is as follows:

> "I will, devise and bequeath all of my property of every sort, kind, and description (sic), both real and personal, unto my brother, Jack Freeman, absolutely and in fee simple forever. I take this opportunity to state at this time that I am fully aware of who all my blood relatives are, and that I am also fully aware of all the past family history, and that I am fully aware of all that my relatives, or any of them, have done, or failed to do for me, and that I am taking this family history into consideration in making the foregoing disposition of my property."

The will contained no other dispositive provision, the two remaining items simply naming testator's brother, Jack Freeman, as executor and directing the executor to pay the testator's just debts and funeral expenses.

Jack Freeman, the executor and sole beneficiary named in the will, died 29 November 1973, some four months before the death of Elmer R. Freeman. Jack Freeman was survived by his widow, Ruby Rice Freeman, by his daughter, Zella Freeman Marler, and by two granddaughters, Linda Gail Marler and Lisa Dale Marler. Jack Freeman's daughter, Zella Freeman Marler, applied for and was granted Letters Testamentary appointing her Administratrix c.t.a. of the estate of her uncle, Elmer R. Freeman. In making application for these Letters Testamentary, Zella Freeman Marler listed the above named survivors of Jack Freeman as the persons entitled to receive the estate of Elmer R. Freeman.

Elmer R. Freeman died without leaving a spouse or issue surviving him. His father died about 1927. He was survived by his mother, Eva Forester, who brought this action as petitioner seeking a declaratory judgment adjudicating that she is the person solely entitled to receive distribution of all of the net assets of the estate of her son, Elmer R. Freeman. The respondents, who are the above named survivors of Jack Freeman, filed answer in which they contend that they are the persons entitled to receive distribution of the net assets of the estate of Elmer R. Freeman. Guardians ad litem were appointed to represent minors, unknown heirs, and unborn persons, and answers were filed by the guardians ad litem.

The court allowed petitioner's motion for summary judgment in her favor, and respondents appealed.

McGuire, Wood, Erwin & Crow by William F. Wolcott III and Larry E. Davis, for petitioner appellee.

Ronald W. Howell for respondent appellants.

Barden & Ruff for Stephen L. Barden III, Guardian ad Litem for the unknown heirs of Jack Freeman and all unborn persons related to Jack Freeman.

Adams, Hendon & Carson, P.A., for James Gary Rowe, Guardian ad Litem for the unknown heirs of Elmer R. Freeman and all unborn persons related to Elmer R. Freeman.

PARKER, Judge.

[1] The devolution of a lapsed devise or legacy is controlled by G.S. 31-42. Subsection (c) of that statute provides that where a devise or legacy lapses, it shall pass under the applicable residuary clause or, if there be none, then as if the testator had died intestate with respect thereto, "if a contrary intent is not indicated by the will." We agree with the trial court's conclusion that a contrary intent is not indicated by the will of Elmer R. Freeman, and we affirm the judgment directing distribution of the entire estate to the petitioner, who, as the sole surviving parent, is the person entitled to take the entire estate under the applicable intestate succession statute, G.S. 29-15(3).

We find unpersuasive the contention made by appellants that a contrary intent was indicated by the will of Elmer R. Freeman because he devised and bequeathed all of his property to his brother, Jack Freeman, "absolutely and in fee simple forever." These are technical words which define the quantum and quality of the estate granted. They do not indicate an intention that the property affected should remain in the family of Jack Freeman in event he should predecease the testator. "[T]he technical term 'in fee simple' is to be given its technical meaning in the absence of a clear expression of a contrary intention in the will itself." *Olive v. Biggs,* 276 N.C. 445, 459, 173 S.E. 2d 301, 310 (1970). We find no such contrary intention expressed in the will of Elmer R. Freeman. The statement in Item Two that the testator was "fully aware" of who his blood relatives were and of all that they, or any of them, had

done or failed to do for him, and that he was "taking this family history into consideration" in making the disposition of his property to his brother, simply falls short of expressing any intention that his brother's family, or, indeed, anyone else in particular, should take in event his brother should predecease him. Such an intention, had the testator entertained it, could have easily been expressed in simple and direct language.

[2] We also reject appellants' contention that summary judgment was improper because a genuine issue of fact was shown to exist concerning the extent of the testator's association and affection for his brother's family as compared with his association and feelings toward his mother. The conflicting affidavits filed by the parties concerning these matters were simply not relevant to any issue before the court, and they were properly ignored by the court in making its determination. The intention of the testator must be determined from the will itself. Where, as here, the language in the will is not ambiguous, no evidence outside the instrument is competent in determining the intent of the testator. 7 Strong, N. C. Index 2d, Wills, § 28. There was in this case no genuine issue as to any material fact, and petitioner was entitled to judgment as a matter of law.

[3] We also find no merit in appellants' further contention that, even if no contrary intention is contained in the express language of the will, the provisions of subsection (a) of G.S. 31-42 apply in this case so as to pass to the issue of Jack Freeman by substitution the devise made to him by Item Two of the will of Elmer R. Freeman. G.S. 31-42(a) provides that, unless a contrary intent is indicated by the will, a devise or legacy given to one who dies before the testator "shall pass by substitution to such issue of the devisee or legatee as survive the testator in all cases where such issue of the deceased devisee or legatee would have been an heir of the testator under the provisions of the Intestate Succession Act had there been no will." In support of their contention, appellants point out that the will of Elmer R. Freeman was executed on 20 June 1959, when the old Statute of Descent was still in effect, and that on that date the lineal descendants of Jack Freeman, had he predeceased his brother Elmer, would have been included among the heirs of the testator. The will, however, though dated 20 June 1959, speaks as of the date of the testator's death which was 9 April 1974. On that date G.S. Ch. 29, enacted by Ch. 879 of the 1959 Session Laws, was in effect and applicable to estates of per-

sons dying on or after 1 July 1960. By virtue of G.S. 29-15(3), the petitioner became solely entitled to receive the entire estate of her son in event of his death intestate. Thus, on the date the will became effective to pass any property, i.e., on the date of the testator's death, the issue of Jack Freeman would not have been "an heir of the testator under the provisions of the Intestate Succession Act had there been no will." Thus, G.S. 31-42(a) has no application under the facts of this case.

The judgment appealed from is

Affirmed.

Chief Judge BROCK and Judge ARNOLD concur.

IN THE MATTER OF METRIC CONSTRUCTORS, INC., AND AETNA CASUALTY AND SURETY COMPANY v. BRUCE A. LENTZ, SECRETARY OF THE DEPARTMENT OF ADMINISTRATION, STATE OF NORTH CAROLINA

No. 7610SC364

(Filed 6 October 1976)

1. **Administrative Law § 5— order requiring bid bond forfeiture — administrative decision — judicial review**

A decision by the Secretary of the Department of Administration ordering petitioners to forfeit a bid bond or be subject to liability for twice the amount of the bond was an "administrative decision" within the purview of the statute providing for judicial review of such a decision, and petitioners were aggrieved persons entitled to seek judicial review of the decision. Former G.S. 143-307 (now G.S. 150A-43).

2. **Administrative Law § 5— review of administrative decision — sovereign immunity**

The doctrine of sovereign immunity did not bar judicial review of an administrative decision by the Secretary of the Department of Administration ordering petitioners to forfeit a bid bond.

3. **Administrative Law § 5— review of administrative decision — appeal — certiorari**

Generally, where *there is no provision for appeal from an order* of an administrative agency, the proper method for review is by certiorari; however, certiorari will not lie when statutes provide for appeal or review.

4. **Administrative Law § 5— appeal of administrative decision — certiorari as ancillary writ**

Where judicial review of an administrative decision was provided for by statute, the reviewing court properly issued a writ of certiorari as an ancillary writ to require the administrative agency to send up the records and documents necessary to dispose of the appeal.

5. **Administrative Law § 5— stay of administrative decision pending appeal**

The superior court did not err in staying the implementation of an administrative decision pending judicial review of the decision. Former G.S. 143-312 (now G.S. 150A-48).

APPEAL by defendant from orders of *Bailey, Judge,* entered 8 December 1975 and order of *Godwin, Judge,* entered 5 February 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 14 September 1976.

In this action plaintiffs seek judicial review of a decision by defendant, Secretary of the Department of Administration. Plaintiffs' pleadings, in pertinent part, show the following:

On 26 March 1974, shortly before 3:00 p.m., plaintiff Metric Constructors, Inc. (Metric), submitted a bid in the amount of $6,332,000 for construction of a state office building. The bid was accompanied by a bid bond in the amount of $316,600 executed by Metric and Aetna Casualty and Surety Company (Aetna).

At approximately 4:00 p.m., while bids were still being read, the vice-president of Metric advised the State's architect that a substantial error was made in the submitted bid in that the bid failed to include an item of more than $896,000 for structural steel. The error was later declared by defendant to be unintentional and clerical in nature. When the receiving of all bids was completed, a representative of Metric asked that its bid be withdrawn due to the erroneous calculation. At approximately 4:45 p.m. three representatives reviewed the worksheets with the State architect and explained the error. At 6:00 p.m. Metric sent a telegram to the Department of Administration stating that it was withdrawing its bid for the reason that the bid failed to include the cost of structural steel.

Thereafter Metric, the low bidder, refused to accept the award of the contract and declined to perform. Pursuant to Metric's request, defendant held a hearing at which he made findings of fact including in substance those above related. He then concluded that the request for release of the bid bond could

not be granted and that Metric should "forthwith make payment of the deposited bid bond or face double liability according to law."

Plaintiffs filed a petition for judicial review of an administrative decision pursuant to Chapter 143, Article 33, of the General Statutes; in the alternative, they asked for a writ of certiorari to review defendant's decision. Judge Smith entered an order staying the administrative decision pending review after which defendant filed motions asking that the stay order be set aside and that the petition for review be dismissed for lack of jurisdiction.

On 8 December 1975 Judge Bailey, following a hearing, entered (1) an order continuing Judge Smith's stay order and (2) a writ of certiorari directing defendant to certify to the superior court the record and all documents in his custody or control relating to this matter. On 5 February 1976 Judge Godwin entered an order denying defendant's motion to dismiss the action. Defendant appealed.

Fleming, Robinson & Bradshaw, P.A., by J. Carlton Fleming and Joyner & Howison, by Robert C. Howison, Jr., for plaintiff appellees.

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

BRITT, Judge.

Inasmuch as defendant is challenging the jurisdiction of the superior court to consider and determine this cause, we hold that he has the right of immediate appeal from the orders in question. G.S. 1-277(b).

Defendant contends that his decision is not subject to judicial review and that the trial court erred in denying the motion to dismiss. We find no merit in this contention.

Former G.S. 143-307 (now 150A-43) provides that: "Any person who is aggrieved by a final administrative decision, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of such decision under this Article . . . ." In the case of *In Re Appeal of Harris*, 273 N.C. 20, 159 S.E. 2d 539 (1968), the Supreme Court held that (former) Chapter 143, Article 33, of

the General Statutes entitled "Judicial Review of Decisions of Certain Administrative Agencies" is to be liberally construed to preserve and effectuate a person's right of review by the courts. While Chapter 143 of Article 33 was repealed by the 1973 General Assembly, effective 1 February 1976, the material provisions of said chapter are now set forth in Article 4 of Chapter 150A.

[1] Defendant argues that his action was not an "administrative decision" within the contemplation of the statute providing for judicial review. We reject this argument and hold that the decision was rendered under former G.S. 143-306(2) in a proceeding in which the rights and duties of the parties were necessarily determined. To obtain judicial review under the former or present chapter, the party must also be an aggrieved person. As stated in *In Re Assessment of Sales Tax,* 259 N.C. 589, 595, 131 S.E. 2d 441, 446 (1963): "The expression 'person aggrieved' has no technical meaning. What it means depends on the circumstances involved. It has been variously defined: 'Adversely or injuriously affected; damnified, having a grievance, having suffered a loss or injury, or injured; also having cause for complaint. More specifically the word(s) may be employed meaning adversely affected in respect of legal rights, or suffering from an infringement or denial of legal rights.' " Petitioners were aggrieved persons under former G.S. 143-307 when defendant ordered them to forfeit their $316,600.00 bid bond or be subject to liability for twice that amount.

[2] Defendant next contends that this action is barred by the doctrine of sovereign immunity. This contention also lacks merit. We note the action complained of took place before 2 March 1976 from which date the Supreme Court has held that sovereign immunity will no longer be a defense in an action against the State for breach of contract. *Smith v. State,* 289 N.C. 303, 222 S.E. 2d 412 (1976). Under the doctrine of sovereign immunity, "[t]he State is immune from suit unless and until it has expressly consented to be sued. It is for the General Assembly to determine when and under what circumstances the State may be sued." *Insurance Co. v. Commissioner of Insurance,* 254 N.C. 168, 173, 118 S.E. 2d 792, 795 (1961). The General Assembly has expressly provided a means of judicial review from administrative decisions, plaintiffs have properly followed the procedures set forth by the statutes, therefore, the present action is not barred by sovereign immunity.

[3, 4] Defendant further argues that the court erred by issuing a writ of certiorari. Generally, where there is no provision for appeal from an order of an administrative agency, the proper method for review is by certiorari. Where statutes provide for appeal or review, certiorari will not lie. 1 Strong, N. C. Index 2d, Administrative Law § 5. In this case, the writ of certiorari was unnecessary for judicial review but it was not issued for that purpose. As stated in *Sanford v. Oil Co.*, 244 N.C. 388, 390, 93 S.E. 2d 560, 562 (1956): "The writ of certiorari may likewise be used as an ancillary writ to require a lower court or administrative agency to send up to the Superior Court records, papers, documents, and other matter necessary to dispose of the appeal. . . ." Here, statutory authority has provided for judicial review. Nevertheless, the issuance of the writ of certiorari was a proper auxiliary process to enable the court to obtain the necessary information required to dispose of the matter already properly before it. *See* 2 McIntosh, N. C. Practice and Procedure 2d § 1861.

[5] Defendant's final contention is that the court erred in staying implementation of his order pending judicial review of the administrative decision. We find no merit in this contention. G.S. 143-312 (now 150A-48) provides that: "At any time before or during the review proceedings the aggrieved person may apply to the reviewing court for an order staying the operation of the administrative decision pending the outcome of the review. The court may grant or deny the stay in its discretion upon such terms as it deems proper." We hold that the court properly entered the stay order.

On judicial review, the superior court must determine the issue whether Metric's bid was based upon an honest and good faith mistake, immediately communicated to the State before any change of position, and upon which equitable relief should be granted.

For the reasons stated, the orders appealed from are affirmed and this cause is remanded to the superior court for further proceedings.

Orders affirmed and cause remanded.

Judges PARKER AND CLARK concur.

STATE OF NORTH CAROLINA v. WILLIAM NEIL FREEMAN, JR.

No. 7620SC272

(Filed 6 October 1976)

1. **Automobiles § 113— death by vehicle — exculpatory statement of defendant — sufficiency of evidence**

In a prosecution for driving on the wrong side of the road and manslaughter, evidence was sufficient to be submitted to the jury, even though the State introduced an exculpatory statement of defendant and did not introduce evidence contradicting the statement, since the introduction by the State of an exculpatory statement made by defendant did not preclude the State from showing that the facts concerning the crime were different from what defendant said about them.

2. **Automobiles § 115— charge of involuntary manslaughter — death by vehicle as lesser included offense**

The offense of death by vehicle as set forth in G.S. 20-141.4 is a lesser included offense of involuntary manslaughter.

APPEAL by defendant from *Collier, Judge.* Judgment entered 28 January 1976 in Superior Court, MOORE County. Heard in the Court of Appeals 18 June 1976.

Defendant was convicted in District Court of driving on the wrong side of the highway and appealed to Superior Court. He was indicted for manslaughter, and the cases were consolidated for trial in Superior Court. The State offered evidence tending to show that at about 10:30 p.m. on 8 October 1975, G. L. Hoyle, a highway patrolman, drove across the Crane Creek bridge on U. S. Highway 1 in Moore County. At that time it had just stopped raining, and Hoyle did not remember any water standing on the highway. Shortly after 11:00 p.m. James Alexander drove to the Crane Creek bridge and observed that a car traveling north on Highway 1 had driven into the abutment on the southbound side of the bridge. He saw defendant unconscious in the driver's seat of the wrecked vehicle, and Michael Martinez, the deceased, in the right front seat. It was not raining at that time, but the road was damp. About an hour later Hoyle returned to the Crane Creek bridge. He observed the wrecked automobile, and in his opinion it was entirely off the paved highway. There were marks leading from the wheels up the shoulder of the road for a distance of 116 feet. He saw defendant being carried to an ambulance, and he noticed an odor of alcohol about his person. Patrolman C. A. Todd

arrived at the scene at 12:20 a.m. He observed a Volkswagen against the bridge abutment on the left hand side of the roadway. The bridge abutment was driven into the center front of the vehicle almost back to the windshield. The fenders of the vehicle had wrapped around the side of the abutment. He saw tire impressions leading from the left hand edge of the paved surface up to the rear of the Volkswagen. Later, at the Moore County Hospital he observed defendant and detected the odor of alcohol about his person. On 10 October Hoyle questioned defendant about the accident after advising him of his constitutional rights. Defendant stated that he was driving the car north on Highway 1 when "a big puddle of water splashed on the windshield and he couldn't control the vehicle, and that was all he remembered." He said that before the accident he had taken some valium tablets that had been prescribed for him and had drunk a few beers. An autopsy revealed that Michael Martinez had been killed as a result of bleeding caused by a tear in the aorta, which could have resulted from a blow to the chest.

Defendant offered no evidence. The jury found him guilty of death by vehicle and driving on the wrong side of the highway. The court granted defendant's motion for arrest of judgment as to the charge of driving on the wrong side of the highway, and it sentenced him to two years in jail for death by vehicle. Defendant appealed.

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

Hoyle & Hoyle, by Kenneth R. Hoyle and J. W. Hoyle, for defendant.

MARTIN, Judge.

[1] Defendant has grouped his five assignments of error into three arguments in his brief. He first contends it was error to deny his motions for dismissal and judgment as of nonsuit at the close of the State's evidence and at the close of all the evidence. He argues there is no evidence of culpable negligence and the State offered no evidence to contradict his exculpatory statement to Officer Hoyle that the accident occurred because he lost control of his vehicle when a puddle of water struck his windshield. It is well settled in this State that in passing upon a motion for nonsuit in a criminal case, the court must ". . .

consider the evidence in its light most favorable to the State, take it as true, and give the State the benefit of very reasonable inference to be drawn therefrom. (Citations omitted.)" *State v. Goines,* 273 N.C. 509, 513, 160 S.E. 2d 469, 472 (1968). Moreover, "[c]ontradictions and discrepancies, even in the State's evidence, are matters for the jury and do not warrant nonsuit. (Citation omitted.)" *State v. Bolin,* 281 N.C. 415, 424, 189 S.E. 2d 235, 241 (1972). If when so considered there is substantial evidence, whether direct, circumstantial, or both, of all material elements of the offense charged, then the motion for nonsuit must be denied and it is then for the jury to determine whether the evidence establishes guilt beyond a reasonable doubt. See *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431 (1956).

Specifically, defendant contends that he comes within the purview of the rule stated in *State v. Bolin, supra.* In Bolin, the Court stated that " '[w]hen 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 omitted.)' " *State v. Bolin, supra,* at 424, 189 S.E. 2d at 241. However, it is equally well established that the introduction by the State of an exculpatory statement made by the defendant does not preclude the State from showing that the facts concerning the crime were different from what defendant said about them. *State v. Bolin, supra.* After carefully reviewing the record, we hold that the court properly ruled that the evidence in this case was sufficient to withstand defendant's motions for nonsuit.

[2] In his second argument defendant contends that the court should have granted his motion for arrest of judgment as to the offense of death by vehicle. He argues that by instructing the jury on death by vehicle as a lesser included offense of manslaughter, the court violated the provisions of G.S. 20-141.4(c), which state that ". . . no person who has been placed in jeopardy upon a charge of manslaughter shall subsequently be prosecuted for death by vehicle arising out of the same death." He contends that death by vehicle cannot be considered a lesser included offense of involuntary manslaughter because of the "mutual exclusiveness" between the two offenses and because the legislature would have stated expressly in the statute that

death by vehicle is a lesser included offense of manslaughter if it had intended such a result.

The purpose of G.S. 20-141.4(c) is not to prevent the courts from treating one offense as a lesser included offense of the other, but rather to prevent the State from bringing a new prosecution against a defendant for death by vehicle after he has already been convicted or acquitted of manslaughter.

It is well settled in North Carolina that ". . . [w]hen a defendant is indicted for a criminal offense he may be convicted of the charged offense or of a lesser included offense when the greater offense charged in the bill contains all the essential elements of the lesser offense, all of which could be proved by proof of the allegations of fact contained in the indictment. (Citations omitted.)" *State v. Riera*, 276 N.C. 361, 368, 172 S.E. 2d 535, 540 (1970). See also G.S. 15-170. " 'The common-law definition of involuntary manslaughter includes unintentional homicide resulting from the performance of an unlawful act, from the performance of a lawful act done in a culpably negligent manner, and from the negligent failure to perform a legal duty.' (Citations omitted.)" *State v. Massey*, 271 N.C. 555, 557, 157 S.E. 2d 150, 153 (1967). Criminal negligence in automobile accident cases is something more than actionable negligence in the law of torts; it is such recklessness, " 'proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others.' (Citations omitted.)" *State v. Massey, supra* at 557, 157 S.E. 2d at 153.

Under this definition " '[a]n intentional, wilful or wanton violation of a statute or ordinance, designed for the protection of human life or limb, which proximately results in injury or death, is culpable negligence. . . .' (Citations omitted.)" *State v. Massey, supra* at 557, 157 S.E. 2d at 153.

The defendant argues that "death by vehicle" is not a lesser included offense under a charge of manslaughter. G.S. 20-141.4 was enacted by the 1973 General Assembly making a violation thereof a misdemeanor. Section (a) of the Act is as follows:

> "Whoever shall unintentionally cause the death of another person while engaged in the violation of any State law or local ordinance applying to the operation or use of a vehicle or to the regulation of traffic shall be guilty of death by

vehicle when such violation is the proximate cause of said death."

This is a case of first impression. It requires an interpretation of G.S. 20-141.4 as it relates to the common law crime of manslaughter. The number of deaths resulting from the operation of motor vehicles on the highways has increased to an alarming extent. Indictment for the common law crime of manslaughter has proved ineffective as a means of repressing the negligence in motor vehicle operation causing death upon the public thoroughfares. The motorist is generally a reputable citizen, and the wrong committed by him which brings someone to his death is most often an unintentional violation of a prohibitory statute or ordinance, unaccompanied by recklessness or possible consequences of a dangerous nature, when tested by the rule of reasonable prevision. Thus, it is apparent that the intention of the legislature in enacting G.S. 20-141.4 was to define a crime of lesser degree of manslaughter wherein criminal responsibility for death by vehicle is not dependent upon the presence of culpable or criminal negligence.

The instant case does not meet the test of distinctness. Every element of G.S. 20-141.4 is embraced in the common law definition of involuntary manslaughter. The evidence presented at trial was sufficient to sustain a verdict of guilty of death by automobile. In the trial we find no prejudicial error.

No error.

Judges BRITT and HEDRICK concur.

HARRY ADCOCK, ADMINISTRATOR OF THE ESTATE OF ELBERT ABSON ADCOCK v. LIFE ASSURANCE COMPANY OF CAROLINA

No. 7616DC354

(Filed 6 October 1976)

1. Evidence § 19; Insurance § 37— credit life insurance — suicide exclusion — hospital records showing depression of insured — remoteness

In an action to recover the proceeds of two credit life insurance policies issued to plaintiff's intestate by defendant where each policy had a provision limiting the liability of the company in a case of suicide and where defendant alleged that deceased died by his own hand,

the trial court did not err in not admitting the records of deceased's hospitalization for depression six months prior to the shooting, since the medical evidence was too remote to be of probative value.

2. **Insurance § 37— credit life insurance — suicide exclusion — burden of proof**

Where a suit is brought on a life insurance policy of general coverage but making suicide an excepted risk, the burden is on the defendant insurer to establish suicide by a preponderance of evidence; therefore, the trial court properly concluded that defendant insurer failed to carry its burden of proof in this action where there was sufficient evidence presented to enable the trier of fact to find that suicide was not the only logical or possible manner of death.

APPEAL by defendant from *Britt, Judge.* Judgment entered 19 January 1976 in District Court, SCOTLAND County. Heard in the Court of Appeals 14 September 1976.

Plaintiff, as administrator, brought this action for the proceeds of two credit life insurance policies issued to plaintiff's intestate, Elbert Abson Adcock, by the defendant, Life Assurance Company of Carolina. The amount of insurance in force at decedent's death was $3,635.41. Each policy had a provision limiting the liability of the company in a case of suicide to an amount equal to the premiums paid. The action was heard before Judge Britt without a jury.

The defendant alleged that deceased died by his own hand. Its evidence tended to show that the plaintiff found the deceased wounded and unconscious in the deceased's bedroom on Sunday night, 9 June 1974. The sheriff's deputies arrived at approximately 9:30 p.m. and found the deceased lying face-up in a pool of blood on the bedroom floor. Blood stains were also noted on the bed and near the door. A .22 caliber rifle containing fifteen live rounds and one spent cartridge were found at the deceased's feet. The deceased had been shot in the head with one bullet. The bullet entered the head near the right ear and exited from the top, right portion of the back of the head. Deceased was right-handed. He was taken to the hospital unconscious, where he remained in that state until his death on 2 July 1974.

Defendant's evidence further tended to show that the sheriff's investigation disclosed no evidence of a struggle, theft, or robbery. There was no alcohol or odor of alcohol about the body or room. No gun cleaning equipment was found by the deputies in the room.

The defendant offered evidence of a conversation between the deceased and the sheriff two weeks prior to the shooting in which the deceased was described as being despondent about the condition of his wife, who had suffered a stroke and was never expected to recover. Defendant attempted to introduce hospital records showing that the deceased had been hospitalized for depression and chronic alcoholism in December 1973; that the depression resulted from his wife's condition; and that while hospitalized, defendant talked of suicide. The records were not allowed in evidence on the grounds that they were too remote.

Plaintiff's evidence tended to show that the deceased was not an alcoholic; that the deceased hunted frequently and was planning to go hunting at the time of the shooting; that deceased had borrowed plaintiff's gun cleaning equipment two days prior to the shooting; and that the gun cleaning equipment was present in the bedroom when plaintiff discovered the body. Plaintiff's evidence further tended to show that there were visible traces of blood not only in the bedroom, but also on a washcloth and mirror in the bathroom, on the wall of the hall leading from the bedroom to the bathroom, and on the phone located in the hall. Finally, plaintiff's evidence tended to show that the deceased, while upset with his wife's condition, had reconciled himself to her plight and had begun to make plans for the future, including preparations to move to a new town and acceptance of a new job which was to begin on 1 July 1974.

Judge Britt ruled that defendant had failed to meet its burden of proof on the issue of suicide and rendered judgment for plaintiff. From this judgment defendant appealed.

Mason, Williamson, Etheridge and Moser, by Andrew G. Williamson and Daniel B. Dean, for the plaintiff.

Womble, Carlyle, Sandridge & Rice, by John E. Hodge, Jr., for the defendant.

BROCK, Chief Judge.

[1] Defendant first contends that the trial court erred in not admitting the records of deceased's hospitalization six months prior to the shooting. Defendant maintains the admission of this evidence would tend to establish in the deceased a despondent and suicidal state of mind.

> "Whether the existence of a particular state of affairs at one time is admissible as evidence of the same state of affairs at another time, depends altogether upon the nature of the subject matter, the length of time intervening, and the extent of the showing, if any, on the question of whether or not the condition had changed in the meantime. The question is one of materiality or remoteness of the evidence in the particular case, and the matter rests largely in the discretion of the trial court." 1 Stansbury, N. C. Evidence (Brandis rev.), § 90.

A discretionary ruling of the trial court is conclusive on appeal, absent a showing of abuse of discretion or some imputed error of law or legal inference. *Privette v. Privette,* 30 N.C. App. 41, 226 S.E. 2d 188 (1976); 1 Strong, N. C. Index 2d, Appeal and Error, § 54, pp. 213-14.

We find no abuse of discretion in the court's ruling that medical evidence of a depressed state of mind was too remote to be of probative value as to a suicidal state of mind six months later. Nor do we find any imputed error of law or inference of law. The court found as fact that the decedent had adjusted to the cause of his despondency and was planning and preparing for a future that reflected his adjustment. These findings based on competent evidence sufficiently show a change of condition in the decedent's state of mind that undermines any materiality the evidence in the hospital records might have had.

The fact that the hospital records were excluded as remote prior to the evidence that established a change of condition does not affect our holding. The exclusion of evidence is not prejudicial when it appears that it could have no material bearing on the issue or could not alter the rights of the parties or affect the result, or where appellant fails to show that the excluded evidence was competent or material. 1 Strong, N. C. Index 2d, Appeal and Error, § 49, pp. 198-99.

[2] We find no merit in the defendant's other contention that the trial court's findings of fact and conclusions of law were unsupported by or contrary to the evidence and the law. Where a suit is brought on a life insurance policy of general coverage but making suicide an excepted risk, the burden is on the defendant insurer to establish suicide by a preponderance of evidence. *Paint Co. v. Insurance Co.,* 24 N.C. App. 507, 211 S.E. 2d 498 (1975); 2 Stansbury, N. C. Evidence (Brandis rev.),

§ 224. In the case at bar there was sufficient evidence presented to enable the trier of fact to find that suicide was not the only logical or possible manner of death. Thus the court's conclusion that defendant failed to carry its burden of proof was a proper one.

The judgment of the trial court is

Affirmed.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. SCOTT BRAUN

No. 7615SC339

(Filed 6 October 1976)

1. **Criminal Law §§ 7, 121— entrapment — question for jury**

In this prosecution for possession of marijuana with intent to sell and deliver, the State's evidence did not disclose entrapment as a matter of law but required submission of the entrapment question to the jury where it tended to show: an undercover agent, while defendant was a hitchhiking passenger, expressed the desire for marijuana; defendant said he could get it for him; the agent contacted defendant the following afternoon and took defendant to a rural home; and defendant returned with marijuana and sold it to the agent.

2. **Criminal Law §§ 7, 121— entrapment — burden of proof**

An instruction placing on defendant the burden of proving entrapment to the satisfaction of the jury does not contravene the decision of *Mullaney v. Wilbur*, 421 U.S. 684.

APPEAL by defendant from *Preston, Judge.* Judgment entered 22 January 1976 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 1 September 1976.

Defendant pled not guilty to the charge of possession of marijuana with intent to sell and deliver.

The State's evidence tended to show that the witness Ned Thorpe was employed by the Chapel Hill Police Department but was on special assignment as an undercover agent for the Burlington Police Department. About midnight on 14 January 1975 he picked up defendant, who was hitchhiking. As they rode to Burlington defendant said he was "high" from beer and

pills. Thorpe asked him if he had any pills; defendant replied that he did not but that he could get any amount of marijuana. Thorpe told defendant that he had to get home, but he would contact defendant the next afternoon. At Thorpe's request defendant wrote his phone number on a piece of paper and gave it to Thorpe. Next afternoon Thorpe phoned defendant, picked him up, and they drove to a house in the country. Defendant returned with a half-pound of marijuana and sold it to Thorpe for $85.00.

Defendant offered no evidence.

The jury returned a verdict of guilty as charged, and from judgment imposing imprisonment, defendant appealed.

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

Hemric & Hemric, P.A., by H. Clay Hemric, Jr., for defendant appellant.

CLARK, Judge.

The defendant assigns as error (1) the denial of his motion for nonsuit on the ground that the defense of entrapment had been established as a matter of law by the State's evidence, and (2) that part of the trial judge's charge which placed on defendant the burden of proving entrapment to the satisfaction of the jury, contending that placing this burden on the defendant violates the federal due process clause, U. S. Const. amend. XIV, § 1.

For his first assignment, defendant relies on *State v. Stanley,* 288 N.C. 19, 215 S.E. 2d 589 (1975), where the Supreme Court for the first time held that the evidence established entrapment as a matter of law and ordered a dismissal of the indictment. The ruling was based on the State's uncontradicted evidence, though the defendant's evidence corroborated that of the State. The defense of entrapment had been presented to the jury by the trial court and rejected.

[1] *Sub judice,* the State's evidence was uncontradicted, the defendant having offered no evidence. This evidence tended to show that the undercover agent, while defendant was a hitchhiking passenger, expressed the desire for marijuana; that defendant said he could get it for him; that the agent contacted

defendant the following afternoon and took defendant to a rural home; and that defendant returned with marijuana and sold it to the agent. The evidence and legitimate inferences arising therefrom were sufficient to require the submission of the entrapment question to the jury but not sufficient to show entrapment as a matter of law. The case before us is distinguishable from *State v. Stanley, supra,* where the evidence disclosed that the undercover agent, after ingratiating himself into the confidence and affection of the teen-age defendant over the course of several weeks, persuaded him to find and buy drugs. The trial court properly denied defendant's motion for judgment of nonsuit.

[2] For his second assignment of error the defendant relies on the recent decision in *Mullaney v. Wilbur,* 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508 (1975), which held that due process requires the prosecution must prove beyond a reasonable doubt each essential element of the crime charged, and that in a homicide case the State must prove beyond a reasonable doubt the absence of 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 extended the *Mullaney* rationale to the element of unlawfulness and the issue of self-defense and applied *Mullaney* to all trials in this State conducted on or after 9 June 1975.

Entrapment is the inducement of one to commit a crime not contemplated by him for the purpose of instituting a criminal prosecution against him. *State v. Stanley, supra.* Entrapment is an affirmative or positive defense. 21 Am. Jur. 2d Criminal Law § 143 (1965). It is, therefore, not an essential element of the crime charged, and is distinguishable from the absence of heat of passion on sudden provocation, which is an element of the crime of manslaughter.

The trial court charged the jury on the law of entrapment, and placed on the defendant the burden of proving his defense to the satisfaction of the jury. *State v. Cook,* 263 N.C. 730, 140 S.E. 2d 305 (1965); 2 Stansbury, N. C. Evidence § 214 (Brandis Rev. 1973). Though the question of entrapment was raised by the State's evidence, the burden of proving that defendant was not entrapped did not rest upon the State.

Mullaney v. Wilbur, supra, did not overrule, but may have cast some doubt on the vitality of, *Leland v. Oregon,* 343 U.S.

790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952), which held that a state could require a defendant to prove his insanity beyond a reasonable doubt. The Supreme Court of North Carolina has held that *Mullaney* has no application to the defense of insanity for which the burden is on the defendant to prove his insanity to the lesser standard of the satisfaction of the jury. *State v. Hammonds,* 290 N.C. 1, 224 S.E. 2d 595 (1976); *State v. Shepherd,* 288 N.C. 346, 218 S.E. 2d 176 (1975). See *Buzynski v. Oliver,* 45 U.S.L.W. 2062 (1st Cir. Jul. 14, 1976).

Both the defense of insanity and the defense of entrapment are affirmative defenses and are alike in that they go to the issue of culpability *vel non,* but the heat of passion issue treated in *Mullaney* goes only to the degree of culpability. The rationale of *State v. Shepherd, supra,* applies also to entrapment, and we find that *Mullaney* is not applicable to this defense. Defendant's assignment of error is overruled.

We have examined but find no merit in defendant's other assignments of error.

No error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. FRANKLIN ALPHON WARD III

No. 7614SC389

(Filed 6 October 1976)

Automobiles § 2— habitual offender statute — failure of prosecutor to act "forthwith"

The trial court had the inherent authority to dismiss a proceeding to have defendant declared an "habitual offender" of the traffic laws upon a determination that the district attorney failed to bring the proceeding "forthwith" as required by G.S. 20-223 and that respondent was prejudiced thereby, and the court's finding that the district attorney had not acted "forthwith" was supported by evidence that the district attorney did not institute the proceeding until some two years and three months after receiving an abstract of respondent's conviction record from the Commissioner of Motor Vehicles.

APPEAL by respondent from *Preston, Judge.* Judgment entered 19 December 1975 in Superior Court, DURHAM County. Heard in Court of Appeals 16 September 1976.

This is a proceeding wherein the State seeks to have respondent declared an "habitual offender" of the North Carolina traffic laws and to have his license to operate a motor vehicle revoked for a period of five years.

The cause was heard before the trial judge whose findings of fact are summarized as follows:

On 7 May 1973 respondent was convicted of driving under the influence and driving while his license was revoked, and as a result the Department of Motor Vehicles revoked his license for four years. On 20 June 1973 the Commissioner of Motor Vehicles determined that respondent's past driving record appeared to bring him within the definition of an "habitual offender" as set forth in G.S. 20-221 and forwarded an abstract of respondent's conviction record to the District Attorney for the Fourteenth Judicial District so that the district attorney could petition the superior court to determine whether respondent is an habitual offender. On 25 September 1975, some two years and three months after receiving the abstract, the district attorney instituted the present action to have respondent determined to be an habitual offender. In the meantime respondent's driving privileges had been reinstated by the Department of Motor Vehicles.

Based upon the foregoing findings of fact the court concluded:

> "That the District Attorney for the Fourteenth Judicial District did not comply with the requirements of NCGS Sec. 20-223 in that he did not institute this action 'forthwith' after receiving an abstract of respondent's driving record from the Commissioner of the North Carolina Department of Motor Vehicles; that as a result of the foregoing, it does appear that respondent has been unduly prejudiced and will suffer the revocation of his driving privileges for a period of not less than two years longer than he would have otherwise lost said driving privileges had the District Attorney complied with NCGS Sec. 20-223;
>
> That based on the aforesaid failure of the District Attorney to comply with NCGS Sec. 20-223 and the resulting prejudice to respondent, if this Court had the discretion to consider respondent's equitable defense of laches, then it would dismiss this proceeding against respondent, but that, notwithstanding the foregoing, NCGS Sec. 20-220

through Sec. 20-231 precludes this Court from exercising any discretion to entertain the respondent's defense of laches or grant respondent any equitable relief pursuant thereto."

The court then concluded that respondent is an "habitual offender" as defined in G.S. 20-221 and ordered him to surrender his driver's license for a period of five years as required by G.S. 20-227. Respondent appealed.

Attorney General Edmisten by Associate Attorney Norma S. Harrell for the State.

Nye, Mitchell & Bugg by John E. Bugg for respondent appellant.

HEDRICK, Judge.

The one question presented on this appeal is whether the trial court erred in concluding it had no discretion to dismiss the proceeding against respondent because of the district attorney's failure to bring the proceeding "forthwith."

G.S. 20-223 provides:

"*District attorney to initiate court proceeding; petition.* —The district attorney, upon receiving the aforesaid abstract from the Commissioner, *shall forthwith* file a petition against the person named therein in the superior court division of the county wherein such person resides . . . The petition shall request the court to determine whether or not the person named therein is an habitual offender." (Emphasis added.)

It is presumed that no meaningless or useless words or provisions are used in a statute, but that each word or provision is to be given some effect. *Jackson v. Board of Adjustment,* 275 N.C. 155, 166 S.E. 2d 78 (1969); 82 C.J.S., Statutes, § 316, pp. 551-552.

Black's Law Dictionary, p. 782 (Rev. 4th ed. 1968) defines "forthwith" as follows: "Immediately; without delay, directly, hence within a reasonable time under the circumstances of the case; promptly and with reasonable dispatch . . . . Within such time as to permit that which is to be done, to be done lawfully and according to practical and ordinary course of things to be performed or accomplished." This Court stated in *Simpson*

v. Garrett, Comr. of Motor Vehicles, 15 N.C. App. 449, 451, 190 S.E. 2d 251, 253 (1972), "The word 'forthwith' in G.S. 20-17 does not require instantaneous action but only action within a reasonable length of time." (Citation omitted.)

Since the court must give some meaning to the word "forthwith" as used in G.S. 20-223, and because the question of whether the district attorney acted forthwith to institute the proceeding depends on the facts and circumstances in each case, we conclude the trial court has discretionary authority to find the facts from the evidence and from the facts found draw legal conclusions as to whether the district attorney acted forthwith in instituting the proceeding and whether any failure on the part of the district attorney to proceed forthwith prejudiced the respondent.

The findings and conclusions made by the trial judge in the instant case that the district attorney had not acted forthwith as required by G.S. 20-223 and that the respondent was prejudiced thereby are not challenged on this appeal. Moreover, the record supports these findings and conclusions. We hold the trial court had the inherent authority to dismiss the proceeding under G.S. 20-223 upon findings and conclusions that the district attorney failed to act forthwith and that the respondent was prejudiced thereby. The trial court erred in not dismissing the action.

The order appealed from is

Reversed.

Judges MORRIS and ARNOLD concur.

STATE OF NORTH CAROLINA v. WILLIAM EDWARD YOUNG, JR.

No. 7614SC390

(Filed 6 October 1976)

APPEAL by respondent from *Preston, Judge.* Judgment entered 12 December 1975 in Superior Court, DURHAM County. Heard in the Court of Appeals 16 September 1976.

This appeal is from a proceeding to have respondent declared an "habitual offender" of the North Carolina traffic laws and to revoke his license to operate a motor vehicle for a period of five years.

Respondent was convicted of his third offense of driving under the influence in September 1974. The first two convictions occurred in 1970 and 1972, and on 18 October 1974 respondent's driver's license was revoked by the Department of Motor Vehicles with provision that he could apply for reinstatement in three years. On 3 March 1975 the District Attorney was notified, pursuant to G.S. 20-220, *et seq.*, that respondent was considered an habitual offender, and on 25 September 1975 a petition was filed to have respondent adjudged an habitual offender.

At the hearing on 10 December 1975, which was held on the petition, the trial court made findings of fact and concluded that it had no discretion to consider any defense of laches in these proceedings, but that if it had such discretion it would dismiss the petition because it was not filed until over a year after the third conviction, because the proceeding was not instituted "forthwith"; and because respondent had suffered prejudice as a result of the delay in instituting the proceeding.

Respondent was found to be an habitual offender as defined in G.S. 20-221 and barred from operating a motor vehicle on the highways of North Carolina. He appealed.

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

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

ARNOLD, Judge.

The case of *State v. Franklin Alphin Ward III* (No. 7614SC389), filed simultaneously herewith, is controlling in this case. The petition should have been dismissed.

Reversed.

Judges MORRIS and HEDRICK concur.

State v. Stanley

STATE OF NORTH CAROLINA v. CLARENCE O'DELL STANLEY

No. 7614SC301

(Filed 6 October 1976)

Automobiles § 2— habitual offender statute — meaning of "forthwith" — two year delay between offenses and filing petition unreasonable

The word "forthwith" as used in G.S. 20-223, the habitual offender statute, means within a reasonable time; therefore, a delay of two years between the time the Commissioner of Motor Vehicles informed the county solicitor that defendant might be an habitual traffic offender and the time the county solicitor filed a petition to have defendant declared an habitual offender was unreasonable.

APPEAL by respondent from *Canaday, Judge.* Judgment entered 30 January 1976 in Superior Court, DURHAM County. Heard in the Court of Appeals 25 August 1976.

Between 1972 and 1973, Clarence O'Dell Stanley, appellant, was convicted three times of driving under the influence of alcohol. On 21 August 1973 his driver's license was permanently revoked, and on 31 October 1973 a search was made of his driving record and an abstract compiled by the Commissioner of Motor Vehicles. On 6 November 1973 the Commissioner informed the Durham County Solicitor that appellant's driving record indicated that he might be an habitual traffic offender under G.S. 20-220, *et seq.* The Commissioner provided a certified copy of the abstract which supported his conclusion. G.S. 20-222.

Nearly two years later, on 23 October 1975, the Durham County Solicitor filed a petition pursuant to G.S. 20-223 asking the Superior Court to require appellant to appear and show cause why he should not be found an habitual offender and barred from operating a motor vehicle on North Carolina's highways. A certified copy of appellant's abstract was attached to this petition. The Superior Court judge issued a Show Cause Order on 26 October 1975, and it was served on appellant that day. A hearing on the petition was held 30 January 1976. Appellant appeared and denied the contents of the abstract but did not testify. He was found to be an habitual offender and was barred from operating a motor vehicle on North Carolina highways.

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

Norman E. Williams and Kenneth B. Oettinger for respondent appellant.

ARNOLD, Judge.

Appellant argues that the solicitor's two year delay in filing the petition violated G.S. 20-223. That statute provides that

> "[t]he District Attorney, upon receiving the aforesaid abstract from the Commissioner, shall *forthwith file a petition* against the person named therein in the superior court division of the county wherein such person resides . . . [emphasis added]."

Appellant argues that forthwith, as used in the statute, means "immediately." However, the word forthwith can also mean "within a reasonable time under the circumstances" or "as soon as reasonably can be expected." Forthwith, as used in other North Carolina traffic statutes, has been held to mean within a reasonable time. *See, Simpson v. Garrett, Comr. of Motor Vehicles,* 15 N.C. App. 449, 190 S.E. 2d 251 (1972). We hold that the same meaning applies in G.S. 20-223.

The State argues that the district attorney's office was understaffed and overburdened with criminal cases which had priority for trial. It is contended that under these circumstances the action was commenced within a reasonable time. This argument might be persuasive to explain the delay in holding the hearing, but the statute does not require that the matter be *heard* forthwith, what is required is that a petition be *filed* forthwith.

We hold that, under the circumstances of this case, the delay of nearly two years by the district attorney in filing the petition was unreasonable.

Reversed.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. OSCAR WILLIAMS

No. 7614SC323

(Filed 6 October 1976)

1. **Assault and Battery § 16— assault with deadly weapon inflicting serious injury — necessity for instruction on assault not inflicting serious injury**

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injuries where all the evidence tended to show that, if an assault occurred, it was an assault with a deadly weapon which inflicted serious injury, the trial court did not err in failing to instruct the jury concerning the misdemeanor of assault with a deadly weapon not inflicting serious injury.

2. **Criminal Law § 137— verdict and judgment inconsistent — remand for correction of judgment**

Where the verdict recited in the judgment was "guilty of the offense of assault inflicting serious injury" but the verdict as actually returned by the jury was that defendant was found guilty of assault with a deadly weapon inflicting serious injury, the case is remanded for correction of the judgment to make it consistent with the verdict.

APPEAL by defendant from *Braswell, Judge.* Judgment entered 25 November 1975 in Superior Court, DURHAM County. Heard in the Court of Appeals 31 August 1976.

Defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injuries. He pled not guilty. The State presented evidence to show that on the morning of 13 July 1975 defendant went to the home of Margaret Stewart and demanded she pay him $30.00 which he claimed she owed him. He said to her, "You don't believe I will kill you, do you?" She replied that she did believe that he would. Defendant then shot her with a pistol, the bullet hitting her in the forehead and causing her to bleed. She was taken to the hospital, where the bullet was removed from her scalp. She remained at the hospital from approximately 10:00 until 3:00 in the afternoon, at which time she went home. She returned to the hospital on two other occasions for treatment of her wound. At the time of the trial she still had recurring headaches, which were characterized by severe sharp pain.

Defendant testified and denied that he said, "You don't believe I will kill you." He testified he had said, "You don't believe I will hurt you." He testified he did not point the pistol at Miss Stewart, he just pulled the pistol out and it went off.

The court submitted the case to the jury under instructions that they might return one of three possible verdicts as follows: (1) guilty of assault with a deadly weapon with intent to kill inflicting serious injury; or (2) guilty of assault with a deadly weapon inflicting serious injury; or (3) not guilty.

The jury returned verdict finding defendant guilty of assault with a deadly weapon inflicting serious injuries. From judgment sentencing him to prison for a term of eight years, defendant appealed.

Attorney General Edmisten by Associate Attorney Daniel C. Oakley for the State.

Bryant, Bryant, Drew & Cribb, P.A., by Lee A. Patterson II, for defendant appellant.

PARKER, Judge.

[1] By his sole assignment of error, defendant contends the court erred in failing to submit as a possible verdict an issue as to his guilt of assault with a deadly weapon. That offense, which is a misdemeanor under G.S. 14-33(b)(1), is a lesser included offense of the felonies described in G.S. 14-32. However, 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. . . . Mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice." *State v. Hicks*, 241 N.C. 156, 159, 84 S.E. 2d 545, 547 (1954).

Here, defendant testified that the shooting was accidental and that no intentional assault occurred. From all of the evidence there can be no doubt that if an assault occurred, it was an assault with a deadly weapon which inflicted serious injury. Therefore, there was no error in the court's failing to instruct concerning the misdemeanor of assault with a deadly weapon not inflicting serious injury. *State v. Turner*, 21 N.C. App. 608, 205 S.E. 2d 628 (1974); *State v. Brown*, 21 N.C. App. 552, 204 S.E. 2d 861 (1974). Indeed, it would have been error, though error certainly favorable to defendant, to instruct the jury on the misdemeanor offense. *See State v. Thacker*, 281 N.C. 447, 189 S.E. 2d 145 (1972).

[2] Although no question has been raised by appellant concerning the form of the judgment entered in this case, we note that the judgment as contained in the record before us recites that defendant has "been found guilty of the offense of assault inflicting serious injury," which is a misdemeanor. Thus, the recital in the judgment would not support the eight year prison sentence imposed. However, the record also clearly shows that the verdict as actually returned by the jury was that the defendant was found guilty of assault with a deadly weapon inflicting serious injury, a felony which would warrant the imposition of the eight year sentence. In order that the judgment may be made consistent with the verdict as it was actually rendered, this case is remanded to the Superior Court in Durham County. That court will cause the defendant and his counsel to appear before it, and, after making due inquiry, shall correct the recitation in the judgment so as to make it consistent with the verdict as actually rendered.

Remanded for correction of judgment.

Chief Judge BROCK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. DONALD RAY ANDERSON

No. 768SC422

(Filed 6 October 1976)

1. **Criminal Law § 98— sequestration of witnesses — discretion of court**

A motion to sequester witnesses is addressed to the sound discretion of the trial judge and his ruling thereon is not reviewable except for abuse of discretion.

2. **Criminal Law § 75— in-custody statements — shoes worn by defendant — admissibility of testimony — conflicts in voir dire testimony**

The trial court did not err in the denial of defendant's motion to suppress the testimony of two police officers with respect to tennis shoes worn by defendant and certain statements allegedly made by him where the court's findings as to the admissibility of such testimony were supported by evidence presented on *voir dire*, notwithstanding there were conflicts in the *voir dire* testimony.

3. **Criminal Law § 112— when jury should acquit — erroneous instruction — harmless error**

The trial court's instruction that the jury should acquit defendant of second degree murder "if the State has satisfied you beyond

a reasonable doubt, or if you have a reasonable doubt as to each and all of those elements which I have just outlined" constituted harmless error where, immediately before and after such instruction, the court correctly instructed on the burden of proof and when the jury should acquit.

APPEAL by defendant from *Peel, Judge.* Judgment entered 16 December 1975 in Superior Court, WAYNE County. Heard in the Court of Appeals 23 September 1976.

Upon a plea of not guilty defendant was tried on a bill of indictment charging him with the murder of John Daniluk on 26 May 1975. The State sought a verdict of guilty of murder in the second degree and presented evidence summarized in pertinent part as follows:

On the night in question, a car driven by Bill Davis and in which Daniluk was a passenger, both of whom were white males, was parked on a street in Mount Olive near a poolroom where numerous black youths congregated. Defendant, who is black, was in the backseat of the car and called a friend over to the car, telling him that the white boys were going to give them some drugs. Davis drove the car to a streetlight at which time a crowd of blacks walked up to the car.

Daniluk told defendant they had no drugs and defendant began arguing with him. A friend of defendant told Davis to get out of the car; Davis did so and began running, outrunning two of the group that ran after him. Davis ran to the police station and reported the incident, naming defendant as one of the persons involved.

Meanwhile, defendant and Daniluk, who was about drunk, got out of the car and defendant began hitting Daniluk, evidently because he had spilled something on defendant. One of the men that had chased Davis, Cecil Teachery, returned to the car and struck Daniluk once. Daniluk fell to the ground and defendant began "stomping" on him. Someone in the group tried to get defendant off of Daniluk but was unsuccessful. Five witnesses identified defendant as the one who was "stomping" Daniluk.

As police approached the scene the group, including defendant, left and went to the poolroom. Thereafter, defendant, who was wearing a green shirt, went home, changed shirts and returned to the poolroom. Police found Daniluk lying on the

ground with his head in a pool of blood and observed the print of a tennis shoe on his back. Daniluk was carried to a hospital where he died several weeks later as the result of head and other injuries received in the altercation.

At their request defendant went with the officers to the police station. They observed that defendant was wearing tennis shoes, that there was blood on one of the soles and that the print on one of the soles matched the shoe print found on Daniluk's back.

Defendant offered testimony tending to show that while he was in the area at the time Daniluk was beaten, and had ridden in the car with Daniluk and Davis, he took no part in the beating.

The jury returned a verdict finding defendant guilty of murder in the second degree and from judgment imposing a prison sentence of not less than 50 nor more than 60 years, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General John M. Silverstein and Associate Attorney Noel Lee Allen, for the State.

Strickland & Rouse, by Robert E. Fuller, Jr., for defendant appellant.

BRITT, Judge.

[1] Defendant assigns as error the failure of the trial court to grant his motion to sequester the State's witnesses. We find no merit in this assignment. It is well settled that a motion to sequester witnesses is addressed to the sound discretion of the trial judge and his ruling is not reviewable except for abuse of discretion. *State v. Sparrow*, 276 N.C. 499, 173 S.E. 2d 897 (1970), *cert. denied*, 403 U.S. 940, 29 L.Ed. 2d 719, 91 S.Ct. 2258 (1971); *State v. Friday*, 21 N.C. App. 154, 203 S.E. 2d 670 (1974). We perceive no abuse of discretion.

[2] Defendant assigns as error the denial of his motion to suppress the testimony of two police officers with respect to the tennis shoes worn by defendant and certain statements allegedly made by him. We find no merit in this assignment.

The record discloses that the trial judge conducted a lengthy voir dire hearing relating to the admissibility of the evidence

proposed to be given by the police. Following the hearing His Honor made extensive findings of fact and conclusions of law and ordered that the evidence be admitted. The main thrust of defendant's argument is that there were conflicts in the testimony, even between the testimony of the two officers, therefore, the findings of fact and conclusions of law were not supported by the evidence.

A careful review of the evidence presented at the voir dire reveals that while there were conflicts in the evidence every finding of fact is supported by competent testimony by one witness or another. It is clear that the responsibility of resolving conflicts in the evidence presented at a voir dire vests in the presiding judge; he hears the evidence and observes the demeanor of the witnesses, therefore, he is the appropriate one to resolve the question. *State v. Barber,* 268 N.C. 509, 151 S.E. 2d 51 (1966). His findings as to the voluntariness of any statements made by the defendant, and any other facts which determine whether the evidence meets the requirements for admissibility, are conclusive if they are supported by competent evidence in the record. *State v. Fox,* 277 N.C. 1, 175 S.E. 2d 561 (1970).

We hold that the trial court did not err in denying defendant's motion to suppress the testimony.

Finally, defendant assigns as error a portion of the trial court's charge to the jury. We find no merit in this assignment.

[3] Toward the end of the charge, as the court was giving its mandate with respect to second-degree murder, the record discloses:

> "And so, members of the jury, first as to the charge of second-degree murder: I charge you, members of the jury, that if the State has satisfied you from the evidence and beyond a reasonable doubt, the burden being on the State to so satisfy you, that on or about May 25, 1975, at 11:30 p.m., Donald Ray Anderson intentionally, unlawfully and willfully, that is without just cause or excuse, assaulted John Daniluk by knocking him to the ground and by stomping him while he was on the ground and that although he was a much heavier man than John Daniluk, did kick and stomp him about the head and body while Daniluk was lying helpless on the ground with the intent to inflict death

or serious bodily injury on John Daniluk, and that his actions caused serious injuries to the head and brain of John Daniluk that proximately caused his death on June 30, 1975, and, members of the jury, if the State has further satisfied you beyond a reasonable doubt that the defendant's actions on that occasion were done out of ill will and malice which the defendant Mr. Anderson harbored against John Daniluk, then it would be your duty to return a verdict of second-degree murder. (B) By that I mean if the State has satisfied you beyond a reasonable doubt, or if you have a reasonable doubt as to each and all of those elements which I have just outlined and heretofore explained to you, it is your duty to return a verdict of guilty of second-degree murder. (B).

DEFENDANT'S EXCEPTION # 80.

If the State has failed to satisfy you beyond a reasonable doubt, or if you have a reasonable doubt as to any one of those elements, it is your duty to acquit the defendant of the charge of second-degree murder."

Defendant contends that the instruction between (B) and (B) was erroneous. While we agree that the challenged instruction was erroneous, we hold that the error was harmless. Our Supreme Court has held in many cases that the trial court's charge to the jury will be construed contextually and segregated portions will not be held prejudicial error when the charge as a whole is free from objection. 3 Strong, N. C. Index 2d, Criminal Law § 168, and cases therein cited.

In the case at hand the instructions immediately preceding and succeeding the challenged instruction were proper in every respect and we cannot believe that the jury was misled by His Honor's brief misstatement. A *lapsus linguae* in the instructions not called to the attention of the court at the time will not be held prejudicial error when it is apparent from the record that the jury could not have been misled thereby. *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).

After a thorough review of the entire record, we conclude that defendant received a fair trial free from prejudicial error.

No error.

Judges PARKER and CLARK concur.

GARDNER HOMES, INC. v. W. G. GAITHER, JR., R. L. HOLLOWELL, JOHN F. RIXEY, AND JOHN L. GIBSON II, PARTNERS TRADING UNDER THE PARTNERSHIP NAME, VIRGINIA DARE ASSOCIATES

No. 761SC284

(Filed 6 October 1976)

1. **Cancellation and Rescission of Instruments § 4— permissible use under zoning ordinance — mutual mistake — grounds for avoidance of contract**

The use of real property permissible under a zoning ordinance is a fact, and a mutual mistake with respect thereto entitles either party to an avoidance of a contract when such fact goes to the essence of the agreement.

2. **Cancellation and Rescission of Instruments § 4— purchase of hotel to convert into apartments — impermissible use under zoning ordinance — mutual mistake as grounds for rescission of contract**

In this action to rescind a contract to purchase a hotel, evidence was sufficient to support findings that the purpose for which plaintiff desired to purchase the hotel was to convert it into an apartment complex and that the parties at the time the contract was entered into were mutually mistaken as to the permissibility under the city's zoning ordinance of a conversion and use of the hotel into an apartment complex; therefore, plaintiff was entitled to rescission of the contract.

APPEAL by defendants from *Peel, Judge.* Judgment entered 6 January 1976 in Superior Court, PASQUOTANK County. Heard in Court of Appeals 24 August 1976.

This is a civil action wherein the plaintiff, Gardner Homes, Inc., seeks to rescind its contract with the defendants, W. G. Gaither, Jr., R. L. Hollowell, John F. Rixey, and John S. Gibson II, partners trading under the name Virginia Dare Associates, to purchase the Virginia Dare Hotel in Elizabeth City, North Carolina, and to recover a fifteen thousand ($15,000) dollar "earnest money" deposit.

Plaintiff alleged in its complaint that the contract was made under a mutual mistake of material fact, and it is therefore entitled to rescind the contract and recover the deposit. Defendants in their answer admitted the receipt of the deposit pursuant to the contract, but denied that the contract was made under a mutual mistake of material fact.

Both parties moved for summary judgment and submitted affidavits and depositions in support of their motions. The un-

contradicted evidence submitted by the parties tends to show the following:

Plaintiff contracted with the defendants for the purchase of the Virginia Dare Hotel in Elizabeth City, North Carolina, and pursuant to said contract gave defendants a fifteen thousand ($15,000) dollar "earnest money" deposit. Plaintiff's purpose for contracting to purchase the hotel was so that it could convert it into a 42-unit apartment complex. This purpose was incorporated into the agreement between the parties and defendants agreed to obtain financing for plaintiff so the purpose could be carried out. Plaintiff discovered a few days before the sale was to be closed that under the Elizabeth City Zoning Ordinance an apartment complex was not a permitted use in the zone in which the property was located. Up until that time, it had also been defendants' view and thinking that the zoning ordinance would permit an apartment complex in the zone in which the property was located.

The court allowed the plaintiff's motion and denied the defendants' motion for summary judgment. From summary judgment for plaintiff rescinding the contract, defendants appealed.

White, Hall, Mullen & Brumsey, by Gerald F. White and John H. Hall, Jr., for plaintiff appellee.

Leroy, Wells, Shaw, Hornthal, Riley & Shearin, by Dewey W. Wells and Roy A. Archbell, Jr., for defendant appellants.

HEDRICK, Judge.

Defendants contend that the court erred in entering summary judgment for plaintiff and in denying their motion for summary judgment. They argue that the evidence considered on the motions for summary judgment discloses that the contract was not made under a mutual mistake of material fact.

In *MacKay v. McIntosh,* 270 N.C. 69, 73, 153 S.E. 2d 800, 804 (1967), we find the following:

> " 'The formation of a binding contract may be affected by a mistake. Thus, a contract may be avoided on the ground of mutual mistake of fact where the mistake is common to both parties and by reason of it each has done what neither intended. Furthermore, a defense may be asserted

when there is a mutual mistake of the parties as to the subject matter, the price, or the terms, going to show the want of a consensus *ad idem*. Generally speaking, however, in order to affect the binding force of a contract, the mistake must be of an existing or past fact which is material; it must be as to a fact which enters into and forms the basis of the contract, or in other words it must be of the essence of the agreement, the *sine qua non*, or, as is sometimes said, the efficient cause of the agreement, and must be such that it animates and controls, the conduct of the parties.' 17 Am. Jur. 2d, Contracts § 143."

[1] The uses of real property permissible under a zoning ordinance is a fact, and a mutual mistake with respect thereto entitles either party to an avoidance of a contract when such fact goes to the essence of the agreement. *MacKay v. McIntosh, Id.*

In the present case all the elements necessary to rescind the contract for mutual mistake of fact as set forth in *MacKay* are established by the uncontradicted evidence submitted by both parties on their motions for summary judgment.

[2] There is no doubt that the mistake was as to a material fact. The purpose for which plaintiff desired to purchase the hotel, as set forth in the agreement itself, was so that it could convert it into an apartment complex. The zoning ordinance prevented the accomplishment of that very purpose.

There is also no doubt that the parties at the time the contract was entered into were mutually mistaken as to the permissibility under the zoning ordinance of a conversion and use of the hotel into an apartment complex. The evidence of both parties is not in conflict on this point. W. D. Gardner, plaintiff's president, testified, "It didn't occur to us—well we just didn't even consider that it may not be zoned for the use we planned for it. . . ." Defendant W. G. Gaither, Jr., who handled the negotiations for the defendants, testified, "It was just a basic assumption of mine at the time of these dealings with Gardner that it [conversion of the hotel into an apartment complex] would be permitted under existing zoning."

Suffice it to say, therefore, the record is replete with evidence clearly establishing that the parties were mutually mistaken with respect to the fact that plaintiff would be permitted under the zoning ordinance to convert the hotel into an apartment complex. There is no evidence to the contrary.

Defendants contend in the alternative that the evidence on the motions for summary judgment raised a genuine issue as to whether the conversion of the hotel into an apartment complex could have been completed within six months. The Elizabeth City Zoning Ordinance provides that an existing nonconforming use may be continued unless the nonconforming use is discontinued for a period of six months. Defendants argue that if the conversion could have been completed within six months, it would have been permissible under the zoning ordinance as a continuation of an existing nonconforming use since the hotel had already contained seven apartments.

There is a genuine issue as to whether the conversion could be completed in six months, but the issue is as to an immaterial fact. Section 4.1 of the Elizabeth City Zoning Ordinance provides: "Nonconforming buildings and nonconforming use of buildings shall not hereafter be *enlarged.*" (Emphasis added.) An increase in the number of apartments in the building from seven to forty-two, as had been planned by plaintiff, would certainly have constituted an enlargement of a nonconforming use.

We hold the evidence in the record discloses the nonexistence of a genuine issue of material fact, and the plaintiff is entitled to a rescission of the contract as a matter of law. G.S. 1A-1, Rule 56. The court correctly denied the defendants' motion for summary judgment and correctly entered summary judgment for plaintiff.

The judgment appealed from is

Affirmed.

Judges BRITT and MARTIN concur.

STATE OF NORTH CAROLINA v. GENE HAYES

No. 7615SC263

(Filed 6 October 1976)

1. Automobiles § 3— driving while license revoked — displaying license known to be revoked

The State's evidence was sufficient for the jury on issues of defendant's guilt of driving while his license was revoked and displaying

a license known to be revoked where it tended to show: when a highway patrolman observed defendant driving an automobile and stopped him on 11 March 1974, defendant displayed what appeared to be a valid driver's license; when asked if his license had not been suspended, defendant stated that he had gone to Raleigh and gotten it back; defendant's license had actually been suspended from 20 September 1973 until 20 September 1974; notices of suspension had been mailed to defendant on three separate dates; a "pick-up notice" was served on defendant by an officer on 15 October 1973 but defendant told the officer he did not have his license because he had lost it; and the officer gave defendant a copy of the notice of suspension which explained why his license had been suspended.

2. Automobiles § 3— notice of license revocation — due process

The manner of giving one notice of the revocation or suspension of his driver's license provided by G.S. 20-48 complies with procedural due process.

APPEAL by defendant from *Walker, Judge.* Judgment entered 20 November 1975 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 18 June 1976.

The defendant, Gene Hayes, was charged in a warrant, proper in form, with operating a motor vehicle on a public street or highway while his operator's license was revoked, a violation of G.S. 20-28(a), and with displaying an operator's license known to be revoked, a violation of G.S. 20-30(1). He was arraigned and pleaded not guilty to each charge but was found guilty by the jury. From a consolidated judgment that he be imprisoned for four months, defendant appealed.

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

Hunt and Abernathy by George E. Hunt for defendant appellant.

HEDRICK, Judge.

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

On 11 March 1974 Trooper Nelson Gunn observed the defendant driving along North Carolina Highway 49. Having been informed earlier that defendant's license was revoked, he stopped defendant on Rural Road 1922 and asked to see his driver's license. Defendant produced what appeared to be a

valid license. When asked if his license had not been suspended, the defendant said no, that he had gone to Raleigh and gotten it back. Trooper Gunn let the defendant proceed. After checking further, however, he arrested defendant on 13 March 1974 for driving while his license was revoked and for displaying a license known to be revoked.

The defendant's Driver's License Record with the Division of Motor Vehicles, which was introduced into evidence, and the testimony of Patrolman Frank Barnhart, together tended to show that defendant's license was revoked for one year, 20 September 1973 to 20 September 1974; that notices of suspension and revocation had been mailed to defendant on 12 July 1973, 5 September 1973, and 9 October 1973 in accordance with G.S. 20-48; and that a "pick-up notice" was served on defendant by Barnhart on 15 October 1973 but that defendant had told him then that he did not have his license because he had lost it. Officer Barnhart gave him a copy of the notice of revocation on 15 October which explained why his license was revoked.

The defendant offered no evidence on his behalf.

When this evidence is considered in the light most favorable to the State, it is sufficient to require submission of both cases to the jury and to support the verdicts. This assignment of error is not sustained.

[2] Based on an exception to the charge duly noted in the record, the defendant contends, "The trial court erred in its instruction regarding the manner of notice required to convict the defendant of operating a vehicle with license revoked . . ." In his brief, citing Judge Martin's dissent in *State v. Atwood,* 27 N.C. App. 445, 219 S.E. 2d 521 (1975), rev'd on other grounds, 290 N.C. 266, 225 S.E. 2d 543 (1976), the defendant argues that G.S. 20-48 does not provide one with procedural due process with respect to the notice that one's driving privileges have been revoked or suspended. The instruction challenged by this exception is in accord with *State v. Teasley,* 9 N.C. App. 477, 176 S.E. 2d 838 (1970), cert. denied, 277 N.C. 459, 177 S.E. 2d 900 (1970), wherein this court held that G.S. 20-48 does provide constitutional procedural due process. In *State v. Atwood,* 290 N.C. 266, 225 S.E. 2d 543 (1976), the Supreme Court reversed the decision of the Court of Appeals, but it did not overrule this court's decision in *State v. Teasley,*

supra. Thus Teasley still stands for the proposition that G.S. 20-48 does afford the defendant procedural due process with respect to the manner of giving one notice of the revocation or suspension of his or her driving privileges.

In discussing the impact of *State v. Atwood, supra,* on the administration of criminal justice in this State, Judge Clark, writing for the Court of Appeals in *State v. Chester,* 30 N.C. App. 224, 227-228, 226 S.E. 2d 524, 526-527 (1976), stated:

> "We conclude that in a prosecution for violation of G.S. 20-28(a) and the evidence for the State discloses that the Department complied with the notice requirements of G.S. 20-48: (1) where there is *no* evidence that defendant did not receive the notice mailed by the Department, it is not necessary for the trial court to charge on guilty knowledge; (2) where there is some evidence of failure of defendant to receive the notice or some other evidence sufficient to raise the issue, then the trial court must, in order to comply with G.S. 1-180 and apply the law to the evidence, instruct the jury that guilty knowledge by the defendant is necessary to convict; and (3) where *all* the evidence indicates that defendant had no knowledge of the suspension or revocation of license, a nonsuit should be granted."

In the present case, there was no evidence that the defendant did not receive notice that his driving privileges had been revoked. Indeed all of the evidence tends to show that he did receive the notice by mail pursuant to G.S. 20-48. In addition Officer Barnhart testified that he served a copy of the notice of revocation on defendant personally on 15 October 1973. We find this assignment of error to be without merit.

The defendant has other assignments of error which we have carefully considered and find to be without merit. We find that the defendant had a fair trial free from prejudicial error.

No error.

Judges BRITT and MARTIN concur.

BOARD OF TRANSPORTATION v. JOSEPH M. WILLIAMS, AND WIFE, MARCILE L. WILLIAMS; JAMES M. BALEY III, TRUSTEE; MOUNTAIN PRODUCTION CREDIT ASSOCIATION

No. 7628SC344

(Filed 6 October 1976)

1. **Highways and Cartways § 5— highway condemnation — motion for extension of time to answer — findings and conclusions**

The trial court was not required to make findings of fact and conclusions of law in an order denying defendants' motion under G.S. 136-107 for an extension of time to file answer in a condemnation action brought by the Board of Transportation.

2. **Highways and Cartways § 5; Rules of Civil Procedure § 55— highway condemnation proceeding — default judgment — prior entry of default not necessary**

Final judgment was properly entered against non-answering defendants in a condemnation proceeding under G.S. Ch. 136 without an entry of default having previously been entered as required by G.S. 1A-1, Rule 55, since Rule 55 is inapplicable to a condemnation proceeding under G.S. Ch. 136.

3. **Highways and Cartways § 5— highway condemnation — final judgment before ruling on defendants' motion**

The court did not err in allowing plaintiff's motion for final judgment against non-answering defendants in a G.S. Ch. 136 condemnation action without first ruling on defendants' motion for an extension of time to file answer where both motions were heard the same day and the fact that final judgment was entered before the order denying defendants' motion was obviously an inadvertence.

APPEAL by defendants Williams from *Rouse, Judge.* Judgment entered 12 December 1975 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 2 September 1976.

On 21 October 1974, plaintiff filed complaint, summons, and declaration of taking in a condemnation proceeding for the taking of the property of defendants Williams. Personal service was effected on defendants Williams on 23 October 1974. The complaint and declaration of taking alleged that no compensation would be due the property owners because "the general and specific benefits to the remainder of the property described in Exhibit 'B' exceed any compensation due because of the taking of a portion thereof."

Defendants Williams failed to answer and on 17 November 1975, plaintiff filed a motion for final judgment pursuant to G.S. 136-107. On 24 November 1975, also pursuant to G.S.

136-107, defendants moved for an extension of time within which to file answer.

On 26 November 1975, the court entered an order stating that the cause was being heard on plaintiff's motion for final judgment, finding that defendants had filed a motion for extension of time within which to answer before the entry of final judgment, and refusing to allow plaintiff's motion "at this time" because of defendants' motion for extension of time, and setting both motions for hearing the week of 8 December 1975.

On 10 December 1975, final judgment was entered, the court concluding "as a matter of law, that failure to answer within said twelve (12) months constitutes an admission that the benefits to the remaining property exceed or equal any damages, and, further, said failure to answer is a waiver of any further proceeding herein to determine just compensation."

On 15 December 1975, an order dated 12 December 1975, denying defendants' motion was entered.

Defendants Williams excepted to the entry of both orders and appealed.

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

Lentz & Ball, P.A., by Ervin L. Ball, Jr., and Lloyd M. Sigman, for defendant appellants.

MORRIS, Judge.

[1] Defendants argue that the court committed reversible error in failing to find facts and set out conclusions of law in his order denying defendants' motion for time within which to file answer. They contend that this is required by G.S. 1A-1, Rule 52(a)(1) which requires that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of appropriate judgment." We think the nonapplicability of this rule to this situation is too obvious to merit discussion. Findings of fact and conclusions of law are required upon entry of an order on a motion only when requested by a party and as provided by Rule 41(b), which is not applicable here. G.S. 1A-1, Rule 52(a)(2). Defendants made no request for findings of fact or conclusions of law.

The motion for extension of time was verified by defendants' counsel. He stated therein that defendants contacted him on 21 November 1975, and asked if they needed to make any appearance in court on 24 November 1975 in response to plaintiff's motion for final judgment. They advised counsel that they had retained him in the Spring of 1975 and requested him to file answer. Counsel averred, however, that he had no recollection of having received the complaint and summons, that no record was made in his office, that no file was set up or index card made to indicate that he had been retained, and that if, in fact, the summons and complaint were brought to his office, they had been lost or misplaced, and no request for an extension of time had been made within the 12 months period required by statute.

G.S. 136-107 provides for the exercise of discretion by the court on a motion for extension of time, timely made, upon good cause shown. The court, in denying defendants' motion, stated that "after considering the motion and arguments of counsel finds that said motion should be denied." The court obviously exercised its discretion, having decided that good cause did not exist, and denied the motion. Defendants' first assignment of error is overruled.

[2] Defendants' remaining assignment of error is directed to the court's signing and entering the order of final judgment. They argue that plaintiff failed to follow the provisions of G.S. 1A-1, Rule 55, which contemplates a two stage approach: entry of default by the clerk and, thereafter, entry of judgment by default. Obviously defendants are correct in their interpretation of the requirements of G.S. 1A-1, Rule 55, and if that Rule were applicable here, their position would have merit. However, this proceeding was brought under Chapter 136 of the General Statutes, and those provisions control the procedures to be followed in condemnation proceedings such as the one before us. G.S. 136-107 clearly provides that where no answer is filed, that failure "shall constitute an admission that the amount deposited is just compensation and shall be a waiver of any further proceeding to determine just compensation; in such event the judge shall enter final judgment in the amount deposited and order disbursement of the money deposited to the owner."

Defendants also argue that Rule 55 requires written notice at least three days prior to the hearing. We have already noted

the inapplicability of Rule 55 to this proceeding. Nevertheless, the record is clear that the motion for final judgment was filed 17 November 1975, that defendants were served with the motion, that they contacted an attorney with reference to whether they needed to appear in court for the hearing of the motion on 24 November 1975, that thereafter the time for hearing was extended and an order entered setting the motion for hearing the week of 8 December 1975. Defendants cannot be heard to complain that they did not have adequate notice.

[3] Finally, they contend that the court was without authority to enter the final judgment without first ruling on their motion for extension of time. Although the record indicates the final judgment was entered on 10 December 1975, and the order denying the defendants' motion was entered 15 December 1975 (signed 12 December 1975), it is clear from both the record and statements of counsel at oral argument, that the two motions were heard the same day. The fact that the final judgment was entered before the order denying defendants' motion is obviously merely an inadvertence. This assignment is also overruled.

Affirmed.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. HAROLD O. MORGAN

No. 764SC355

(Filed 6 October 1976)

1. **Bastards § 10.5— preliminary action to determine paternity — blood grouping test requested — continuance proper**

It would seem that in a preliminary proceeding to determine the paternity of an unborn child a continuance until the birth of the child would be required when a defendant requests a blood grouping test under G.S. 49-7.

2. **Bastards § 3— unborn child — wilful neglect to support — trial improper — action to establish paternity proper**

Where the mother of an unborn child alleged that defendant was the father of the child and that he failed to provide support and financial aid, the trial court was without power to try defendant for wilfully neglecting his illegitimate child, since defendant could not be tried for that offense prior to birth of the child; however, the

court could proceed to determine the issue of paternity, though the mother's affidavit was filed and the arrest warrant for defendant was issued prior to the child's birth.

3. Bastards § 10.5— action to establish paternity — showing child to jury — no error

In a proceeding to determine the paternity of an illegitimate child, the trial court did not abuse its discretion in permitting the child in question to appear in the courtroom with his mother, nor in permitting the district attorney to ask defendant questions concerning the child's features and thereby to exhibit the child to the jury.

APPEAL by defendant from *James, Judge.* Finding entered 5 December 1975 in Superior Court, ONSLOW County. Heard in the Court of Appeals 14 September 1976.

After appeal from district court defendant was tried *de novo* in superior court upon the original warrant. Only one issue was submitted to the jury in superior court: "Is the defendant, Harold O. Morgan, the father of Stacy Andrew Riggleman, born of the body of Edna Riggleman on October 16, 1975? ANSWER: Yes."

Defendant appealed.

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

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

BROCK, Chief Judge.

[1] The child in this case (Stacy Riggleman) was born 16 October 1975. The original warrant, upon which defendant was tried in superior court, was issued on 28 May 1975. For the purpose of determining the issue of paternity, this is permissible. General Statute 49-5 provides: "Preliminary proceedings under this Article to determine the paternity of the child may be instituted prior to the birth of the child but when the judge or court trying the issue of paternity deems it proper, he may continue the case until the woman is delivered of the child." It would seem that in such a preliminary proceeding a continuance until the birth of the child would be required when a defendant requests a blood-grouping test under G.S. 49-7. "There can be no doubt that a defendant's right to a blood test is a substantial right and that, upon defendant's motion, the court must order the test when it is possible to do so." *State v. Fowler,* 277 N.C.

305, 177 S.E. 2d 385 (1970). The 1975 amendment to G.S. 8-50.1 amplifies the importance of this right to a blood-grouping test.

In the case presently before us the trial in superior court was held after the birth of the child, and the defendant was accorded a blood-grouping test. Therefore, the judgment in the district court requiring the defendant to pay support prior to the birth of the child is of no effect.

The affidavit upon which the warrant was issued in the present case reads:

> "The undersigned, Edna Earl Riggleman, being duly sworn, complains and says that at and in the county named about (sic) and on or about the 28th day of May, 1975, the defendant named above did unlawfully, wilfully neglect to give any support or financial aid to Edna Earl Riggleman who is now pregnant for Five (5) months with his illegitimate child and did Fail to give aid or support after the demand on May 27, 1975 and on other Previous occasions."

Upon the foregoing affidavit, on 28 May 1975 the court issued its order directed to an officer, commanding him "forthwith to arrest the defendant named above and bring him before District Court, to be dealt with according to law."

The pertinent procedural facts of this case are almost identical to those in *State v. Robinson,* 245 N.C. 10, 95 S.E. 2d 126 (1956), and the holding there is controlling in this case. In *Robinson* an arrest warrant was issued upon the affidavit dated 13 December 1950. The child in *Robinson* was born 17 December 1950. The affidavit stated ". . . on or about 12 day of April 1950, John Robinson with force and arms, at and in the county aforesaid, did wilfully, maliciously, unlawfully beget upon the body of Myrtle Christmas a child yet unborn and did fail to provide medical care for the said Myrtle Christmas against the Statute . . ." In *Robinson* the Court held, *inter alia,* as follows: "The mother filed an affidavit specifically charging the defendant with being the father of her unborn child. The fact that the affidavit also stated that the defendant had failed to provide medical care for affiant neither weakens nor strengthens the charge defendant was required to answer . . . When the affidavit was filed and the warrant of arrest issued, de-

fendant had not committed the statutory offense of wilfully neglecting his illegitimate child. (Citations omitted.) The crime had been committed when the case was tried. The court was, however, without power to try the defendant for the crime, but lack of authority to pass on the guilt of the defendant because of the date of the complaint did not impair the authority of the court to proceed to determine the issue of paternity."

[2] The same is true in the present case. The mother filed an affidavit specifically charging the defendant with being the father of her unborn child. This is the charge he was required to answer. The additional allegations of failure to give financial aid to the mother are surplusage. They neither weaken nor strengthen the charge defendant was required to answer. General Statute 49-5 specifically provides for preliminary proceedings to determine the issue of paternity. The alleged father is given the right of appeal from an adverse finding.

In the present case the only finding made in the superior court was on the issue of paternity. The evidence was ample to support the verdict.

[3] Defendant complains that the child in question was permitted to be within the bar with the mother and her seventeen year old daughter. He also complains that the district attorney was permitted to ask defendant questions concerning the child's features and to thereby exhibit the child to the jury. The trial judge overruled defendant's objections on these points. We see no improper conduct on the part of the mother or the district attorney, and we find no abuse of discretion on the part of the trial judge.

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

No error.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. JAMES LOUIS WILLIAMSON

No. 767SC372

(Filed 6 October 1976)

Criminal Law § 66— in-court identification — pretrial showup identification

In this prosecution for armed robbery, the trial court properly permitted in-court identifications of defendant as the robber where the court determined from competent *voir dire* testimony that the identifications stemmed from the witnesses' observations of defendant at the crime scene and were not the result of a lineup or other out-of-court confrontation; however, the court erred in the admission of testimony of a one-man lineup identification of defendant where there was no emergency situation requiring an immediate one-man lineup, there was no showing that defendant was advised of his right to counsel at the lineup, and there was no showing that defendant consented to a lineup or was advised that he would be exhibited to witnesses for identification.

APPEAL by defendants from *Tillery, Judge.* Judgment entered 7 January 1976 in Superior Court, WILSON County. Heard in the Court of Appeals 15 September 1976.

Defendant was charged in a bill of indictment with the felony of robbery with a firearm.

The State's evidence tends to show the following: Defendant and a companion went into Ferrell's Supply Store about 9:00 a.m. on 25 September 1975. The operator, Wilson, and two customers, Horne and Watson, were in the store. Defendant held a gun to Wilson's head, and defendant's companion held a gun to Horne's head. Defendant removed money from Wilson's pocket, and then defendant and his companion made Wilson, Horne, and Watson lie on the floor. Defendant opened the cash drawer and removed the money from it, and defendant and his companion drove away in Wilson's automobile. Wilson and Horne gave the investigating officer a description of defendant but were unable to describe defendant's companion. Defendant was described as a light-skinned colored male, six feet or more in height, muscular with a large neck, a yellowish patch of hair on the left side of his head, and wearing blue slippers with thick orange colored soles. It was brought out on *voir dire* that on the same day the investigating officer received a call from an informant advising that James Louis Williamson had committed the robbery at Ferrell's Supply Store and that he had

just checked in room 434 at the Cherry Hotel in Wilson. Therefore, the investigating officer, with other officers, went to room 434 at the Cherry Hotel, where defendant answered and opened the door. Blue slippers with thick orange soles were observed under the bed, and distinctive coins matching the description of some taken from a compartment of the cash register in Ferrell's Supply Store were on the table beside the bed. Defendant fit the description given by Wilson and Horne, and he was placed under arrest for armed robbery. Wilson, Horne, and Watson identified defendant, the shoes, and the coins at the sheriff's office that night, again at the preliminary hearing, and again at trial.

Defendant offered no evidence.

Attorney General Edmisten, by Associate Attorneys Alan S. Hirsch and Acie L. Ward, for the State.

Connor, Lee, Connor, Reece & Bunn, by James F. Rogerson, for the defendant.

BROCK, Chief Judge.

Prior to testimony identifying defendant as the robber, defendant objected and moved to suppress identification testimony and testimony of the lineup identification. A *voir dire* was conducted upon the competency of the testimony.

From competent evidence the trial judge determined that the in-court identification of defendant as the robber stemmed solely from the witnesses' observation of defendant at the scene of the crime and was not a result of out-of-court confrontation or lineup procedures employed by the sheriff. Defendant's objections to the in-court identification of defendant were properly overruled.

During the *voir dire* it was developed that after defendant had been arrested, the three witnesses were brought to the sheriff's office to view a suspect. The three witnesses were placed in one room, and defendant was brought in alone. He was required to turn around two or three times and then was taken from the room. The witnesses were asked together if he was the one who robbed the store, and the witnesses replied that he was. The trial judge ruled that this lineup procedure was not illegal and permitted in-court testimony of the lineup identifica-

tion. This was error which we cannot say was nonprejudicial beyond a reasonable doubt.

In this case there was no emergency situation requiring an immediate one-man lineup. The defendant had already been arrested for the offense under a showing of adequate probable cause. There was no danger he would depart the jurisdiction of the court. There was no showing that defendant was advised of his right to counsel at the lineup. There was no showing that defendant consented to a lineup or that he was advised that he would be exhibited to witnesses for identification.

The officers should have known better than to conduct such a one-man lineup. The district attorney should have known better than to have tendered evidence of the lineup identification. The trial judge committed error in permitting such testimony. Had the lineup procedure been proper, the in-court identification of defendant was ample to require submission of the case to the jury without necessity for evidence of a lineup identification.

We have not considered the remaining assignments of error because they probably will not arise upon a new trial. This case has been tried twice, but still another trial must be ordered because of the use of incompetent evidence of identification at an illegally conducted lineup.

New trial.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. DAVID O'HARA DAVIS

No. 7610SC324

(Filed 6 October 1976)

Criminal Law § 66— in-court identification of defendant — no taint from pretrial photographic identification

Evidence was sufficient to support the findings and conclusion of the trial court that an in-court identification of defendant by the armed robbery victim was not tainted by an impermissively suggestive pretrial photographic identification procedure.

State v. Davis

APPEAL by defendant from *Bailey, Judge.* Judgment entered 18 November 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 31 August 1976.

Defendant was indicted for armed robbery. Before pleading not guilty defendant moved to suppress identification testimony of the alleged victim. Motion was denied.

Evidence at trial tended to show that on the night of 29 July 1975 defendant and two others robbed a Little General Store in Raleigh where Mrs. Stella Morgan was working as cashier. Defendant testified that at the time of the robbery he was returning from Goldsboro, where he had purchased heroin, to Raleigh.

From a jury verdict of guilty of armed robbery and a thirty year prison sentence defendant appealed.

Attorney General Edmisten, by Associate Attorney James E. Scarbrough, for the State.

Sanford, Cannon, Adams & McCullough, by Daniel T. Blue, Jr., for defendant appellant.

ARNOLD, Judge.

Defendant argues that the court erred in denying his motion to suppress Mrs. Morgan's identification testimony. The question presented is whether the identification was tainted by an impermissively suggestive pretrial photographic identification procedure. Each case has to stand on its own facts, and conclusions of law drawn from the *voir dire* examination are to be upheld where supported by competent evidence. *State v. Smith,* 25 N.C. App. 595, 214 S.E. 2d 200 (1975).

Testimony on *voir dire* tended to show that three weeks following the robbery Detective Beasley was investigating defendant's possible involvement in other robberies unrelated to the robbery in question. Detective Beasley showed defendant's picture to Mrs. Morgan, and across the bottom of the picture was written "armed robbery." The detective testified that at the time he visited the Little General Store he did not know that Mrs. Morgan was the employee who had been robbed, and he did not suspect defendant of the Little General robbery. Mrs. Morgan was asked if she had ever seen the man in the photograph in the vicinity, and she replied yes, he was the man who robbed her.

Mrs. Morgan was later shown a group of photographs, including defendant's, and she selected defendant's picture from among the others. Thereafter she identified defendant in a lineup with six other men of the same race and of similar weight and height. She also identified defendant at a second lineup.

Defendant complains that the original photographic identification was impermissibly suggestive and tainted the subsequent identifications.

On *voir dire* Mrs. Morgan testified that defendant had entered the store previously on the same night of the robbery, and that during the robbery she had a good opportunity to see defendant's face in good light and at close range as he pulled a stocking over his head, and that her identification was based on her recollection of the robbery.

After weighing the evidence the trial court concluded that the identification by Mrs. Morgan based on the original photograph shown her was spontaneous and not tainted by impermissible suggestion. The court also concluded that Mrs. Morgan's identification of defendant in the lineup was based in part on her having seen defendant in the original picture and in the group of pictures shown her, and that the validity of the identification of defendant was a question for the jury.

The Supreme Court of the United States has indicated that "each case must be considered on its own facts, and . . . convictions based on eyewitness identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States,* 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed. 2d 1247, 1253 (1968).

In this case a *voir dire* was properly held to determine whether the identification procedure was impermissibly suggestive, and the court made findings of fact to support its conclusion that the initial identification was not impermissibly suggestive. We hold that the findings are plainly supported by the evidence and thus conclusive and binding on this Court. *State v. Whitehead,* 25 N.C. App. 592, 214 S.E. 2d 316 (1975).

Appellant assigns other errors which we have carefully reviewed. It is our opinion that he received a fair trial free of prejudicial error.

No error.

Chief Judge BROCK and Judge PARKER concur.

IN THE MATTER OF MICHELLE LEE GODWIN, MINOR

No. 767DC381

(Filed 6 October 1976)

Parent and Child § 1— termination of parental rights — serious neglect — refusal to consent to adoption — refusal of counseling

The refusal of the natural parents of a child who has been in a foster home for some four years to consent to the adoption of the child by others and the refusal of the father, who suffers from a mental illness, to submit to further counseling to determine his ability as a parent do not constitute "serious neglect" within the meaning of G.S. 7A-288(4) which would permit the court to terminate the parental rights of the natural parents.

APPEAL by petitioner from *Carlton, Judge.* Order entered 4 February 1976 in District Court, NASH County. Heard in the Court of Appeals 16 September 1976.

On 5 November 1975 the Nash County Department of Social Services (petitioner) filed a petition pursuant to G.S. 7A-288(4) asking the court to terminate the parental rights of Cecil and Wanda Godwin as to their four-year-old daughter, Michelle, including their right to consent or object to the adoption of Michelle. At a hearing petitioner's evidence tended to show:

In 1972 Michelle, along with her two older sisters, was placed in the custody of the Nash County Department of Social Services upon an adjudication that they were neglected and dependent children. This adjudication was based primarily upon the father's mental illness and the mother's limited intellectual capacity. The father was diagnosed as a chronic paranoid schizophrenic, which illness will never be cured although medication can control some of the symptoms such as hallucinations

and illusions. The father has been admitted to Cherry Hospital on four occasions and in the opinion of psychiatrists his chances for holding normal employment are minimal. The father is likely to require future hospitalization although he has refused for the last year to return to the mental health center for further counseling. His ability as a parent is below normal due to his inability to think through relationships and his inflexibility with people. The mother has a third grade education and has spent ten years at the Caswell Center. Following this adjudication, Michelle was placed in a foster home when she was 18 months old. At the time she was placed in foster care, she was "below normal" but now is above normal in every respect and is very outgoing. Michelle has no emotional ties with her parents and, in fact, regards her foster mother as her real mother. In October 1974, it was determined that the monthly visits of Michelle with her parents were doing more harm than good because of the confusion that was created. The two older children, who have developed emotional ties with their parents, have continued their visits and petitioner is not seeking to terminate parental rights as to them; in fact, the social workers have told the parents that the two older children *may* be returned to them depending on future evaluations. No caseworker has ever seen the parents physicially abuse their children nor has any caseworker ever seen any intentional neglect on their part. The parents have consistently refused to sign a voluntary consent for Michelle to be adopted by other parties.

Respondents' evidence tended to show: In 1972 the father suffered a "nervous breakdown" from the pressures of his job. Since that time he has made regular visits to the mental health clinic from which he has received medication and he believes he is greatly improved. The father has not refused to be re-evaluated but is merely waiting for the social worker to make an appointment. In addition to the disability benefits and social security that the family receives, the mother has been earning money regularly by babysitting for the two-year-old child of a friend. The parents love their children and would like to be normal parents once again. They have refused to consent to the termination of parental rights and subsequent adoption of Michelle even if it means she will remain in a foster home because they are not willing "to give away [their] flesh and blood."

From a denial of the petition to terminate parental rights, petitioner appealed.

George Paul Duffy, Jr., for the petitioner appellant.

Ezzell, Henson & Fuerst, by James E. Ezzell, Jr., for respondent appellees.

BRITT, Judge.

The sole question presented on appeal is whether the trial court erred in concluding that there had been no "physical abuse or serious neglect" as required to terminate parental rights under G.S. 7A-288(4). We hold that it did not.

The statutory provision applicable to the present case is G.S. 7A-288(4) which provides that the court may enter an order terminating parental rights if the court finds: "That the parent has so physically abused or seriously neglected the child that it would be in the best interest of the child that he not be returned to such parent." As stated in *Dept. of Social Services v. Roberts*, 22 N.C. App. 658, 660, 207 S.E. 2d 368, 370 (1974): "It should be noted that the court is not required to terminate parental rights under any circumstances. G.S. 7A-288 only gives the court the authority to do so in the exercise of its discretion. . . . "

To terminate parental rights under the present statutory provision, the trial court must base its determination on evidence which shows either physical abuse or serious neglect. No evidence of physical abuse was presented in the instant case. Petitioner contends that the refusal of the Godwins to consent to the adoption of Michelle (by other parties) and the refusal of the father to submit to further counseling to determine his ability as a parent constitute serious neglect. We agree with the trial court that this is not the type of "serious neglect" contemplated by the statute.

The evidence presented was insufficient to support a finding of serious neglect, therefore, the decision of the trial court is

Affirmed.

Judges PARKER and CLARK concur.

QUAKER FURNITURE HOUSE, INC. v. EMIL BALL, INDIVIDUALLY AS GENERAL PARTNER, AND SPANISH INNS CHARLOTTE, LTD., A NORTH CAROLINA LIMITED PARTNERSHIP

No. 7625SC347

(Filed 6 October 1976)

Rules of Civil Procedure §§ 5, 12, 55— mailing of answer within time allowed — entry of default and default judgment improper

Where defendants' answer was served on plaintiff by deposit in the mail on the last day of the thirty-day period for service of the answer but plaintiff and the clerk did not receive the answer until three days later, by which time an entry of default and a default judgment had been entered against defendants, the trial court properly set aside the default judgment, since (1) G.S. 1A-1, Rule 5(d), does not state a time within which all pleadings subsequent to the complaint must be filed with the court; (2) defendants complied with the requirement of G.S. 1A-1, Rule 12(a)(1), that answer be served within 30 days after service of summons and complaint; and (3) service of an answer is both a pleading and an appearance for the purpose of G.S. 1A-1, Rule 55, which provides that a defendant's default can be entered only if he has failed to plead, and default judgment may be entered only if a defendant has failed to appear.

APPEAL by plaintiff from *Kirby, Judge.* Order entered 10 February 1976 in Superior Court, CATAWBA County. Heard in Court of Appeals 2 September 1976.

This is a civil action wherein the plaintiff, Quaker Furniture House, Inc., seeks to recover from the defendants, Emil Ball and Spanish Inns Charlotte, Ltd., the principal sum of $22,929.10 plus interest from 23 May 1975.

The action was commenced on 24 October 1975, and service of process was duly had upon the defendants on 30 October 1975. The last day of the thirty-day period for service of the answer was Monday, 1 December 1975, and the answer was served on the plaintiff that day by deposit in the mail.

On 2 December 1975 plaintiff filed with the clerk an affidavit and request to enter default, and on that day the clerk entered an entry of default and a default judgment against the defendants in the amount of $22,929.10 plus eleven percent interest from 23 May 1975. On 4 December 1975 plaintiff received in the mail the original answer and on that same date the clerk received and filed a copy of the answer.

On 10 February 1976 defendants moved that the default judgment be set aside. From an order of the court granting the motion, plaintiff appealed.

Corne & Pitts by Larry W. Pitts for plaintiff appellant.

Craighill, Rendleman & Clarkson by Francis O. Clarkson, Jr., for defendant appellees.

HEDRICK, Judge.

Plaintiff assigns as error the order of the trial court setting aside the default judgment. Plaintiff concedes that service of the answer was had upon it within the thirty-day period after service of the summons and complaint prescribed by G.S. 1A-1, Rule 12(a)(1), but argues that the portion of G.S. 1A-1, Rule 5(d) which provides, "All pleadings subsequent to the complaint shall be filed with the court," entitles it to a default judgment since the answer was not filed with the court until some thirty-five days after service of the summons and complaint. We do not agree.

Under G.S. 1A-1, Rule 55 a defendant's default can be entered only if he "has failed to plead or is otherwise subject to default," and a default judgment can be entered by the clerk only if the defendant has failed "to appear." We hold that service of the answer is both a "pleading" and an "appearance" for the purpose of Rule 55.

G.S. 1A-1, Rule 12(a)(1) provides in part: "[A] defendant shall *serve* his answer within 30 days after service of the summons and complaint upon him." (Emphasis added.) Rule 12(a)(1) requires only that the defendant *serve* his answer within thirty days. There is nothing in Rule 5(d) that requires the defendant to file his answer with the court within thirty days as well. Rule 5(d) does not provide any period in which the filing must take place.

Although the trial court has discretion under certain circumstances to set aside an entry of default under G.S. 1A-1, Rule 55(c) and a default judgment under G.S. 1A-1, Rule 60(b), we are of the opinion that the trial court in setting aside the default judgment correctly concluded that since the defendants had served their answer on the plaintiff within thirty days after they had been served with the summons and

complaint, the judgment had been "entered inadvertently and is void and of no legal effect." G.S. 1A-1, Rule 60(b)(4).

The order appealed from is

Affirmed.

Judges MORRIS and ARNOLD concur.

TONY EUGENE GUTHRIE v. ROBERT M. RAY

No. 7628DC303

(Filed 6 October 1976)

1. **Process § 4— officer's return — presumption of valid service**

When an officer's return on the summons shows legal service, a rebuttable presumption of valid service is created.

2. **Process § 7— service on person at defendant's dwelling — insufficiency of return**

An officer's return on the summons indicating that the officer left a copy of the summons and complaint with defendant's mother "who is a person of suitable age and discretion and who resides in the defendant's dwelling house or usual place of abode" failed to disclose that service was had on the defendant by leaving a copy of the summons and complaint *at* defendant's dwelling house or usual place of abode as required by G.S. 1A-1, Rule 4(j)(1)(a).

APPEAL by defendant from *Styles, Judge.* Judgment entered 19 February 1976 in District Court, BUNCOMBE County. Heard in the Court of Appeals 26 August 1976.

This is a civil action wherein plaintiff, Tony Eugene Guthrie, seeks to recover from defendant, Robert M. Ray, for personal injuries and property damage allegedly resulting from the negligent operation of a motor vehicle owned by defendant. The action was commenced 10 May 1972 and service was allegedly made on the defendant on 16 May 1972. Defendant made no appearance and filed no responsive pleading, and his default was entered on 1 March 1973. On 26 September 1973, after a hearing on issue of damages, a judgment of default awarding plaintiff twenty-nine hundred ($2900) dollars was entered.

On 27 March 1975 defendant moved that the court set aside the default judgment for insufficient service of process. In sup-

port of the motion defendant submitted his own affidavit wherein he stated: that he had been a resident of Tennessee since July 1962 and had been continuously employed and registered to vote in Tennessee since that time; and that he was not visiting at Route 3, Box 187, Weaverville, North Carolina, on 16 May 1972.

After the hearing on the motion the trial court made the following pertinent finding of fact: "THAT a Buncombe County Deputy Sheriff has made a return on the original Summons which states that the defendant was served by delivering copies of Summons and Complaint to the defendant's mother, Mrs. C. Ray, in the defendant's dwelling house or usual place of abode, with said service having been made on May 16, 1972." It thereafter made the following pertinent conclusion of law: "THAT the process in this case was duly served on the defendant on the 16th day of May, 1972."

From an order denying defendant's motion, he appealed.

Swain, Leake & Stevenson, by A. E. Leake for plaintiff appellee.

Morris, Golding, Blue and Phillips, by Steve Kropelnicki and James F. Blue III, for defendant appellant.

HEDRICK, Judge.

Service of process in this case was attempted pursuant to G.S. 1A-1, Rule 4(j)(1)(a), which provides in pertinent part as follows:

> "(j) *Process — manner of service to exercise personal jurisdiction.* — In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in G.S. 1-75.4, the manner of service of process shall be as follows:
>
> (1) Natural Person. — Except as provided in subsection (2) below, upon a natural person:
>
> a. By delivering a copy of the summons and of the complaint to him or by leaving copies thereof *at the defendant's dwelling house or usual place of abode* with some person of suitable age and discretion then residing therein;" (emphasis added).

The officer's return on the summons in this case states that the defendant was served as follows:

> "[O]n 16th May 1972, at the following place: Route 3, Box 187, [Weaverville, N. C.] By: leaving copies with Mrs. C. Ray (mother) who is a person of suitable age and discretion and who resides in the defendant's dwelling house or usual place of abode."

[1] When the officers return on the summons shows legal service, a presumption of valid service of process is created. *Harrington v. Rice,* 245 N.C. 640, 97 S.E. 2d 239 (1957), 6 Strong, N. C. Index 2d, Process, § 4, p. 455. However, such a presumption may be rebutted. *Harrington v. Rice, supra.*

In *Williams v. Hartis,* 18 N.C. App. 89, 195 S.E. 2d 806 (1973), where service of process was attempted pursuant to Rule 4(j)(1)(a), Judge Britt, speaking for this Court, said:

> "Statutory provisions prescribing the manner of service of process must be strictly construed, and the prescribed procedure must be strictly followed; and, unless the specified requirements are complied with, there is no valid service." (Citation omitted.) *Id.* at 92, 195 S.E. 2d at 808.

[2] Although the trial court found as a fact that the return on the summons states that a Deputy Sheriff of Buncombe County served the defendant by leaving a copy of the summons and complaint with defendant's mother "in the defendant's dwelling house or usual place of abode," there is no evidence in this record to support such a finding. The officer's return on the summons merely indicates that the officer left a copy of the summons and complaint with defendant's mother, "who is a person of suitable age and discretion and who resides in the defendant's dwelling house or usual place of abode." The return clearly fails to disclose that service was had on the defendant by leaving a copy of the summons and complaint *at* defendant's dwelling house or usual place of abode as required by G.S. 1A-1, Rule 4(j)(1)(a). Indeed all of the evidence in the record tends to show that the defendant was a resident of Tennessee when service of process was attempted in North Carolina.

Since there is no evidence in the record to support the court's critical finding that service of process was had as prescribed by statute, its conclusion that, "[P]rocess in this case

was duly served on the defendant on the 16th day of May, 1972," is erroneous.

For the reasons stated the order denying the defendant's motion to set aside the default judgment is reversed, and the cause is remanded to the District Court for the entry of an order setting aside the default judgment and dismissing the action.

Reversed and remanded.

Judges BRITT and MARTIN concur.

LINDA F. SMITH v. RALPH LEE BURDEN

No. 768DC312

(Filed 6 October 1976)

Bastards §§ 3, 8; Judgments § 44— criminal conviction for nonsupport of child — subsequent civil action for child support — question of paternity

A prior criminal conviction of failure to support an illegitimate child was not conclusive as to paternity in a civil action for support of the child, and the warrant, verdict and prayer for judgment continued from the prior criminal action were incompetent on the question of paternity in the civil action.

APPEAL by petitioner from *Hardy, Judge.* Judgment entered 29 December 1975 in District Court, WAYNE County. Heard in the Court of Appeals 31 August 1976.

On 8 November 1965, Linda Artis (now Linda Smith) swore out a warrant in Wayne County charging Ralph Lee Burden with the criminal offense of willfully failing and refusing to provide support and medical expenses for his illegitimate child, Raimon LeVell Artis, born 17 September 1965 to Linda Artis (Smith), then unmarried. In that proceeding defendant pleaded not guilty. Judge Gaylor found defendant guilty on 15 December 1965 and continued prayer for judgment for two years conditioned upon defendant's paying court costs, medical bills for the birth of the child, and support payments of $30.00 per month commencing 15 December 1965. No final judgment has ever been entered in this action.

On 3 November 1975 Linda Smith filed a petition under the Uniform Reciprocal Enforcement of Support Act (Chapter 52A of the General Statutes of North Carolina) seeking support for the illegitimate child of the petitioner and respondent, Ralph Lee Burden. Respondent moved to dismiss the action. Judge Hardy made the following findings of fact:

"1. That an action was instituted by the petitioner against the defendant in this Court in November 1972 (72CVD2237), which said action was dismissed because of the failure of the petitioner to show a judicial determination of paternity of the child; and a further action having been instituted in March 1974 (74CVD717) and the same having been dismissed upon motion of the defendant.

"2. That the only record evidence connecting the defendant, Ralph Lee Burden, with paternity of the petitioner's child are:

"(a) A warrant attached to said petition charging the defendant with nonsupport but fails to allege that he is the father of said child, which said warrant was brought in the County Court of Wayne County designated case No. G 3787, dated November 8, 1965.

"(b) A judgment entered in said action by Charles Gaylor presiding Judge, making an adjudication of guilty dated December 15, 1965, and continuing prayer for judgment for two years, a copy of which is also attached to the petition.

"3. That it is apparent from the record that no final judgment has ever been entered in this matter; that the time for entry of judgment expired in December 1967.

"4. That the record evidence fails to show that there has ever been a judicial determination that the defendant is the father of the petitioner's child."

On 29 December 1975, Judge Hardy dismissed the petition on the grounds that there had been no judicial determination of respondent's paternity. From this judgment granting dismissal, petitioner appeals. Respondent did not file a brief or make an appearance in this appeal.

Attorney General Edmisten, by Assistant Attorney General Parks H. Icenhour, for petitioner.

No appearance for respondent.

BROCK, Chief Judge.

The petitioner argues on appeal that Judge Hardy was in error in finding that there had been no judicial determination of paternity in the 1965 criminal action against respondent brought under G.S. 49-2. Petitioner further argues that the 1965 criminal action conclusively establishes respondent's paternity in the present action. Judge Hardy dismissed the petition on the ground that there had never been a judgment in the prior criminal action. We find it unnecessary to rule on his conclusion because whether his reasoning is correct or not, the result is correct. Petitioner is not entitled to relief in this action.

An action for support of illegitimate children under Chapter 52A of the General Statutes is a civil action. *Childers v. Childers,* 19 N.C. App. 220, 198 S.E. 2d 485 (1973); *Cline v. Cline,* 6 N.C. App. 523, 170 S.E. 2d 645 (1969). In such an action paternity must be judicially determined to warrant relief. G.S. 52A-8.2. Prior criminal conviction of failure to support illegitimate children is not conclusive as to paternity in a subsequent civil action for support of the same children. In the subsequent civil action, the putative father is entitled to have the issue of paternity litigated. *Tidwell v. Booker,* 290 N.C. 98, 225 S.E. 2d 816 (1976).

In the case at bar petitioner presents no evidence whatsoever of respondent's paternity except the warrant, verdict, and prayer for judgment continued from the prior criminal action. Under *Tidwell* such evidence is incompetent; therefore, petitioner has not met the requirements of Chapter 52A as to proof of paternity and is not entitled to relief.

Affirmed.

Judges PARKER and ARNOLD concur.

JOHNNIE FLETCHER HUSSEY v. JOE DALTON CHEEK

No. 7620SC368

(Filed 6 October 1976)

Judgments § 44— acquittal of criminal assault — subsequent action for civil assault

Plaintiff is not estopped to proceed in a civil action for assault by defendant's acquittal of a criminal assault arising out of the same occurrence since the parties in the two proceedings are not the same, the State and plaintiff are not in privity, and the burden of proof in the two trials is different.

APPEAL by plaintiff from *Collier, Judge.* Order entered 26 January 1976 in Superior Court, MOORE County. Heard in the Court of Appeals 14 September 1976.

In the action to recover for personal injury plaintiff alleges that on 6 July 1974 the defendant wilfully and maliciously shot him in the chest with a handgun which resulted in permanent injury.

Defendant in his answer alleged that criminal charges had been brought against him for the shooting of 6 July 1974; that he had pleaded self-defense; and that in Superior Court a jury had acquitted him of all charges. Defendant pled that plaintiff was estopped to proceed in this civil action by defendant's acquittal on the criminal charges in Superior Court.

Defendant moved for summary judgment on the ground of collateral estoppel by reason of his former acquittal. At hearing defendant introduced a transcript of the trial in which he was acquitted by the jury at the 2 December 1974 Criminal Session of the Superior Court of Moore County on the charge of assaulting the plaintiff with a deadly weapon with intent to kill inflicting serious injury. From summary judgment plaintiff appealed.

Ottway Burton from plaintiff appellant.

Seawell, Pollock, Fullenwider, Van Camp & Robbins, P.A., by James R. Van Camp and Bruce T. Cunningham for defendant appellee.

CLARK, Judge.

The issue presented is whether collateral estoppel may be applied to the issue of self-defense in a civil assault case when

the defendant has previously been acquitted of a criminal assault arising out of the same occurrence.

In a recent decision, *Tidwell v. Booker,* 290 N.C. 98, 225 S.E. 2d 816 (1976), (three judges dissenting), rev'g 27 N.C. App. 435, 219 S.E. 2d 648 (1975), the Supreme Court of North Carolina held that in a civil proceeding by the mother to have the defendant declared the father of her illegitimate child and to require child support of defendant, the prior conviction of the defendant in a criminal prosecution for bastardy did not estop the defendant in the present action to deny paternity. The court stated, "Thus, we conclude that, for the reason that the parties to the criminal and civil proceedings are not the same and the State and this plaintiff are not in privity, the defendant is not estopped in the present action to deny paternity . . . . " 290 N.C. at page 114.

Though plaintiff in the present action was the "prosecuting witness" in the criminal prosecution and plaintiff's attorney in the present action was "private prosecutor" in the criminal prosecution, under the ruling in *Tidwell,* the parties to the criminal and civil proceedings are not the same, and the State and plaintiff are not in privity. The plaintiff in this civil action for personal injury resulting from assault and battery by the defendant is not estopped by the acquittal of the defendant in the criminal prosecution for the same alleged assault.

This same result may be reached in the present case by focusing on the burdens of proof in the two trials. In the criminal action the burden was on the State to prove the absence of self-defense beyond a reasonable doubt. *State v. Fletcher,* 268 N.C. 140, 150 S.E. 2d 54 (1966). In the civil action the burden was on the defendant to prove self-defense by the greater weight of the evidence. *Roberson v. Stokes,* 181 N.C. 59, 106 S.E. 151 (1921). In no way can the State's failure to carry its burden in the criminal case be dispositive of the defendant's burden in the civil case. When the burden of proof at the second trial is less than at the first, the failure to carry that burden at the first trial cannot raise an estoppel to carrying the lesser burden at the second trial.

The summary judgment for defendant is

Reversed and this cause remanded.

Judges BRITT and PARKER concur.

EDNA HICKS LOER v. ROBERT LEE LOER

No. 7619DC343

(Filed 6 October 1976)

Divorce and Alimony § 23; Parent and Child § 7— agreement to support child until emancipation — termination of duty when child reaches 18

A father's obligation under a separation agreement to make payments for the support and education of his son until he reaches "age 21 . . . (or is) emancipated" terminates when the son attains legal emancipation at age 18 under G.S. Ch. 48A.

APPEAL by plaintiff from *Warren, Judge.* Judgment entered 25 February 1976, District Court, CABARRUS County. Heard in the Court of Appeals 2 September 1976.

Plaintiff, former wife of the defendant, alleged the indebtedness of defendant pursuant to a separation agreement dated 1 February 1971. This agreement provided that defendant would pay plaintiff the sum of $112.50 per month for the support, maintenance and education of Robert Earl Loer, a child of the marriage, until he would reach "the age of 21 years, be married, emancipated, or shall die, in the earliest of such events such obligation expiring."

At the time the agreement was made a child was emancipated at age 21 under the common law rule. The age of emancipation was lowered to 18 effective 5 July 1971 by G.S. Chap. 48A. Robert Earl Loer was born on 5 November 1956, and thereby attained age eighteen on 5 November 1974. As of that date defendant ceased to make any payments pursuant to the agreement. Robert Earl Loer was at all times subsequent to that date a college student with no source of income except the plaintiff, was unmarried, and was not suffering from any physical or mental disability.

Upon these facts, the trial court concluded that Robert Earl Loer had become legally emancipated on 5 November 1974 and that defendant was therefore relieved of any obligation for his support, maintenance and education.

Plaintiff appealed.

Williams, Willeford, Boger & Grady by Samuel F. Davis, Jr., and John Hugh Williams for plaintiff appellant.

Davis, Koontz & Horton by Clarence E. Horton, Jr., for defendant appellee.

CLARK, Judge.

The sole question presented for decision is whether the father's contractual liability for the support and education of his son until he reaches "age 21 . . . (or is) emancipated" terminates when the son attains legal emancipation at age 18 under G.S. Chap. 48A.

A very similar issue was resolved in *Shoaf v. Shoaf,* 282 N.C. 287, 192 S.E. 2d 299 (1972), where a consent judgment provided for support until the child "reaches his majority or is otherwise emancipated." The court unequivocally stated that the age of emancipation was fixed by the legislature at 18 and that the courts had no power to raise or lower it. It is true that parties may contract for liability in excess of their legal obligations. *Mullen v. Sawyer,* 277 N.C. 623, 178 S.E. 2d 425 (1971); *Carpenter v. Carpenter,* 25 N.C. App. 235, 212 S.E. 2d 911 (1975), *cert. denied,* 287 N.C. 465, 215 S.E. 2d 623 (1975). Here, as in *Shoaf,* the liability of the father was limited to his legal obligation. We are unable to distinguish the language of this agreement from that construed in *Shoaf.* The clear intent of the parties was to provide for support until emancipation, which would include attaining majority. The age of majority has been set by the General Assembly at 18. G.S. 48A-2.

The fact that the contract being interpreted here is a separation agreement, not a consent judgment, is of no significance. *Stanley v. Cox,* 253 N.C. 620, 117 S.E. 2d 826 (1961); 5 Strong, N. C. Index 2d, Judgments, § 10 (1968).

The decision is

Affirmed.

Judges BRITT and PARKER concur.

ROCKINGHAM COUNTY v. L. A. REYNOLDS COMPANY AND ARGONAUT INSURANCE COMPANY

No. 7617SC391

(Filed 6 October 1976)

Counties § 8— county contract — accountant's certification

A county's contract for grading work in the construction of a county airport was invalid for failure to comply with former G.S.

153-130 where it contained no statement signed by the county accountant that provision for the payment of money due under the contract had been made by appropriation duly made or by bonds or notes duly authorized, notwithstanding the contract was a "continuing" contract within the meaning of former G.S. 153-2.1, since the provision in G.S. 153-2.1 that the statement required by G.S. 153-130 "shall be placed on a continuing contract only if sufficient funds have been appropriated to meet the amount to be paid . . . in the fiscal year in which the contract is made" does not mean that some continuing contracts are excluded from the G.S. 153-130 requirement of certification but means that the required certification shall not be made unless the necessary appropriations have been authorized.

APPEAL by plaintiff from *Walker, Special Judge.* Judgment entered 9 February 1976 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 16 September 1976.

On 20 November 1972, Rockingham County hired L. A. Reynolds Company to do heavy grading work in the construction of the Rockingham County airport. The work, had it been done, would have continued until the very end of fiscal year 1972-1973. Final payment would not have been due until the work was inspected and accepted by the county. It is almost certain that final payment would not have been made until fiscal year 1973-1974.

Reynolds repudiated the contract, and the county relet the contract at a higher bid and sued Reynolds and its surety for damages. Defendants moved for summary judgment, and the court ruled that the contract was invalid for failure to comply with G.S. 153-130. Rockingham County appeals from summary judgment in favor of defendants.

Griffin, Post, Deaton & Horsley, by Hugh P. Griffin, Jr., for plaintiff appellant.

Hatfield and Allman by Weston P. Hatfield and R. Bradford Leggett, for defendant appellees.

ARNOLD, Judge.

The court granted summary judgment on the ground that the contract was invalid for failure to comply with G.S. 153-130, a section of the General Statutes which was then in force but has since been repealed. This section provided in part:

> " . . . No contract . . . requiring the payment of money [by a county] shall be valid unless the same be in writing, and unless the same shall have printed, written or type-

written thereon a statement signed by the county accountant as follows: 'Provision for the payment of moneys to fall due under this agreement has been made by appropriation duly made or by bonds or notes duly authorized, as required by the "County Fiscal Control Act."' "

The required language was omitted from the contract between Rockingham County and L. A. Reynolds Company. Therefore, nothing else appearing, the contract was invalid.

Rockingham County argues that G.S. 153-2.1 creates an exception to G.S. 153-130. G.S. 153-2.1 applies to "continuing contracts," that is, contracts "some portion of which or all of which may be performed in an ensuing fiscal year." Thus, G.S. 153-2.1 pertains to the contract before us. The statute stipulates that "no [continuing] contract shall be entered into unless sufficient funds have been appropriated to meet any amount to be paid . . . in the fiscal year in which the contract is made." The statute concludes, saying, "The statement required by G.S. 153-130 . . . *shall* be placed on a continuing contract *only* if sufficient funds have been appropriated to meet the amount to be paid . . . in the fiscal year in which the contract is made." (Emphasis added.)

The word "only" does not mean that some continuing contracts are excluded from the G.S. 153-130 requirement of certification. It simply means thaat the required certification shall not be made unless the necessary appropriations have been authorized. If no such appropriation has been made, the county is prohibited from entering into the continuing contract.

Summary judgment for defendants was properly entered. The contract did not include the statement required by G.S. 153-130, and it was thus invalid.

Affirmed.

Judges MORRIS and HEDRICK concur.

RAYMOND E. ROLLINS v. PAUL H. GIBSON AND R. F. WALKER

No. 7618DC315

(Filed 6 October 1976)

Process § 4; Penalties— false return — recovery of penalty from sheriff — inapplicability to criminal cases

The statute providing for the recovery of a penalty from the sheriff for making a false return, G.S. 162-14, does not apply to a return made to process issued in a criminal proceeding.

APPEAL by defendants from *Alexander, Judge.* Judgment entered 18 November 1975 in District Court, GUILFORD County. Heard in the Court of Appeals 31 August 1976.

Plaintiff brought this action against defendant Gibson, Sheriff of Guilford County, and against his co-defendant Walker, a Deputy Sheriff, to recover the $500.00 penalty provided for in G.S. 162-14 for making a false return.

In September 1974 the plaintiff in this action received a traffic ticket while driving on Interstate 85 between Greensboro and Lexington. He was convicted in the District Court in Davidson County and appealed to the Superior Court. On 13 November 1974 a subpoena was issued in that case directing plaintiff to appear before the Superior Court at Lexington on 25 November 1974. This was delivered to the Sheriff of Guilford County on 14 November 1974. It was returned on 24 November 1974 with the following notation:

> "After due and diligent search Raymond Rollins not to be found in Guilford County. This 24 day of Nov., 1974. Time ----------.
>
> Paul H. Gibson, Sheriff
> By s/R. F. Walker, D. S."

Because plaintiff failed to appear for the trial of the misdemeanor charge against him in the Superior Court in Davidson County, an instanter capias was issued from that court on 25 November 1974. Pursuant to this capias, plaintiff was arrested at his home in Guilford County on 29 December 1974. He was held in custody until he posted an appearance bond.

On 24 March 1975 plaintiff brought this action against Sheriff Gibson and Deputy Sheriff Walker. In his complaint,

plaintiff alleged that the return dated 24 November 1974 was false in that plaintiff was present in Guilford County at the address shown on the subpoena each day between 14 November 1974 and 24 November 1974.

The jury returned verdict finding that defendant failed to make due and diligent search for the plaintiff and that the return by the defendants was false. Judgment was entered that plaintiff recover $500.00 from the defendant, Paul H. Gibson, as penalty for said false return. From this judgment, defendants appealed.

Michael R. Greeson, Jr., for plaintiff appellee.

William L. Daisy for defendant appellants.

PARKER, Judge.

G.S. 162-14, the statute upon which plaintiff's claim is based, was originally enacted in 1777. Insofar as here pertinent it has remained virtually unchanged to the present times. Its provisions do not apply to a return made to process issued in a criminal proceeding. *Martin v. Martin,* 50 N.C. 349 (1858). The judgment appealed from is reversed and this cause is remanded with directions that plaintiff's action be dismissed.

Reversed and remanded.

Chief Judge BROCK and Judge ARNOLD concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 6 OCTOBER 1976

BOBBITT v. COLQUITT No. 7610DC276	Wake (75CVD4559)	Affirmed
HOLLAND v. HOLLAND No. 7611DC376	Harnett (75CVD0767)	Affirmed
HOYLE v. HOYLE No. 769DC341	Vance (73CVD1080)	Affirmed
STATE v. CURRY No. 7615SC346	Alamance (75CRS787)	No Error
STATE v. DRIGGERS No. 7620SC348	Anson (75CR1469)	No Error
STATE v. ELLIOTT No. 7620SC369	Union (75CR10145)	No Error
STATE v. JOYCE No. 7621SC181	Forsyth (75CR38495)	No Error
STATE v. KINLAW No. 768SC397	Wayne (75CR6255)	No Error
STATE v. LACKEY No. 7629SC334	McDowell (74CR5200)	New Trial
STATE v. PERRY No. 7614SC370	Durham (75CR27476) (76CR430)	No Error
STATE v. SHEPPARD No. 7628SC379	Buncombe (75CR23974)	No Error
STATE v. UNDERWOOD No. 7614SC300	Durham (75CR22892)	Reversed
WOODS v. INSURANCE CO. No. 7618SC414	Guilford (74CVS12187)	Affirmed

LARRY G. MOZINGO AND WIFE, KATHLEEN A. MOZINGO, AND RIVER-DRIVE APARTMENTS, INC. v. NORTH CAROLINA NATIONAL BANK

No. 763SC404

(Filed 20 Oocbter 1976)

1. **Evidence § 32; Bills and Notes § 19— method of payment of notes — oral agreement — parol evidence rule**

Evidence of an alleged oral agreement by defendant bank to renew plaintiffs' unsecured demand notes until payment could be made from proceeds of the sale of certain apartment projects would not contradict the terms of the demand notes and would be admissible to show the agreed upon method of payment of the notes; therefore, the trial court erred in dismissing plaintiff's claim for breach of the oral agreement on the ground that it violated the parol evidence rule.

2. **Rules of Civil Procedure § 12— striking of defenses — argument of legal principles applicable to claim for relief**

Defendant's contention that the appellate court should not consider plaintiffs' argument that the trial court erred in striking certain of their defenses because plaintiffs failed to argue the legal principles underlying a motion to strike defenses pursuant to G.S. 1A-1, Rule 12(f) is without merit where plaintiffs argued the principles for Rule 12(b)(6), since the same tests apply to both rules.

3. **Bills and Notes § 19; Uniform Commercial Code § 27— oral agreement as to payment from certain proceeds — defense to note**

An alleged oral agreement that a note be paid only out of the proceeds from the sale of certain apartment projects would be a defense to an action to recover a deficiency judgment on the note. G.S. 25-3-305(2); G.S. 25-3-306(b).

4. **Bills and Notes § 19— action on note — lack of consideration — sufficiency of complaint**

Plaintiffs' complaint was sufficient to raise the defense of lack of consideration to defendant bank's counterclaim on a $600,000 note, secured by deeds of trust, given by plaintiffs to defendant in lieu of $600,000 in outstanding unsecured notes on plaintiffs' $750,000 debt to the bank, where it alleged that the total outstanding debt of $750,-000 was not reduced, the time for payment was not extended, no more money was loaned, and the deed of trust on the new note was required to satisfy defendant's bank examiners.

5. **Mortgages and Deeds of Trust § 19— constitutionality of foreclosure procedure — striking of allegations**

The trial court did not err in striking plaintiffs' defense that the N. C. foreclosure procedure is unconstitutional under the decision of *Turner v. Blackburn*, 389 F. Supp. 1250 (W.D.N.C. 1975) because they had no opportunity for a hearing under G.S. 45-21.34 to assert defenses to the foreclosure since the *Turner* decision applies only

prospectively, and the foreclosure sale in question occurred more than a year before that decision.

6. Bills and Notes § 20— breach of agreement to return note — genuine issue of fact

Plaintiffs' verified complaint, when treated as an affidavit in opposition to affidavits filed by defendant bank, was sufficient to raise a genuine issue as to whether defendant breached an agreement to return to plaintiffs a note given as security for a $750,000 loan upon plaintiffs' payment to defendant of $125,000 of the loan.

APPEAL by plaintiffs from *Browning, Special Judge.* Judgment entered 11 February 1976 in Superior Court, PITT County. Heard in the Court of Appeals 22 September 1976.

The plaintiffs, Mr. and Mrs. Mozingo and their corporation, Riverdrive Apartments, Inc., filed a complaint against defendant, North Carolina National Bank (NCNB), for breach of contract and misrepresentation. NCNB, in turn, filed a counterclaim for a deficiency judgment on a note. The trial court dismissed all of plaintiffs' claims, either under Rule 12(b)(6) or Rule 56(c), Rules of Civil Procedure, and granted summary judgment for NCNB on its counterclaim. Plaintiffs appealed.

It appears from the pleadings and affidavits that plaintiffs developed and built homes and apartments. In 1969, plaintiffs began three new projects: the Country Club Apartments, Phase 2, in Greenville; the Park Area Apartments, Phases 1 and 2, in Washington, North Carolina; and the Mozingo Office Building, also in Washington (hereinafter "the projects"). Plaintiffs arranged permanent loan commitments with various banks, each of which took a deed of trust conveying the project it financed as security for the note given. In light of these commitments, plaintiffs arranged construction loans for all the projects with NCNB. NCNB knew that these loans exceeded by $750,000 the total of all permanent loans, but it took no security on plaintiffs' notes for the excess. Further, plaintiffs allege that NCNB orally agreed that these notes were to be paid only from proceeds received from the sale of the projects, and until the projects were sold, the notes were to be renewed.

On 29 November 1971, plaintiffs gave NCNB a $600,000 demand note, secured by second deeds of trust on the projects, in lieu of $600,000 in outstanding notes on its $750,000 debt. Plaintiffs allege that NCNB told them that the deeds of trust were needed to satisfy objections of their bank examiners, and that the new demand note was a device permitting them to

fluctuate the interest rate on the construction loans. According to plaintiffs' allegations, NCNB specifically agreed that the new note and securities would not alter the existing oral agreement whereby the notes were to be paid only out of proceeds from the projects.

At the same time that plaintiffs executed the $600,000 note, they also assigned to the bank other stocks and notes as security for the remaining $150,000 of the $750,000 debt. Among these notes was one for $104,457.54 made by G. D. Bell and his wife, payable to plaintiffs (hereinafter "the Bell collateral"), and secured by a deed of trust on another of plaintiffs' apartments, Country Club Apartments, Phase 1. Plaintiffs allege that NCNB orally agreed that this note, and other collateral, would be returned to plaintiffs upon payment of $125,000, but that, upon payment by plaintiffs of the $125,000 on 26 September 1972 the Bell collateral was not returned.

Plaintiffs completed their projects, but, because of the depressed real estate market, were unable to sell them. They made no profit operating the projects and, consequently, fell behind in payments both to NCNB and to their permanent lenders. On 11 January 1974, NCNB foreclosed its deed of trust and sold the projects at auction to satisfy plaintiffs' $600,000 demand note. NCNB was the only bidder and bought the projects for $348,851, subject to first mortgages amounting to $1,199,875. Plaintiffs allege that at the time of sale the fair market value of the projects was $2,055,000.

On 31 January 1974, plaintiffs filed a verified complaint against NCNB for breach of oral contracts underlying the $600,000 note and the Bell note. In an order filed 30 May 1974, the trial court concluded that plaintiffs' complaint failed to state a claim for which relief could be granted and dismissed pursuant to Rule 12(b)(6). The court did, however, grant plaintiffs leave to amend.

In their amended verified complaint, filed 2 July 1974, plaintiffs alleged three causes of action, in pertinent part as follows:

I. First Cause of Action—Breach of Contract

1. In 1971, plaintiff and defendant entered into an oral contract, the terms of which are as follows:

(a) Defendant agreed to loan to plaintiffs funds necessary for the completion of apartment projects. . . .

(b) It was specifically agreed . . . that said sums were to be repaid from the proceeds of the sales of the apartment projects by plaintiffs.

2. Defendants breached the contract in that they demanded repayment of said loans prior to the sales of the apartment project by plaintiffs, and forced sales [thereof].

. . . .

II. Second Cause of Action—Misrepresentation

. . . .

2. On November 29, 1971, defendant, in order to secure part of [a $750,000] debt, induced plaintiffs to execute a promissory note in the amount of $600,000, payable on demand, secured by a second deed of trust on the apartment projects referred to above, by making the following representations:

(a) That the execution of the note and deed of trust would not change the terms or legal consequences of the loan agreement set forth in the First Cause of Action;

(b) That the . . . note was merely a vehicle to permit the defendant to show the loan on its books as a secured loan . . . for the benefit of the bank examiners.

[Thereafter, the complaint purports to allege the other elements of actionable fraud.]

III. Third Cause of Action—Breach of Contract

1. [P]laintiffs and defendants entered into an oral contract. . . .

(a) In order to secure a pre-existing debt of approximately $125,000 owed by plaintiffs to defendant, plaintiffs agreed to and did assign to defendant a certain note [for] $104,457.54 . . . from Gerald Bell . . . to Larry G. Mozingo and wife . . . secured by a deed of trust. . . .

(b) Defendant specifically agreed to release and reassign to plaintiffs the said note and deed of trust upon payment of said debt.

2. The debt was repaid by plaintiffs to defendant on or about September 26, 1972.

3. Defendant breached said contract in that defendants failed to reassign and return to plaintiffs the said Bell note and deed of trust and still refuses to do so.

4. As a result of the breach . . . plaintiffs have been coerced into a forced sale of said property, resulting in a loss of $295,000 to plaintiffs.

NCNB again moved to dismiss plaintiffs' amended complaint under Rule 12(b)(6). In an order dated 18 November 1974, the trial court denied the motion as to the Third Cause of Action on the Bell note. The court deferred ruling on the First and Second Causes of Action and asked to see a second amended complaint alleging the latter claim for misrepresentation. A second amended complaint was filed 29 November 1974, but the trial court in its discretion did not allow this pleading. In an order pursuant to Rule 12(b)(6), and dated 14 February 1975, the court dismissed the plaintiffs' First and Second Causes of Action in the amended complaint.

On 9 January 1975, NCNB filed answer to plaintiffs' claim based on the Bell collateral. It denied the existence of an agreement to return the Bell collateral prior to payment of the entire $750,000 debt. They averred that the Bell collateral was released following foreclosure of the apartment projects. NCNB also counterclaimed for a foreclosure deficiency judgment of $299,740.08.

In reply to the counterclaim plaintiffs asserted, as "fourth" and "fifth" defenses, the same breach of contract and misrepresentation claims contained in their amended complaint which were dismissed for failure to state claims upon which relief could be granted. They also asserted, as "second, third, sixth and seventh defenses," failure of consideration, sale of the property for less than its true value, mutual mistake of law and unconstitutional foreclosure. Motion by NCNB to strike all of plaintiffs' defenses to its counterclaim was allowed except for the third defense regarding sale of the property for less than its value. NCNB also moved for summary judgment which was accompanied by affidavits of the bank officers stating that there was no agreement to release the Bell collateral

until the entire debt was paid, and that at the time of foreclosure the plaintiffs owed $645,592.45; and that the M.A.I. appraisal of the property foreclosed was $1,548,000 and NCNB's bid was $345,851, with prior mortgages of $1,229,139.58 existing on the property. The trial court entered summary judgment for NCNB on all issues except the actual value of the projects at the time of foreclosure. That issue was reserved for trial.

Joseph F. Bowen, Jr., for plaintiff appellants.

Everett & Cheatham, by James T. Cheatham and Edward J. Harper II, for defendant appellees.

ARNOLD, Judge.

[1] We first consider whether the trial court erred in dismissing, under G.S. 1A-1, Rule 12(b)(6), plaintiffs' claim for breach of the alleged oral contract to renew plaintiffs' unsecured notes until payment could be made from proceeds of the sale of the apartment projects. Rule 12(b)(6) provides that a complaint must be dismissed when on its face it appears that no law supports it, that some fact essential to it is missing, or that some disclosed fact necessarily defeats it. *Hodges v. Wellons*, 9 N.C. App. 152, 175 S.E. 2d 690, *cert. den.* 277 N.C. 251 (1970). The trial court held that because the complaint alleged the contract to be in parol plaintiff failed to state a claim for which relief could be granted. We disagree.

The parol evidence rule, upon which the trial court relied, prohibits introduction of parol evidence to contradict the terms of a written agreement. If, however, only part of a contract is written, the test for determining whether the remaining part can be proved by parol is simply stated: If oral evidence does not contradict written it is admissible; otherwise, it is not admissible.

Plaintiffs allege an oral agreement that the note was to be paid only out of the proceeds from the sale of the projects. The note itself is silent on the question of the method of payment. Therefore, the plaintiffs' evidence is admissible to prove the existence of this alleged oral term.

The general rule is that parol evidence is admissible to show the agreed upon method of payment on a note. *See, Borden, Inc. v. Brower*, 284 N.C. 54, 199 S.E. 2d 414 (1973), and cases cited therein. *See also*, 2 Stansbury, Law of Evidence,

§ 256 (Brandis Rev. 1973). Plaintiffs particularly rely on a line of cases admitting parol evidence to show agreement that a note was to be paid out of a particular fund. For example, in *National Bank v. Winslow,* 193 N.C. 470, 137 S.E. 320 (1927), the maker of a demand note gave it to the payee who, in turn, endorsed it to the holder. The holder sued the maker on the note. The maker, by way of a defense, introduced evidence to prove a parol agreement, known to the holder, that the note be paid only out of proceeds from the sale of peanuts. Our Supreme Court held that such evidence was admissible and affirmed judgment for the maker. *Accord, Trust Co. v. Wilder,* 206 N.C. 124, 172 S.E. 884 (1934) (note payable only out of proceeds from the sale of land); *Stack v. Stack,* 202 N.C. 461, 163 S.E. 589 (1932) (note payable only out of proceeds from land); *Evans v. Freeman,* 142 N.C. 61, 54 S.E. 847 (1906) (note payable only out of proceeds from sale of patent rights in a machine.)

NCNB argues that since the note in question was a demand note, an agreement that it could be paid only out of the proceeds from the sale of the projects, in effect, meant that it was not payable on demand, but only upon the occurrence of an uncertain event. Thus, they argue, the underlying oral agreement contradicts the terms of the writing. However, the case of *National Bank v. Winslow, supra,* stems from a suit on a demand note, and other cases, *supra,* involving notes payable on certain dates, substantially support the rule in *Winslow.* We do not agree with NCNB's argument that the oral agreement contradicts the demand note. All notes, including demand notes, are subject to the risk that the maker will be unable to pay upon presentment. By contracting to restrict the source of funds from which the note can be paid, the maker of the note only increases the already-present risk that the note cannot be paid. He does not change the demand provision at all.

[2] NCNB asserts that we should not consider plaintiffs' next argument that the court erred in striking their second, fourth, fifth, sixth and seventh defenses, because plaintiffs fail to argue the legal principles underlying a motion to strike pursuant to G.S. 1A-1, Rule 12(f). Rule 12(f) permits the trial court to strike any "insufficient defense." We note however that plaintiffs do argue the principles for Rule 12(b)(6), an analogue to Rule 12(f), and the same tests apply. *Trust Co. v. Akelaitis,* 25 N.C. App. 522, 214 S.E. 2d 281 (1975).

[3] Plaintiffs' fourth defense alleges breach by NCNB of their contract that the $600,000 note be paid only out of proceeds from sale of the projects. We have held that plaintiffs can try to prove this breach of contract. If it is proved, it is a defense. G.S. 25-3-305(2); 25-3-306(b). Therefore, the court erred in striking it. Plaintiffs' fifth defense alleges misrepresentation about the legal effect of executing the demand note. Since the parol evidence rule does not bar proof of the contract, there could have been no misrepresentation. This defense was properly stricken. Plaintiffs' sixth defense alleges a mutual mistake of law as to the consequences of the parol evidence rule. There was no mistake, and this defense was also properly stricken.

[4] Plaintiffs' second defense alleges that plaintiffs received no consideration in exchange for executing the $600,000 note and deed of trust. Lack of consideration is a contract defense that can properly be raised in this action on a note. G.S. 25-3-305(2); 25-3-306(c). It appears from facts alleged in the pleadings that plaintiffs may have obtained no benefit in exchange for executing the new note and deed of trust. It is alleged in the pleadings that the total outstanding debt of $750,000 was not reduced. The time for payment was not extended. No more money was loaned, and, the deed of trust itself benefited NCNB, if only for the purpose of satisfying the bank examiners. We conclude that the defense of no consideration is properly raised by the pleadings and that it was error to strike it.

[5] Plaintiffs further contend that it was error to allow defendant's motion to strike their seventh defense wherein they attack the constitutionality of the North Carolina foreclosure procedure. They contend that they had no opportunity for a hearing under G.S. 45-21.34 to assert defenses to the foreclosure, and plaintiffs cite *Turner v. Blackburn*, 389 F. Supp. 1250 (W.D.N.C. 1975) as authority. Plaintiffs' contention is without merit. The *Turner* decision was more than a year after the foreclosure sale, and *Turner* only applies prospectively. (Also, see: G.S. 45-21.33(c)(3) which does not apply to foreclosures commenced prior to ratification date of June 6, 1975).

In summary, the motion to strike by NCNB was properly allowed as to plaintiffs' fifth, sixth and seventh defenses. It was improperly allowed as to the second and fourth defense.

[6] Finally, plaintiffs contend that the court erred in granting summary judgment against them as to the third cause of action,

breach of the alleged contract to return the Bell note. Plaintiffs' verified complaint alleged that they had assigned the "Bell collateral" to defendant with defendant's specific agreement to reassign the Bell collateral to plaintiffs upon payment of the $125,000; that plaintiffs had paid the $125,000; and that defendant had failed to reassign the Bell collateral.

By affidavits of its officers, NCNB denied the contract to reassign the Bell collateral and said that the Bell collateral had subsequently been returned to plaintiffs. NCNB argues that summary judgment was proper because its affidavits established that the assignment of the Bell collateral was not subject to any agreement to release the collateral before the entire indebtedness was paid, and because plaintiffs had produced no affidavits in opposition to facts contained in NCNB's affidavits. It cites Rule 56(e) requiring, *inter alia:* "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

The court may consider, at the hearing on the motion for summary judgment, pleadings, affidavits which meet the requirements of Rule 56(e), depositions, answers to interrogatories, admissions, oral testimony, documentary material, facts subject to judicial notice, and such presumptions as would be available at trial. *Butler v. Berkeley,* 25 N.C. App. 325, 213 S.E. 2d 571 (1975). As pointed out in *Page v. Sloan,* 281 N.C. 697, 705, 190 S.E. 2d 189 (1972):

> "A verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify as to the matters stated therein."

Plaintiffs' verified complaints were made of their own personal knowledge, and they set forth the particulars of such facts as would be admissible in evidence. Moreover, it affirmatively appears that plaintiffs, Mr. and Mrs. Mozingo, are competent to testify as to the matters stated in their complaint. When their verified complaint is treated as an affidavit in compliance with G.S. 1A-1, Rule 56(e) they have established a genuine issue as to whether there was a breach of the alleged

agreement to release the Bell collateral upon payment of $125,000. The granting of summary judgment for NCNB as to plaintiffs' third cause of action was error.

Judgment is reversed and the cause remanded for proceedings consistent with this opinion.

Reversed and remanded.

Judges MORRIS and HEDRICK concur.

THE NORTH CAROLINA STATE BAR v. FRANK WADE HALL, ATTORNEY AT LAW, BUNCOMBE COUNTY, ASHEVILLE, NORTH CAROLINA

No. 7628SC350

(Filed 20 October 1976)

Attorney and Client § 10; Criminal Law § 25— plea of nolo contendere by attorney — subsequent disciplinary proceeding — sufficiency of evidence of criminal offense

In an action brought by petitioner seeking disciplinary action against respondent, an attorney at law licensed to practice in N. C., the *adjudication of guilt* and *judgment of conviction* entered upon respondent's plea of *nolo contendere* to a charge of possession of chattels of a value less than $100 which had been embezzled and stolen while moving in interstate shipment were sufficient to prove the commission of a criminal offense showing professional unfitness; therefore, the trial court should have granted petitioner's motion for summary judgment and proceeded to enter judgment of punishment.

ON *writ of certiorari* to review the order of *Rouse, Judge.* Order entered 10 December 1975, in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 2 September 1976.

Petitioner brought this action seeking disciplinary action against respondent, an attorney at law license to practice in the State of North Carolina. The complaint alleges that "On November 5, 1974, the respondent entered a plea of nolo contendere to a charge of possession of chattels of a value less than $100 which had been embezzled and stolen while moving in interstate shipment in violation of Title 18, United States Code, Section 659. Said plea was entered in the United States

District Court, Western District of North Carolina. Thereafter respondent was adjudged guilty of said offense." Respondent's answer did not deny this allegation.

The complaint further alleged in paragraph 4:

"4. The conduct of the respondent set forth above constitutes a violation of the laws of North Carolina and the Canons of Ethics and Code of Professional Responsibility of The North Carolina State Bar as follows:

Frank Wade Hall has committed a criminal offense showing professional unfitness, a violation of North Carolina General Statute § 84-28(2)a.

Frank Wade Hall has failed to uphold the honor and maintain the dignity of the profession as required by Canon 29 of the North Carolina State Bar in effect until December 31, 1973, and has engaged in illegal conduct involving moral turpitude in violation of Disciplinary Rule 1-102(a)(3) of the Code of Professional Responsibility of the North Carolina State Bar in effect since January 1, 1974, both of the allegations contained in this paragraph constituting violations of the North Carolina General Statutes § 82-28(2)f."

Respondent's answer denied these allegations. Respondent made an election to have the matter tried in the Superior Court by a judge and a jury as provided in G.S. 84-28(3)d., and the pleadings and summons were certified to the Superior Court by the Secretary of the North Carolina State Bar. The petitioner then moved for summary judgment and attached to the motion a copy of the judgment and commitment in the United States District Court for the Western District of North Carolina. Respondent filed nothing in answer to the motion, but moved for judgment on the pleadings and for dismissal for failure of the complaint to state a claim for relief. The court heard the motions and denied all of them by order entered 10 December 1975. Petitioner gave notice of appeal.

Petitioner filed with this Court a petition for a writ of certiorari and with the Supreme Court a petition for discretionary review. Both were denied. Petitioner then filed with this Court a petition for reconsideration of the order denying its petition for a writ of certiorari. This petition was allowed, and respondent's motion to dismiss the appeal was denied.

McDaniel, Melott and Fogel, by Robert A. Melott, for appellant North Carolina State Bar.

Uzzell & DuMont, by Harry DuMont, for respondent appellee.

MORRIS, Judge.

The only question presented by this appeal is whether petitioner was entitled to summary judgment. Respondent strenuously contends that petitioner has not met the burden of showing that no genuine issue of fact exists and that this Court should remand the case to the Superior Court with directions that it be dismissed. We note that respondent did not appeal from the denial of his motion to dismiss and his motion for judgment on the pleadings.

This action is brought under the provisions of G.S. 84-28, entitled *Discipline and Disbarment*, prior to the rewriting of the statute by the 1975 General Assembly. That statute confers upon the Council of the North Carolina State Bar jurisdiction to hear and determine all allegations of "malpractice, corrupt or unprofessional conduct, or the violation of professional ethics, made against any member of the North Carolina State Bar," and to ". . . administer the punishments of private reprimand, suspension from the practice of law for a period not exceeding 12 months, and disbarment as the case shall in their judgment warrant, for any of the following causes: a. Commission of a criminal offense showing professional unfitness; . . . f. The violation of any of the canons of ethics which have been adopted and promulgated by the Council of the North Carolina State Bar." The statute further provides that all defenses shall be asserted by written answer and gives the respondent the right to elect to be tried in the superior court, in which case the complaint and answer shall be certified to the clerk of the superior court of the county of residence of respondent. Proceedings shall then "be conducted in the superior court in term in accordance with the laws and rules relating to civil actions, with right of appeal to the appellate division."

The complaint here alleges that respondent entered a plea of nolo contendere in the Federal District Court to a charge of possession of chattels of a value less than $100.00 which had been embezzled and stolen while moving in interstate shipment in violation of Title 18, United States Code, § 659, and that

thereafter respondent was adjudged guilty of the offense charged. By his answer, respondent did not deny this allegation. In his brief and argument he freely admits that he did enter a plea of nolo contendere to the charge but urges that, under North Carolina law, that plea cannot be used against him in this proceeding. Respondent argues that the decision in *In re Stiers,* 204 N.C. 48, 167 S.E. 382 (1933), if not controlling, is certainly persuasive. There the respondent had entered a plea of nolo contendere in the District Court of the United States to ten counts of embezzlement of proceeds of War Risk Insurance paid by the government to him as guardian. At that time, the statute governing disciplinary proceedings provided for disciplinary action upon a conviction or a confession in open court, State or Federal. The solicitor presented to the court a copy of the bill of indictment, judgment and docket entries in the District Court. The trial court entered judgment that upon the record presented, ". . . the plea of *nolo contendere* does not amount to a confession of a felony . . ." and dismissed the proceeding. The State appealed. The Supreme Court held that the State had no right of appeal since the statute did not expressly give that right and dismissed the appeal. That question does not arise in the case before us because the General Assembly has expressly conferred the right of appeal by G.S. 84-28(3)f. The Court in *Stiers,* however, went further and discussed the nature and quality of a plea of nolo contendere:

> "A plea of *nolo contendere,* which is still allowed in some courts, is regarded by some writers as a *quasi*-confession of guilt. Whether that be true or not, it is equivalent to a plea of guilty in so far as it gives the court the power to punish. It seems to be universally held that when the plea is accepted by the court, sentence is imposed upon a plea of guilty. The only advantage in a plea of *nolo contendere* gained by the defendant is that it gives him the advantage of not being estopped to deny his guilt in civil action based upon the same facts. Upon a plea of guilty entered of record, the defendant would be estopped to deny his guilt if sued in a civil proceeding." 204 N.C. at 50.

Therefore, the Court said, since ". . . a disbarment proceeding is of a civil nature, the mere introduction of a certified copy of an indictment, and judgment thereon, based upon a plea of *nolo contendere,* is not sufficient to deprive an attorney of his license; certainly, when he is present in court, denying his guilt

and strenuously contending that his fault, if any, rested upon a technical violation of a statute." *Id.* While the court's statement was not necessary for decision in *Stiers,* we agree with respondent that it is persuasive. However, even if the statement were necessary for decision, we do not think it would be controlling here.

In *Stiers* the judgment in the District Court was as follows:

> "*Judgment and Docket Entries:* June 13th, 1932, Case called for trial. Plea Nolo Contendere entered, on recommendation of United States Attorney, ordered that defendant pay a fine of $500.00, and pay the guardian of C. R. Ring, $1800.00, amount paid by guardian in the civil action to procure restitution to C. R. Ring.
>
> And defendant placed on probation for three years, in custody of the probation officer for this District before whom he is to report monthly, and must show fine paid in six months and the $1800.00 in one year, and must be suspended from the practice of law in this Court during probation period."

In the case before us the judgment and commitment was as follows:

> "UNITED STATES OF AMERICA
> v. } No. 74-72
> WADE HALL
>
> On this 5th day of November, 1974 came the attorney for the government and the defendant appeared in person and by counsel Lamar Gudger
>
> IT IS ADJUDGED that the defendant upon his plea of Nolo Contendere and the court being satisfied there is a factual basis for the plea has been convicted of the offense of Chattels of a value less than $100.00 which had been embezzled and stolen while moving in Interstate Shipment in violation of Title 18, USC Section 659 as charged in one count and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE (1) YEAR, suspended on probation without supervision for THREE (3) YEARS and pay $1,000.00 Fine. PAID."

Here, there is not only a *plea of nolo contendere,* but there is an *adjudication of guilt and a conviction* upon the plea. The complaint alleges an adjudication of guilt, and this allegation is not denied. Under these facts we are of the opinion and so hold that the adjudication of guilt and judgment of conviction entered on the plea are sufficient to prove the "commission of a criminal offense showing professional unfitness."

The position we take is supported by authority from other jurisdictions.

In *Neibling et al. v. Terry,* 352 Mo. 396, 177 S.W. 2d 502 (1944), respondent had entered a plea of nolo contendere in the United States District Court to several counts of using the mails to defraud and was convicted on the plea. There respondent admitted the conviction but took the position, as does respondent in the case sub judice, that the conviction could not be used against him in the disbarment proceeding because it was entered on a plea of nolo contendere. The petitioner had moved for judgment on the pleadings. The Court said:

> "It is settled that a plea of nolo contendere amounts to an implied confession of guilt and for the purposes of the prosecution is equivalent to a plea of guilty. The plea should not be used by one who has not violated the law. *U. S. v. Norris,* 281 U.S. 619." 352 Mo. at 398.

Further the Court said at p. 400: "Other cases cited by respondent may be distinguished in that they hold, and properly so, the plea of nolo contendere may not be used as an admission in another suit. They do not discuss the effect of a conviction under such a plea in connection with statutory disqualification . . ." and went on to hold that respondent's *conviction* on his plea of *nolo contendere* is sufficient to authorize his disbarment under the Missouri statute providing that production of the record of conviction of any criminal offense involving moral

turpitude would be sufficient to support disbarment without further trial.

In Matter of Ward, 18 A.D. 2d 15, 238 N.Y.S. 2d 278 (1963), respondent had entered a plea of nolo contendere in the United States District Court to the charge of filing false and fraudulent income tax returns. Upon the plea the Court entered a judgment "that the defendant has been convicted on his plea of nolo contendere" and sentenced him to 2 years imprisonment, suspended, and he was placed on probation and fined. Respondent answered, raising no issue of fact, and moved to dismiss on the ground his plea of nolo contendere was not a basis for disciplinary action. The Court held that the plea "unquestionably supports a judgment of conviction of a crime and, therefore, it is a proper basis for disciplinary action." 18 A.D. 2d at 16.

In *State v. Mathew,* 169 Neb. 194, 98 N.W. 2d 865 (1959), respondent attorney entered a plea of nolo contendere in the United States District Court to the charge of knowingly transporting a girl from Nebraska to Colorado for the purpose of prostitution and debauchery. He was convicted on the plea. These facts were alleged in the Bar Association's complaint and admitted in respondent's answer. The Bar Association moved for judgment on the pleadings. Respondent's argument was that his plea could not receive evidentiary consideration in the disbarment proceeding. The Supreme Court of Nebraska held that the Bar was entitled to judgment, the judgment of conviction entered on respondent's plea being competent evidence of his conviction. See also *State v. Tibbels,* 167 Neb. 247, 92 N.W. 2d 546 (1958), and *State v. Stanosheck,* 167 Neb. 192, 197, 92 N.W. 2d 194 (1958), where the Court said:

> "In comparable situations, it is generally held that a judgment of conviction of a felony or misdemeanor involving moral turpitude, rendered upon a plea of nolo contendere, is conclusive upon a respondent lawyer in a disciplinary proceeding, and is sufficient to authorize the court to impose discipline where a statute or rule of court, as heretofore recited, provides that a lawyer convicted of such an offense may be disbarred."

In *In re Snook,* 94 Idaho 904, 499 P. 2d 1260 (1972), the Supreme Court of Idaho held that a conviction based on a plea of nolo contendere to a charge of income tax evasion is such a

conviction of a felony as will subject an attorney to disciplinary action, including disbarment.

In *State v. Estes,* 130 Tex. 425, 432, 109 S.W. 2d 167 (1937), the Court said:

> "The next contention made by the respondent is that he was not *convicted* within the intent and meaning of article 311. He urges in this connection that he entered a plea of nolo contendere in the federal court case in which he was charged with the commission of a felony, and that such plea, when accepted by the prosecuting attorney, becomes an implied confession of guilt and is equivalent to a plea of guilty for the purpose of that case only and cannot be used against the defendant as an admission of guilt in any civil suit for the same act.
>
> If it be granted that the plea entered by the respondent does not create an estoppel and that he is at liberty to relitigate the fact of his guilt or innocence in another case, it avails nothing in this case. The term 'conviction' referred to in the statute is not restricted to a conviction procured upon entry of a particular plea by the accused in the case in which the conviction was had. The issue raised by the relators in the second count of the petition is whether respondent had been 'convicted of a felony' as alleged. It appears from the recitations of the judgment in evidence that he was convicted. No contention is made that the offense for which he was convicted was not a felony, nor is the issue of guilt or innocence involved in this proceeding. Our conclusion is in accord in principle with that reached in the cases of *State of Montana ex rel. McElliott v. Fousek,* 91 Mont. 457, 8 P. (2d) 795, 81 A.L.R. 1099 and the companion case, *State ex rel. Anderson v. Fousek,* 91 Mont. 448, 8 P. (2d) 791, 84 A.L.R. 303."

Other cases to the same effect are *In re Bosch,* 175 N.W. 2d 11 (N.D. 1970); *State Board of Law Examiners v. Holland,* 494 P. 2d 196 (Wyo. 1972); and *In re Mann,* 151 W. Va. 644, 154 S.E. 2d 860 (1967). It must be noted, however, that Article VI, Part E, § 24 of the By-Laws of the West Virginia State Bar provides that " . . . [a] plea or verdict of guilty or *a conviction after a plea of nolo contendere shall be deemed to be a conviction within the meaning of this section.*" (Emphasis supplied.)

While we are of the opinion that an exception to the general rule in this and other jurisdictions that a plea of nolo contendere cannot be used against a defendant in any proceeding other than the case in which it was entered should be made in the case of disciplinary proceedings against licensed attorneys, we do not think the position we have here taken does violence to the general rule. It simply should have no application where a judgment of conviction is entered on the plea. However, even where no judgment of conviction is entered nor adjudication of guilt made, it does not seem to us that a licensed attorney, who certainly knows or should know the effect of a plea of nolo contendere, should be allowed to use that plea as a cloak of immunity from the penalties likely to be imposed in a subsequent disciplinary action by the North Carolina State Bar.

For the reasons stated herein, we reach the conclusion that the trial court should have granted petitioner's motion for summary judgment and proceeded to enter judgment of punishment.

Reversed and remanded.

Judges HEDRICK and ARNOLD concur.

FRED J. STANBACK, JR. v. VANITA B. STANBACK

No. 7619SC413

(Filed 20 October 1976)

1. **Trial § 10— court's limitation of defendant's testimony — no error**

In a hearing on defendant's motion to modify a previously entered judgment providing for the custody and support of the parties' children, the trial court did not unduly limit defendant's testimony by (1) interrupting her and admonishing her that she need not "go into that" and that she should answer questions and not ad-lib or ramble, or (2) refusing to let her testify regarding an itemized list of her living expenses which she had prepared.

2. **Trial § 5— sequestration of witnesses — no error**

The trial court did not err in requiring defendant's witnesses to be sequestered but allowing certain of plaintiff's witnesses to testify in the presence of each other, since at the time defendant testified the court's sequestration order was not in effect, and defendant's witnesses were therefore able to hear her testimony; furthermore, the record did not show which of plaintiff's witnesses were allowed to hear

other witnesses' testimony or that defendant made any objection thereto.

3. Trial § 57— hearing without jury — rules of evidence relaxed

In a trial or hearing by the court without a jury the rules of evidence are not so strictly enforced as in a jury trial, and it will be presumed that the judge disregarded any incompetent evidence that may have been admitted unless it affirmatively appears that he was influenced thereby.

4. Trial § 58— hearing without jury — conclusiveness of findings

In a trial or hearing without a jury the findings by the court are conclusive if supported by any competent evidence, notwithstanding that there is evidence contra which would sustain findings to the contrary.

5. Divorce and Alimony §§ 23, 24— child custody and support — findings of fact supported by evidence

In a hearing on defendant's motion to modify a previously entered judgment providing for the custody and support of the parties' children, the trial court's findings relating to the environment in which the three children in question would live while in the custody of plaintiff and relating to the responsibility of plaintiff to contribute for repairs and upkeep of the home where the children resided with defendant were supported by competent evidence.

APPEAL by defendant from *Collier, Judge.* Judgment entered 1 December 1975 in Superior Court, ROWAN County, and order entered 22 December 1975 in chambers. Heard in the Court of Appeals on 23 September 1976.

Defendant appeals from a judgment modifying a previously entered judgment providing for the custody and support of the three children of the parties and from an order denying her a new trial. Portions of the record pertinent to this appeal are summarized as follows:

Plaintiff instituted this action on 28 March 1965 seeking a divorce from bed and board. Defendant filed a cross action asking for alimony without divorce and custody of the three children, namely, Bradford, born on 1 April 1959, Lawrence, born on 25 August 1960, and Clarence, born on 29 June 1965.

The cause came on for trial at the 11 March 1968 civil session of Rowan Superior Court before Judge Exum. After a jury was empanelled, the court was advised that the parties had agreed on the terms of a separation agreement with respect to alimony. Thereupon, the court, sitting without a jury, conducted a hearing relating to the custody of and support for the children.

Pursuant to the hearing, on 9 May 1968 Judge Exum entered an order finding extensive facts and concluding that each of the parties was of good moral character and fit to have custody of the children; that the best interest of the children would be served by placing them in the care and custody of both parties, with physical custody in defendant subject to their spending part of the time with plaintiff. The court ordered that the children live with defendant, subject to certain specified times that they would spend with plaintiff; and that plaintiff would pay to defendant the sum of $500 per month for their maintenance and support and also pay all hospital, medical and dental bills incurred on their behalf and further provide them with whatever preparatory, college and graduate education "the children appear to be fitted to obtain."

On 5 September 1973 defendant filed a motion alleging changed conditions and asking that the 9 May 1968 judgment with respect to child custody and support be modified. (At some time between those dates the parties were divorced.)

The motion came on for hearing before Judge Collier at the October 1975 session of the court. Following a three-day hearing, the court entered a judgment making lengthy findings of fact and modifying the previous judgment in the following respects: Increased the time that the three boys will spend with plaintiff; substantially increased the amount that plaintiff will pay for the support of the boys; made special provisions regarding church attendance; and set forth the following provisions with respect to repairs to and other expenses of the home belonging to and occupied by defendant:

> "That a Trust Fund shall be established for the proper maintenance, repair, and necessary expenses for the house of the defendant in which the minor children will be residing at least a portion of the time until the youngest child reaches his eighteenth birthday, with a person agreeable to both parties designated as the Trustee, or, if the parties cannot agree on a Trustee, a person to be appointed by the court, who shall be a person with some knowledge of home maintenance and repair and the available community resources to provide proper maintenance, into which Fund the plaintiff will pay the sum of Ten Thousand ($10,000.00) Dollars to put the house into proper repair and good condition to the extent the Ten Thousand Dollars can do so, and

into which Trust Fund each party shall contribute the sum of Two Hundred ($200.00) Dollars a month, with the first contribution by each party to be made by January 10, 1976, and by the 10th of each month thereafter, which sums shall be used by the Trustee to pay all ad valorem taxes, insurance, and upkeep until the youngest boy reaches the age of eighteen years, at which time the Trust Fund will terminate and any remaining balance will be paid equally to the plaintiff and the defendant, and from which Trust Fund the Trustee shall be paid the sum of ten (10%) percent annually for his time, with the Trustee specifically directed by the court to consult with the defendant prior to making any decisions with regard to any repairs, renovations, or other expenditures made at the house, but with the Trustee to have full discretion after such consultation to make such repairs as he deems necessary and appropriate to keep the house in good shape, with the Trustee further being directed by the court to give consideration to any suggestions or requests made by the defendant, and to make periodic inspections of the premises, but retaining full discretion as to what expenditures should be made, consistent with the need to keep the house in good shape and repair and the available funds for such purpose, giving priority in all cases to the payment of all ad valorem taxes and insurance. That the Trustee shall file an annual account with the Clerk of the Court to be filed in the court file of this cause, with a copy to be furnished to each party by the Trustee.

"That prior to the plaintiff being required to pay the Ten Thousand ($10,000.00) Dollars hereinabove provided, the defendant must provide satisfactory evidence that she has either renegotiated any current debt on the house or has in any manner she chooses brought the debt current and put it on a basis that it can be retired with periodic monthly payments consistent with her income and the defendant shall execute a note secured by a deed of trust in favor of the plaintiff for Ten Thousand ($10,000.00) Dollars without interest, to become due and payable at any time the house is sold, under foreclosure or voluntarily, before the youngest boy reaches his eighteenth birthday, at which time the note will be marked satisfied, the monthly contributions will cease, the Trustee will distribute any balance remaining in the Trust Fund as herein-

above provided, and the defendant will own the property free and clear of this indebtedness."

On 10 December 1975 defendant filed a motion asking for a new trial on the ground that she did not receive a fair trial due to certain improper conduct by plaintiff and his counsel prior to and after the hearing. On 22 December 1975 the court entered an order denying this motion.

Defendant appealed, assigning errors.

Hudson, Petree, Stockton, Stockton & Robinson, by Norwood Robinson and George L. Little, Jr., and Kluttz and Hamlin, by Clarence Kluttz, for plaintiff appellee.

Walser, Brinkley, Walser & McGirt, by Walter F. Brinkley, for defendant appellant.

BRITT, Judge.

[1] First, defendant contends the trial court committed error when it did not permit her "to offer full and complete evidence when the evidence she attempted to offer was both relevant and pertinent." We find no merit in this contention.

Under this contention defendant argues that in presenting her case it was necessary that she bring out many pertinent facts relating to the background of the long controversy between her and plaintiff; that the trial court demonstrated "an attitude of haste and intolerance" with respect to permitting her to testify fully and offer all necessary evidence. She cites instances in which the court interrupted her testimony with the admonition that she need not "go into that," that she should answer questions and not "ad-lib" or ramble, and the refusal to let her testify regarding an itemized list of *her* living expenses which she had prepared.

It is clear that the trial judge has the duty to supervise and control the trial of causes to prevent injustice to either party, *Greer v. Whittington,* 251 N.C. 630, 111 S.E. 2d 912 (1960), and in discharging that duty the judge has large discretionary powers. *Miller v. Greenwood,* 218 N.C. 146, 10 S.E. 2d 708 (1940). And it is the duty of the judge to control the examination and cross-examination of witnesses. *Greer v. Whittington, supra.*

The record in this case discloses that defendant's testimony on direct and redirect examinations consumes approximately thirty-eight pages and on cross-examination some twenty-eight pages. A careful review of the record leads us to conclude that His Honor did not unduly limit defendant's testimony.

[2] Defendant contends the court erred in the manner in which it conducted the hearing. Specifically, defendant argues that the court prejudiced her cause when it required her witnesses to be sequestered but allowed certain of plaintiff's witnesses to testify in the presence of each other. This contention has no merit.

The assignment of error embodying this contention is supported by defendant's exception No. 6. The record discloses that defendant was the first witness to testify; that following her testimony there was a recess for lunch; that after the recess the trial judge made the following statement: "In the interest of the welfare of these children I think in my discretion I am going to hear and permit only the attorneys, the parties and their immediate families and, of course, court officials, to be present for the balance of the case." The hearing was then resumed in another courtroom with only those named by the court present. Defendant made no objection to the court's action.

The sequestration of witnesses rests in the sound discretion of the trial court. *Berry Bros. Corp. v. Adams-Millis Corp.*, 257 N.C. 263, 125 S.E. 2d 577 (1962). We perceive no abuse of discretion in this case. At the time defendant testified the court's sequestration order was not in effect, therefore, her witnesses were able to hear her testimony which, no doubt, outlined her contentions. Furthermore, the record fails to disclose which of plaintiff's witnesses were allowed to hear other witnesses' testimony or that defendant made any objection thereto.

In her third and fourth contentions defendant argues that the court erred in excluding competent evidence offered by her and in admitting incompetent evidence offered by plaintiff. These contentions have no merit.

[3] Clearly the testimony which the court excluded were conclusions of the witnesses. As to the challenged testimony of plaintiff, assuming *arguendo* that it was incompetent, we perceive no prejudice to defendant. In a trial or hearing by the

court without a jury, the rules of evidence are not so strictly enforced as in a jury trial and it will be presumed that the judge disregarded any incompetent evidence that may have been admitted unless it affirmatively appears that he was influenced thereby. 7 Strong, N. C. Index 2d, Trial § 57. There is no showing that the judge was influenced by the challenged testimony.

Defendant contends next that the court erred in making certain findings of fact and in its judgment relating to the custody of the children. We find no merit in this contention.

[4] Defendant argues that the court should have made findings of fact as tendered by her. No useful purpose would be served in setting out here the findings made by the court and those proposed by defendant. It suffices to say that while the evidence might have supported the findings requested by defendant, it supported those found by the court. It is well settled that in a trial or hearing without a jury the findings by the court are conclusive if supported by any competent evidence, notwithstanding that there is evidence contra which would sustain findings to the contrary. 7 Strong, N. C. Index 2d, Trial § 58, page 379.

As to the judgment, while the findings of fact made by the court would support different provisions for dividing custody of the children between the parties, the decision was one for the trial judge to make. G.S. 50-13.2. The trial court and not the appellate court has the opportunity to observe the demeanor of the witnesses, hear their testimony and, in this case, confer privately with the children.

[5] Defendant contends the court erred in its findings of fact relating to "the environment in which the three minor children of the parties would live while in the custody of plaintiff." This contention has no merit.

The evidence revealed that after the parties were divorced plaintiff remarried and that his present wife has two minor daughters who live in plaintiff's home. Defendant argues that while the evidence showed that plaintiff has a comfortable home that it is not sufficiently large to provide desirable accommodations for the two girls and plaintiff's three boys. While it is true that defendant's home would provide more room and less crowded accommodations than plaintiff's home,

we think the findings made by the trial court are supported by the evidence.

Defendant contends the court erred in its findings relating to the responsibility of plaintiff to contribute for repairs and upkeep of the home where the children will reside with defendant.

The assignments of error embodying this contention are supported by Exceptions 21 and 23 which are to findings of fact 11 and 16; also Exception 29 which is that part of the judgment quoted in the early part of his opinion. In findings 11 and 16 the court found that defendant's home is in a poor state of repair, that major repairs are necessary to provide a suitable home for the boys when staying with defendant, but that she has incurred an indebtedness of $40,000 which is secured by a deed of trust on the home; that defendant is not qualified by training, education or experience to supervise the making of necessary repairs to the home; and that proper measures should be taken to insure that money provided by plaintiff for repairs and maintenance will be properly spent to the end that the house will be available and adequate until the youngest boy reaches age 18.

We conclude that the findings are supported by the evidence. As to the provisions of the judgment quoted above, providing for a trustee and imposing certain requirements on defendant, we hold that the trial judge exercised his lawful authority. Our statutory law and our case law provide trial judges with broad authority in making provision for the custody and support of minor children. Indicative of this are the numerous remedies set forth in G.S. 50-13.4, ending with subsection (11) which states that the specific enumeration of remedies shall not constitute a bar to remedies otherwise available.

Defendant contends that the court erred in that it failed to order plaintiff to pay a sufficient amount for the support and maintenance of the children. We find no merit in this contention. The trial court has wide discretion in determining the amount to be paid for the support of children and we perceive no abuse of discretion in this case.

Defendant contends the trial court erred in denying her motion for a new trial. It suffices to say that we have carefully considered this contention and find it also to be without merit.

Finally, defendant contends the court erred in signing the judgment for the reason that the conclusions of law and the mandate of the court were not based upon proper findings of fact which were supported by competent evidence. We find no merit in this contention but hold that the findings of fact were fully supported by the evidence, the conclusions of law were supported by the findings of fact and the conclusions of law provide sufficient basis for the judgment.

For the reasons stated, the judgment and order appealed from are

Affirmed.

Judges PARKER and CLARK concur.

EQUITY ASSOCIATES, A NORTH CAROLINA GENERAL PARTNERSHIP, N. CARL MONROE, JERRY N. THOMAS, AND HAROLD GREENE v. THE SOCIETY FOR SAVINGS

No. 7618SC423

(Filed 20 October 1976)

Process § 14— jurisdiction over foreign corporation — contract made and to be performed in N. C.

A Connecticut corporation was subject to the jurisdiction of the courts of this State under G.S. 55-145(a)(1) in an action for breach of contract to provide permanent financing for a motel to be constructed in this State and for fraud and unfair and deceptive acts in relation to such contract where the contract was made in this State because plaintiff performed the final act necessary to make it a binding agreement by signing it in this State, and where the contract was substantially performed in this State because the motel was built here; furthermore, the Connecticut corporation had sufficient minimal contacts with this State so that subjecting it to the jurisdiction of the courts of this State did not violate due process since it voluntarily joined in a contract to be performed in this State.

APPEAL by defendant from order of *McConnell, Judge.* Order entered 2 April 1976 in Superior Court, GUILFORD County. Heard in the Court of Appeals 23 September 1976.

Defendant, The Society for Savings, is a foreign corporation organized under the laws of Connecticut. It appeals from

an order that it is subject to the *in personam* jurisdiction of the courts of North Carolina under G.S. 55-145(a)(1).

The facts pertaining to jurisdiction over the parties are not in dispute. Equity Associates (Equity) is a general partnership organized under the laws of North Carolina, and its general partners, N. Carl Monroe, Jerry N. Thomas and Harold Greene are residents of this State. In an agreement dated 14 March 1974, Equity entered into a contract with The Society for Savings (Savings), a Connecticut corporation which neither resides nor transacts business in North Carolina, and Connecticut General Mortgage and Realty Investments (Connecticut General), a trust organized in Massachusetts. This contract provided for financing of a motel to be built in Winston-Salem, and was executed by Connecticut General in Massachusetts, by Savings in Connecticut and, finally, by Equity in North Carolina. The contract provided that Connecticut General would make Equity a $1,800,000 construction loan evidenced by a promissory note, with which to build the motel. It further provided that upon completion of the motel and other requirements, Savings would buy the note from Connecticut General and extend the due date as a way to provide permanent financing for Equity. Equity built the motel and, so they allege, complied with all other contract requirements. On 30 September 1975 representatives of Connecticut General and Equity went to the offices of The Society for Savings in order to close the sale of the loan documents as provided in the 14 March 1974 agreement. Savings at that time refused to purchase these documents.

Equity filed suit on 17 November 1975 in Guilford Superior Court alleging causes of action against Savings for breach of contract, fraud, and unfair and deceptive acts and practices violating G.S. 75-1.1. Process was personally served on Savings at its offices in Connecticut. Thereafter, on 19 December 1975, Savings appeared by counsel and, pursuant to Rule 12(b)(2), Rules of Civil Procedure, filed a motion to dismiss for lack of jurisdiction. In affidavits supporting its motion, Savings affirmed that it had never resided, or been admitted to do business, in North Carolina. It further affirmed that it had no agent, place of business or property in North Carolina, and that it never solicited business in this State. It admitted that its employees had twice visited North Carolina on business stemming from this contract with Equity.

The motion to dismiss was denied. The trial court concluded that the 14 March 1974 contract was made and substantially performed in North Carolina, that the contract constituted a promise by Savings to Equity to create an interest in, protect, acquire, use, own, control and possess realty in North Carolina, and that there were sufficient contacts between Savings and North Carolina so that exercise of jurisdiction by the State comported with due process. Savings appeals.

Brooks, Pierce, McLendon, Humphrey and Leonard, by Hubert Humphrey and Michael D. Meeker, for plaintiff appellees.

Smith, Moore, Smith, Schell and Hunter, by Bynum M. Hunter and David M. Moore II, for defendant appellant.

ARNOLD, Judge.

Savings denies that G.S. 55-145(a)(1) subjects it to the jurisdiction of North Carolina's courts. We disagree. G.S. 55-145(a)(1) provides:

> "(a) Every foreign corporation shall be subject to suit in this State, whether or not such foreign corporation is transacting or has transacted business in this State and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows:
>
> (1) Out of any contract made in this State or to be performed in this State. . . ."

The contract between Savings and Equity was both made and substantially performed in North Carolina. It was made here because Equity performed the final act necessary to make it a binding agreement by signing it in Greensboro, North Carolina. *Goldman v. Parkland of Dallas, Inc.*, 277 N.C. 223, 176 S.E. 2d 784 (1970); *Munchak Corp. v. Caldwell*, 25 N.C. App. 652, 214 S.E. 2d 194 (1975). The contract was substantially performed here because the motel was built here. *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E. 2d 225 (1965). Clearly, if G.S. 55-145(a)(1) is given its plain and ordinary meaning, it encompasses this cause of action.

Savings argues that *Atlantic Coast Line R. R. v. Hunt & Sons, Inc.*, 260 N.C. 717, 133 S.E. 2d 644 (1963), and cases following it, restrict the bounds of G.S. 55-145(a) so that it only

reaches those causes of action which arise in North Carolina. Equity argues that the more recent case of *Byham v. National Cibo House Corp., supra,* extends jurisdiction to the full statutory limits. We hold that, on our facts, *Byham* controls. Byham, a North Carolina resident, sued Cibo House, a Tennessee corporation, for rescission of a restaurant franchise contract made in Tennessee and to be performed in North Carolina. The cause of action was based on allegations of fraud in the inducement. Thus, the cause of action arose in Tennessee at the time the contract was completed. Cibo House moved to dismiss the action on grounds that North Carolina lacked jurisdiction. The trial court denied the motion, and our Supreme Court affirmed on appeal holding that since the franchise was to operate in North Carolina it was a contract to be substantially performed here. This was enough to comply with G.S. 55-145(a)(1).

We are aware of language in *Atlantic Coast Line R. R. v. Hunt & Sons, Inc., supra,* which says: "G.S. 55-145 pertains only to local actions. It has no application to any cause of action arising outside the State." *Id.* at 721. Similar language appears in *Marshville Rendering Corp. v. Gas Heat Eng'r Corp.,* 10 N.C. App. 39, 177 S.E. 2d 907 (1970), and *Dillon v. Numismatic Funding Corp.,* 29 N.C. App. 513, 225 S.E. 2d 137 (1976). These opinions are to be read in light of their facts. The broad statements, following *Hunt & Sons,* that no part of G.S. 55-145 provides jurisdiction over a cause of action arising outside North Carolina are *obiter dicta* and do not control the case at bar. *Hunt & Sons* and *Marshville Rendering Corp.* are both tort actions. G.S. 55-145(a)(4) says, "Every foreign corporation shall be subject to suit . . . on any cause of action arising . . . out of tortious conduct in this State. . . . " In *Hunt & Sons* the complaint alleged that the manufacturer of gas water heaters, a Michigan corporation, sold a heater to the plaintiff in Michigan without warning the plaintiff it was inherently dangerous, and that because of this negligence the heater exploded in Virginia. Clearly, the tort occurred outside North Carolina, and G.S. 55-145(a)(4) could not give jurisdiction to this state's courts. *Marshville Rendering Corp.* is remarkably similar. There a Nevada corporation sold a gas boiler to a North Carolina contractor. The sale was completed in Pennsylvania. There was an alleged defect in the boiler, and it exploded in North Carolina. Under our law, the cause of action for tort and breach of warranty arose at the time of sale in Pennsylvania. Therefore, North Carolina had no jurisdiction under G.S. 55-145(a)(4).

Unlike *Hunt & Sons* and *Marshville Rendering Corp., Dillon v. Numismatic Funding Corp., supra,* does allege a cause of action for breach of contract. This contract between New York and South Carolina residents was both made and breached in South Carolina. Had it been performed, performance would have occurred in New York. Because the contract was neither made, nor to be performed, here in North Carolina, this state had no jurisdiction under G.S. 55-145(a)(1). Moreover, the cause of action did not arise out of business solicited by the parties in North Carolina, and thus G.S. 55-145(a)(2) could not apply. Therefore, the broad assertion in *Dillon* that G.S. 55-145 applies only to a cause of action arising in North Carolina is dictum.

Having decided that G.S. 55-145(a)(1) gives North Carolina jurisdiction over this cause of action, we still have to determine whether application of this statute to this cause of action meets the due process requirement of the Fourteenth Amendment of the Federal Constitution. We hold that it does. The "minimal contacts" requirement of *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), says that "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 minimum contacts with it such that the maintenance of the suit does not offend 'the traditional notions of fair play and substantial justice.' " *Id.* at 316. Regardless of what other contacts may be present, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws." *Hanson v. Denckla,* 357 U.S. 235, 253 (1958). Savings has performed just such a purposeful act. It has voluntarily joined in a contract to be performed here in North Carolina. "It is sufficient for the purpose of due process if the suit is based on a contract which has a substantial connection with the forum state." *Byham v. National Cibo House Corp., supra* at 57, 143 S.E. 2d 232. *Accord, Goldman v. Parkland of Dallas, Inc.,* 7 N.C. App. 400, 173 S.E. 2d 15 (1970), *aff'd* 277 N.C. 223, 176 S.E. 2d 784 (1970).

In addition to the contract itself, Savings was personally served with process at its offices in Connecticut. All of the plaintiffs reside in North Carolina, and they performed acts here which, judging from the parties' affidavits, will be material

to this suit. The motel is in North Carolina, and again judging from the affidavits, facts about its construction and condition will be at issue. Because of these facts, it is reasonable, convenient and fair to require Savings to defend this lawsuit in North Carolina. Due process is satisfied. *Byham v. National Cibo House Corp., supra.*

The order of the court below is

Affirmed.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. RANDALL FRANCIS DRAKE

No. 7626SC363

(Filed 20 October 1976)

Criminal Law § 101— expression of opinion by one juror to another during recess — denial of mistrial — refusal to call juror

In a prosecution for first degree murder, the trial court erred in denying defendant's motions for a mistrial based on alleged juror misconduct and to call the juror to determine if any prejudice occurred to defendant where a disinterested witness gave uncontradicted testimony that during a recess she heard one juror express to another juror an opinion on the issue of self-defense.

APPEAL by defendant from *Lewis, Judge.* Judgment entered 17 December 1975, in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 14 September 1976.

Defendant pled not guilty to the charge of first-degree murder.

The State's witness Summers, a friend of defendant who accompanied him on the night of 10 April 1974, testified that in a tavern defendant insulted and threatened the victim, Jack Richmond, about a debt. Defendant then left the tavern. He returned in fifteen minutes, and they resumed quarreling. Richmond invited defendant outside. There, when they were about ten feet apart, defendant pulled a gun from his pocket, pointed it at Richmond and told him to "go for your pocket again." Richmond approached defendant and was standing about an arm's length away with his hands empty when defendant

shot him in the chest. Richmond fell forward and grabbed defendant, who then fired a second shot which hit Richmond in the neck. After Richmond fell to the ground, defendant pulled an open knife from Richmond's pocket and told Summers that the victim had tried to cut him. Summers saw no blood on defendant's face or hands.

The investigating officer testified that upon arriving at the scene he saw the defendant; that he did not recall seeing cuts or blood on defendant's hands but he did not examine him; and that the tavern owner gave him an open knife, which did not have any blood on the blade.

Keith Stroud, an attorney then employed in the Office of the Public Defender, testified for the State that he talked with defendant on the night of the shooting and saw two shallow cuts on the top of his left hand and blood on his left ear.

At the close of the State's evidence the trial court ordered a fifteen minute recess. Upon reconvening defendant moved for a mistrial because of jury misconduct. The court, after a hearing which is fully reported in the opinion, denied the motion.

Defendant's testimony tended to show that Richmond owed him some money; that in the tavern Richmond initiated the discussion about the debt, threatened him, and made obscene gestures to him. Defendant went to his car and got his gun because he "had to get the money one way or another." Richmond invited him outside and there pulled an open knife from his pocket and advanced on him. They struggled and the gun fired accidentally as defendant fell to the ground. Defendant further testified that Richmond had a reputation for danger and violence, and admitted on cross-examination that he had two prior convictions for assault.

The jury returned a verdict of guilty of second-degree murder, and from judgment imposing imprisonment, defendant appeals.

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

John G. Plumides and Shelley Blum, of Counsel, for defendant appellant.

CLARK, Judge.

Defendant assigns as error: (1) the denial of a motion for mistrial because of juror misconduct supported by the uncontradicted testimony of a disinterested witness which showed an expression of prejudicial opinion during a recess following the presentation of the State's evidence by one juror to other jurors on an issue crucial to the defense; and (2) the denial of a motion to call that juror for examination after hearing the uncontradicted testimony of the disinterested witness.

In support of the motion defendant offered the testimony of Phyliss Jacobs. The record of the investigation by the court is, in part, as follows:

"PHYLISS JACOBS . . . .

* * * *

I went down to the coffee bar in the basement.

* * * *

As I opened the door and went through, several of the jurors were standing at the door talking and I heard one say to the others, 'the boy probably took a knife and cut himself and threw the knife away and is going to plead self-defense' . . . .

* * * *

. . . I felt like he was influencing the other Jurors. . . . [S]o I said, excuse me, sir, you don't know that that's what happened because you weren't there and I wasn't there and so you shouldn't be talking about it.

* * * *

THE COURT: [T]he motion for mistrial is denied, in the discretion of the Court.

MR. PLUMIDES: I would like to call that Juror, if Your Honor please.

THE COURT: That motion is denied. . . . "

It does not appear from the record whether this witness had any interest in the outcome of the trial. Her testimony was uncontradicted and nothing appears to impeach her credibility.

In ruling on this assignment of error we must assume that the court acted on the assumption that the circumstances related by the witness were true, but that, in its discretion, the obvious misconduct was not so prejudical to the defendant as to call for a mistrial.

The statement attributed to the juror was in violation of the precautionary instructions given by the trial court to the jury immediately after impanelling:

> "And lastly, the only proper place for a jury to deliberate upon any criminal case is in the Jury Room at the end of the whole case, that is, after the evidence is all presented, the lawyers have had their opportunity to make their final summations or arguments to you and the Court has had its opportunity to charge you on the applicable law. So, you should keep your mind open until reaching the Jury deliberation room and not decide the case prior to that time, when you can have the counsel and advice of your fellow jurors."

This is an excellent statement of the appropriate standard of conduct for jurors. See Annot., Juror—Contact With Party, 55 A.L.R. 750 (1928); Supplemental Annot., 62 A.L.R. 2d 300 (1958); Annot., Juror — Communications With Witness, 52 A.L.R. 2d 182 (1957); Annot., Juror—Communication With Outsider, 64 A.L.R. 2d 158 (1959). With instructions such as this one as a guide, jury misconduct has become rare, and there are few recent cases in our State dealing with the problem.

It is well-settled law in this State that the determination of the trial court on the question of juror misconduct will be reversed only where an abuse of discretion has occurred. *O'Berry v. Perry,* 266 N.C. 77, 145 S.E. 2d 321 (1965); *Brown v. Products Co.,* 5 N.C. App. 418, 168 S.E. 2d 452 (1969); 7 Strong, N. C. Index 2d, Trial, § 50 (1968). The reason for the rule of discretion is apparent. Misconduct is determined by the facts and circumstances in each case. The trial judge is in a better position to investigate any allegations of misconduct, question witnesses and observe their demeanor, and make appropriate findings.

If prejudicial misconduct is found, the court has the discretionary power to withdraw a juror at any time and to declare a mistrial. *Greer v. Bank,* 202 N.C. 220, 162 S.E. 233 (1932); 2 McIntosh, N. C. Practice, § 1543 (2d Ed. 1956).

Our courts have generally refused to find an abuse of discretion in cases containing allegations of jury misconduct, but in each case the record shows that the trial court conducted a careful, thorough investigation, including an examination of the juror involved when warranted and concluded that the conduct had not prejudiced the jury on any key issue. *O'Berry v. Perry, supra; Keener v. Beal,* 246 N.C. 247, 98 S.E. 2d 19 (1957); *Wright v. Holt,* 18 N.C. App. 661, 197 S.E. 2d 811 (1973), *cert. denied,* 283 N.C. 759, 198 S.E. 2d 729 (1973); *Brown v. Products Co., supra.*

In *O'Berry,* after the jury had returned a verdict for the plaintiff, the defendant moved for a new trial on the basis of a meeting between a juror, the plaintiff, and a witness for the plaintiff. The trial court made an immediate investigation, found that they had walked to lunch together; that they had talked about fishing and not about the case; and that there had been no effect on the verdict. The court even examined the sheriff for his opinion of the juror's character and reputation. Writing for the Court, Justice Sharp (now Chief Justice) relied upon the trial court's extensive investigation, found no abuse of discretion in the denial of defendant's motion and noted that instructions such as the one in this case may not always be adequate to control jury misconduct. We would agree that where instructions fail to prevent alleged misconduct, an investigation may be required; and if prejudicial misconduct is found, circumstances may warrant a mistrial, a contempt citation, or any appropriate action by the trial court.

In *Stone v. Baking Co.,* 257 N.C. 103, 125 S.E. 2d 363 (1962), the court found no abuse of discretion where the trial court had refused to examine the juror accused of misconduct, but there, the movant could not identify the person with whom the juror allegedly spoke, and the content of the conversation, as reported by the movant, was devoid of any reference to the trial or any issues therein.

While the appellate courts in this State have enunciated the general rule of discretion in juror discussions with parties and witnesses, they have never been called upon to rule on alleged discussions solely among jurors before the time for deliberation in the jury room. Appellate courts in several other jurisdictions have confronted the problem of alleged juror misconduct resting solely upon conversations among jurors outside

the jury room, and have uniformly adhered to the principle that such conduct is improper. *Winebrenner v. United States,* 147 F. 2d 322 (8th Cir. 1945); *Glascow Realty Co. v. Metcalfe,* 482 S.W. 2d 750 (Ky. Ct. App. 1972); *City of Pleasant Hill v. First Baptist Church,* 1 Cal. App. 3rd, 384, 82 Cal. Rptr. 1 (1969); *People v. Carr,* 370 Mich. 251, 121 N.W. 2d 449 (1963). An examination of the jurors involved in the alleged misconduct to determine prejudicial effect is generally not required where the witness did not hear any of the content of the conversation and the allegations are nebulous. *Wilson v. California Cab Co.,* 125 Cal. App. 383, 13 P. 2d 758 (1932); *Glascow Realty Co. v. Metcalfe, supra; Commonwealth v. Clore,* 438 S.W. 2d 498 (Ky. Ct. App. 1969). But an examination will generally be required where some prejudical content is reported. *St. Louis S. Ry. v. Gregory,* 387 S.W. 2d 27 (Tex. 1965); *Cloudt v. Hutcherson,* 175 S.W. 2d 643 (Tex. Civ. App. 1943); *Rowe v. Shenandoah Pulp Co.,* 42 W. Va. 551, 26 S.E. 320 (1896). Since the need for an examination of the juror to determine prejudicial effect depends upon all the facts and circumstances involved, it may be required in some cases even when the content is unknown. *O'Berry v. Perry, supra; Smith v. Brown,* 102 Cal. App. 477, 283 P. 132 (1929).

The precautionary instructions of the trial court in this case, that it was the duty of the jurors not to form or express an opinion on the merits of the cause until submission of the case to them, is indicative of the law in this State and elsewhere. See 89 C.J.S. Trial, § 460 b (1955). Every violation of these instructions is not such prejudicial misconduct as will vitiate the verdict. However, we do not accept the argument of the State that there can be no reversible error for jurors to form and express an opinion before deliberations since they have the right to discuss the evidence and express opinions once they are in the jury room. In this case the trial court denied the defendant's timely motion based on the uncontradicted testimony of a disinterested witness to call the juror who allegedly formed and expressed an opinion on the crucial issue of self-defense, and the court denied the motion for mistrial without determining the truth about the alleged misconduct and, if true, the effect of the juror's statement upon other jurors who heard him.

Reversible error may include not only error prejudicial to a party but also error harmful to the judicial system. Basic principles of proper juror conduct should not be ignored by

the trial court. We find that under the circumstances of this case the denial of the defendant's motions for mistrial and to call the juror as a witness, or to otherwise investigate and determine the alleged juror misconduct, was error, and we order a

New trial.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. LESTER LEE ARTIS

No. 7626SC203

(Filed 20 October 1976)

1. **Criminal Law § 101— sequestration of witnesses — discretionary matter**

The sequestration of witnesses is not a matter of right but of discretion on the part of the trial judge, and the exercise of such discretion is not reviewable in the absence of abuse of discretion.

2. **Robbery § 3— companion in crime arrested and charged — admissibility of evidence**

The trial court in a prosecution for armed robbery did not err in admitting testimony that a companion had been arrested and charged with the same robbery with which defendant was charged, since such testimony was relevant and necessary to form a composite picture of the crime and its perpetrators.

3. **Bill of Discovery § 6— photographic evidence — substantial compliance with pre-trial discovery order**

Evidence was sufficient to support the trial court's finding that the State complied substantially with a pre-trial discovery order directing the district attorney to reveal certain photographs to counsel for defendant.

4. **Constitutional Law § 30— speedy trial — no abridgement of right**

Where defendant was arrested on 22 June 1975 and on 8 August 1975 and 5 September 1975 petitioned for a speedy trial because he was incarcerated and unable to make bail, defendant failed to show any prejudice resulting from the delay, and his motion for speedy trial was properly denied.

5. **Criminal Law § 66— in-court identification of defendant — no improper pre-trial procedures**

The trial court in an armed robbery prosecution did not err in allowing in-court identifications of defendant where the court found

that the identifications were based on observation at the crime scene and did not result from any photographs or identification procedures suggestive or conducive to mistaken identification.

APPEAL by defendant from *Baley, Judge.* Judgment entered 14 October 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 9 June 1976.

Defendant was indicted upon a charge of armed robbery in violation of N. C. G.S. 14-87.

Evidence for the State tended to show that on 21 June 1975 at 4:30 p.m. defendant and another man entered Elder's Supermarket and took money from the cash registers; that defendant had a shotgun and made everyone lie on the floor except the manager, Howard Norman, who was unable to get on the floor due to an injured knee and was therefore able to observe defendant's face for approximately four minutes; that another store employee, Michael Sloan, saw defendant enter the store and recognized him because he attended junior high with defendant about five years ago and had seen defendant on the street since; that defendant and his companion left the store and were heading to a red and white Chevelle when police pulled up, at which time defendant dropped the gun and money and ran; that Norman, Sloan and a police officer picked defendant's picture out of a photographic lineup; and that defendant looked the same at trial as he did on the day of the robbery except that his hair was one inch longer with no part and Norman did not recall that defendant had a beard or mustache.

Defendant presented seven witnesses who testified he was at a funeral from 3:00 to 5:00 p.m. on 21 June 1975 and one witness who testified that Michael Sloan told him he did not really recognize defendant but was forced to testify because he was in trouble for a drug offense. Michael Sloan denied such a conversation.

From a verdict of guilty of robbery with a dangerous weapon and a judgment sentencing the defendant to not less than twenty-five nor more than thirty years in prison, the defendant appealed.

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

Public Defender Michael S. Scofield, by Assistant Public Defender James Fitzgerald, for defendant.

MARTIN, Judge.

The defendant assigns as error the failure of the court to sustain his motion to sequester the State's witnesses.

[1] Under our decisions, the sequestration of witnesses is not a matter of right but of discretion on the part of the trial judge. The exercise of such discretion is not reviewable in the absence of abuse of discretion. See *State v. Taylor,* 280 N.C. 273, 185 S.E. 2d 677 (1972); *State v. Hudson,* 23 N.C. App. 734, 209 S.E. 2d 542 (1974). No abuse of discretion is shown in this respect on the record before us. This assignment of error is overruled.

[2] Defendant next contends the court erred in admitting testimony that a companion had been arrested and charged with the robbery of the same Elder's Supermarket. He contends this testimony was not only irrelevant but also prejudicial in that it allowed the jury to infer defendant's guilt from the police action of arresting his companion. We disagree. In criminal cases every circumstance that is calculated to throw any light upon the supposed crime is relevant and admissible. See *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506 (1965) cert. den. 384 U.S. 1020, 16 L.Ed. 2d 1044, 86 S.Ct. 1936 (1966). The testimony in the instant case was relevant and necessary to form a composite picture of the crime and its perpetrators. See *State v. Old,* 272 N.C. 42, 157 S.E. 2d 651 (1967). In addition, the defendant could not have been prejudiced since his trial could have been consolidated with Garland's pursuant to G.S. 15A-926(b)(2). The burden is on the defendant appellant not only to show error but also to show that he was prejudiced or that the verdict of the jury was probably influenced by the evidence in question. See *State v. Bovender,* 233 N.C. 683, 65 S.E. 2d 323 (1951). The defendant in the case at bar has not satisfied this burden. This assignment of error is overruled.

[3] Next, defendant contends he is entitled to a new trial for the failure of the State to comply with the pre-trial discovery order directing the district attorney to reveal certain photographs to counsel for defendant. He argues that (a) permitting defendant to examine the photographs on the day of the trial was not substantial compliance; (b) even though the photographs were not introduced into evidence, State elicited evidence concerning the photographic lineup; and (c) although G.S. 15A-910 allows a court, when faced with a violation of a dis-

covery order, to "order the party to permit the discovery or inspection," the statute also permits the court to "enter other appropriate orders" and since the compliance violation in this case was substantial, a new trial is required.

Regulation of discovery and failure to comply determinations are within the sound discretion of the trial court. The court has broad and flexible powers to rectify the situation if a party fails to comply with discovery orders or provisions of the discovery article. See G.S. 15A-910. In the case at bar the court found that the discovery order and discovery laws had been substantially followed. The crucial identifications of the defendant were not based on the photographs but were independent in-court identifications of what the witnesses saw at the time of the robbery. The trial court found as a fact and concluded as a matter of law that the in-court identification of the defendant did not result from any photographic identification procedures. The defendant has failed to show that he was prejudiced or that the verdict of the jury was probably influenced by this evidence. *State v. Bovender, supra.* This assignment of error is therefore overruled.

Defendant next contends his right to a speedy trial was infringed and the court erred by failing to hold an evidentiary hearing on defendant's request for a speedy trial and by denying defendant's motion to dismiss.

[4] Defendant was arrested on 22 June 1975 and on 8 August 1975 and 5 September 1975 petitioned for a speedy trial because he was incarcerated and unable to make bail.

G.S. 15A-954(a)(3) provides that "the court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that the defendant has been denied a speedy trial as required by the Constitution of the United States and the Constitution of North Carolina."

"The constitutional right to a speedy trial protects an accused from extended imprisonment before trial, from public suspicion generated by an untried accusation, and from loss of witnesses and other means of proving his innocence resulting from passage of time." *State v. Spencer,* 281 N.C. 121, 124, 187 S.E. 2d 779, 781 (1972). "The burden is on the accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or wilfulness of the State's prose-

cution." *State v. Hollars,* 266 N.C. 45, 52, 145 S.E. 2d 309, 314 (1965). "Neither the Constitution nor the legislature has attempted to fix the exact time within which a trial must be had. 'Whether a speedy trial is afforded must be determined in the light of the circumstances of each particular case. In the absence of a statutory standard, what is a fair and reasonable time is within the discretion of the court. (Citation omitted.)' " *State v. Hollars, supra* at 51, 145 S.E. 2d at 313.

The congestion of criminal court dockets has consistently been recognized as a valid justification for de'ay. Both crowded dockets and lack of judges or lawyers, along with other factors, have made some delays inevitable. See *State v. Brown,* 282 N.C. 117, 191 S.E. 2d 659 (1972).

In the present case, the defendant's several motions for a speedy trial on 8 August 1975 and 5 September 1975 appear to be based on his contention that he is entitled to a speedy trial because he was unable to make bond and remained incarcerated. He does not contend nor does the record suggest that his ability to present his defense was in any way impaired by the delay. In this case the record does not reveal prejudice resulting from the delay. Defendant's contention that he has been denied his right to a speedy trial is therefore without merit and cannot be sustained.

In conjunction with the speedy trial issue, the defendant contends that the trial court erred by failing to hold an evidentiary hearing on the request for a speedy trial. In response to this argument, it is initially apparent that the trial judge does not have to hold an evidentiary hearing and make findings of fact every time a defendant contends that he has been denied a speedy trial. *State v. Roberts,* 18 N.C. App. 388, 197 S.E. 2d 54 (1973), cert. den. 283 N.C. 758, 198 S.E. 2d 728 (1973). Moreover the trial record on this appeal reveals that there was a hearing on the defendant's motion. A view of the record discloses the following:

"(2) Motion for speedy trial. Defendant renewed his Motion for a speedy trial, requesting dismissal.

THE COURT: Upon motion made by defense counsel for a speedy trial, the motion having already been heard by Judge Frank Snepp and having been determined adversely to the defendant, the motion for a speedy trial—the motion

to dismiss for lack of a speedy trial is DENIED and the defendant is assured that he will be given an immediate trial. Exception by the defendant."

Defendant's contention that the court erred in not holding a hearing on his motion is without merit and cannot be sustained.

[5] The defendant next contends that the court erred in admitting certain identification testimony.

The test under the due process clause as to pre-trial identification procedures is whether the totality of the circumstances reveals that the pre-trial procedures were so unnecessarily suggestive and conducive to an irreparable mistaken identification as to offend fundamental standards of decency, fairness, and justice. *State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10 (1974).

Defendant was identified by two eyewitnesses to the crime and their identifications were found by the trial court to be in-court identifications of independent origin, based solely upon what the witnesses saw at the time of the crime. The court further found that the identifications did not result from any photographs or identification procedures suggestive or conducive to mistake in identification. A policeman also identified defendant as the man he saw with a shotgun outside the supermarket just after the robbery, and the court found that this also was an independent in-court identification. The court's findings of fact in this regard are conclusive on this Court because they were supported by competent evidence. See *State v. Tuggle,* 284 N.C. 515, 201 S.E. 2d 884 (1974).

Defendant's remaining assignment of error is without merit and is overruled.

In the trial of the case we find no prejudicial error.

No error.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. RICHARD POWELL WALKER

No. 7626SC295

(Filed 20 October 1976)

1. **Homicide § 21— involuntary manslaughter — sufficiency of evidence**

The State's evidence was sufficient to support a verdict finding defendant guilty of involuntary manslaughter where it would support a finding that the killing resulted from an unlawful assault by defendant upon the occupants of a truck or from defendant's culpable negligence in approaching the truck with a loaded pistol, his finger on the trigger, and demanding that the occupants leave the truck.

2. **Homicide § 28— defense of accident or misadventure — instructions sufficient**

In a homicide prosecution where defendant contended that the shooting in question was accidental, the trial court's instruction on the defense of accident or misadventure which defined it as being characterized by a lack of wrongful purpose or criminal negligence on defendant's part and explained its exculpatory effect was proper.

3. **Criminal Law § 138; Homicide § 31— involuntary manslaughter — sentence recommending work release — challenge premature**

Where the trial court, upon defendant's conviction for involuntary manslaughter, imposed a sentence of imprisonment for 7 years with a recommendation that at the end of 2 years defendant, if qualified, be placed on work release for the remainder of the 7 year period, and provided that restitution in a named sum be made to the minor children of the homicide victim out of defendant's work release earnings, defendant's contention that such punishment exceeded the limits of G.S. 14-18 was prematurely raised on appeal, since (1) the court's provisions were not binding on the Parole Commission, the body with which all releasing authority for work release privileges rests, (2) defendant would become eligible for parole before the expiration of the 2 year period set by the trial court, and (3) defendant might not even be granted the privilege of participating in the work release program.

APPEAL by defendant from *Baley, Judge.* Judgment entered 10 December 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 24 August 1976.

Defendant was charged in an indictment with the offense of first degree murder.

The State offered evidence tending to show that on the night of 26 May 1974 the manager of the Tastee-Freez in Cornelius heard a shot while working and shortly thereafter saw defendant walking around the Tastee-Freez to the rear of the parking lot; that another Tastee-Freez patron drove up and

saw defendant standing by the driver's side of a dark blue pickup truck; that a lady sitting on the passenger side, later identified as defendant's wife, opened her door and the patron saw a blonde man lying across the seat with his head in her lap; that defendant then walked past the patron's car to the rear of the lot, got in another car and drove off; that the pickup truck then left the Tastee-Freez; that defendant's wife drove the truck ¼ of a mile to the Bantam Chef where a policeman called an ambulance; that the blonde man, Stuart Winkler, had been shot in the left chest with a .38 caliber pistol and died as a result thereof; that the police subsequently received a call and found defendant at a friend's house with a .38 caliber pistol lying on the table in front of him; that the pistol had been recently fired and the bullet found in Winkler's body had come from defendant's gun.

Defendant testified that he and his wife were separated; that he did not know Winkler but knew his wife was going with him; that after the separation his wife kept his blue pickup truck, which was registered in her name for insurance purposes only, and he wanted it back; that he saw the truck at the Tastee-Freez and approached it with his pistol loaded because he knew his wife carried a pistol; that he opened the door on the driver's side and asked Winkler and his wife to get out of the truck; that Winkler grabbed the gun and it went off accidentally; that defendant never intended to hurt anyone with the gun but only intended to protect himself; and that he then drove to a friend's house, told her what happened and gave her permission to call the police.

The jury returned a verdict of guilty of involuntary manslaughter. The court imposed a prison sentence of seven years with conditions from which the defendant appealed.

Attorney General Edmisten, by Associate Attorney Jo Anne Sanford Routh, for the State.

Wardlow, Knox & Knox, by H. Edward Knox and William G. Robinson, for defendant.

MARTIN, Judge.

[1] Defendant contends the court erred in denying his motion for nonsuit at the close of State's evidence and again at the close

of all evidence because there was no showing of an unlawful act or criminal negligence by defendant.

It is well settled in this State that upon a motion for a nonsuit in a criminal case

> " . . . the trial judge is required to take the evidence for the State as true, to give to the State the benefit of every reasonable inference to be drawn therefrom and to resolve in the favor of the State all conflicts, if any, therein. (Citations omitted.)" *State v. Edwards,* 286 N.C. 140, 145, 209 S.E. 2d 789, 792 (1974).

The State's evidence taken in this light would support a finding that the killing resulted from an unlawful assault by defendant upon the occupants of the truck or from defendant's culpable negligence in approaching the truck with a loaded pistol, his finger on the trigger, and demanding that the occupants leave the truck. This evidence, taken as true, supports a conclusion that the denial of defendant's motions for a nonsuit was proper and that defendant's assignment of error is without merit.

[2] The defendant next contends the court erred in failing to charge the jury as to the substance and legal effect of defendant's contention that the shooting was accidental. By this assignment he challenges the sufficiency of the court's instruction regarding the defense of accident and misadventure.

Subsequent to the court's instructions as to the elements of the varying degrees of homicide for which defendant could have been found guilty, the court instructed on the defense of accident or misadventure:

> "If Stuart Wayne Winkler died by accident or misadventure, that is, without wrongful purpose or criminal negligence on the part of the defendant, the defendant would not be guilty.
>
> " . . .
>
> "The burden of proving an accident is not on the defendant. His assertion of an accident is merely a denial he committed any crime. The burden remains on the State to prove the defendant's guilt beyond a reasonable doubt."

It was made clear that unless the jury found from the evidence and beyond a reasonable doubt that defendant's killing of Stuart Wayne Winkler resulted from an unlawful or criminally negligent act by the defendant, that it could not convict him of involuntary manslaughter. Defendant now suggests instructions should have been to the effect that if defendant was doing a lawful act in approaching the truck, and if he was not committing an assault, then the incident should be characterized as an accident or misadventure. The trial court's instructions were to this very effect. The jury was required to find that defendant committed either an unlawful act or a culpably negligent act before it could convict him of involuntary manslaughter. The court charged as follows:

> "For you to find the defendant guilty of involuntary manslaughter, the State must prove two things beyond a reasonable doubt; first, that the defendant acted unlawfully or in a criminally negligent way."

Defendant's contention of accident or misadventure is an important feature of his case. The trial court squarely addressed that contention when it charged on the defense, defined it as being characterized by a lack of wrongful purpose or criminal negligence on defendant's part, and explained its exculpatory effect. It is established in this jurisdiction that where the judge's charge fully instructs the jury on all substantive features of the case, defines and applies the law thereto, and states the contentions of the party as the trial court did here, it complies with G.S. 1-180, " . . . and a party desiring further elaboration on a particular point, or of his contentions . . . must aptly tender request for special instructions. (Citation omitted.)" *State v. Garrett,* 5 N.C. App. 367, 372, 168 S.E. 2d 479, 482 (1969). If defendant had desired further elaboration on this contention, or a variation in the phrasing thereof, he should have tendered such request either prior to the charge or at the close thereof when the court specifically asked counsel whether anything further was desired.

The defendant's second assgnment of error is therefore overruled.

Defendant's third assignment of error is overruled.

[3] By defendant's fourth assignment of error he contends the court erred in the judgment and commitment entered. More

specifically, the defendant assigns error to the following emphasized portion of the commitment:

> "It is adjudged that the defendant be imprisoned for the term of seven (7) years in the State Department of Corrections. At the expiration of the service of two (2) years of this sentence, it is the recommendation of the Court, if at that time he be considered qualified, that he be placed on work release for the remainder of the seven year period, WITH THE PROVISION THAT HE PAY FROM THE FUNDS SECURED BY WORK RELEASE, THE SUM OF TWO HUNDRED FIFTY ($250.00) DOLLARS A MONTH FOR A PERIOD OF FIVE (5) YEARS, WHICH SUM IS TO BE PAID INTO THE OFFICE OF THE CLERK OF SUPERIOR COURT, AND TO BE HELD IN TRUST FOR THE TWO MINOR CHILDREN OF THE DECEDENT, STUART WAYNE WINKLER, TO BE USED FOR THEIR USE AND BENEFIT."

Defendant's brief presents the argument that G.S. 14-18, which governs the matter of punishment for involuntary manslaughter, provides only for fine or imprisonment, or both, in the discretion of the court, and that the trial court's sentence herein exceeds the limits of the statute by recommending payment of restitution out of defendant's work-release earnings.

This question contemplates the occurrence of events in the future which are too speculative for this Court to consider at the present time. First of all, the defendant may not even be granted the privilege of participating in the work-release program. Secondly, he may be paroled prior to the point at which the trial court's recommendation as to work-release would be effective.

The actual commitment of the defendant to the Department of Corrections was for a period of seven years. In sentences of greater than five years duration, a trial court is not at liberty to impose a mandatory assignment to the work-release program. See G.S. 148-33.1. Moreover, G.S. 148-33.1(b) read in conjunction with G.S. 143B-266(b) makes it clear that all releasing authority for work-release privileges for any inmate serving a term of greater than five years rests ultimately in the Parole Commission. Therefore, the trial court's recommendation that the defendant be placed on work-release is not binding thereon. Therefore, this "recommendation" by the trial court does not require defendant to go on work-release at all, and it is

clear that if he does not go on the program he would not pay any restitution out of "work-release earnings."

Therefore, it would appear that the trial court below has merely set forth for the Parole Commission's consideration the conditions upon which it would recommend work-release. Defendant has not yet been "injured" by this recommendation and it is speculative to assert that he ever will be, since, in addition to the factors set forth above, G.S. 148-58 provides that a prisoner is eligible to have his case considered for parole after service of one-fourth of his sentence. Defendant will thus be eligible for consideration for parole in twenty-one months, or three months prior to the time at which the court's recommendation regarding work-release would be effective. For the foregoing reasons, a consideration of the question presented by defendant's argument is premature at this point.

Defendant's fourth assignment of error is therefore overruled.

In the trial we find no prejudicial error.

No error.

Judges BRITT and HEDRICK concur.

DOCKET E-5690 ELLIS HARRIS, SON OF RICHARD HARRIS, DECEASED
DOCKET E-5691 ARNITA IRVIN, WIDOW, ET AL
DOCKET E-5692 LEONA MARROW, WIDOW
EMPLOYEES
PLAINTIFFS

v.

JACK O. FARRELL, INC., EMPLOYER, INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY
CARRIER
DEFENDANTS

No. 769IC365

(Filed 20 October 1976)

Master and Servant § 62— workmen's compensation — auto accident on way home from work — injuries not arising out of employment

In this proceeding to recover death benefits under the Workmen's Compensation Act, evidence was sufficient to support the Commis-

sion's conclusion that while the deceased employees sustained injuries by accident which resulted in their deaths, such injuries did not arise out of and in the course of their employment with defendant employer where such evidence tended to show that the fatal automobile accident in question occurred after the employees had completed their day's work at the job site, had punched out on the time clock, had left the place of their employment, and had started homeward in a truck owned and operated, though such operation was subsidized by the employer, by a fellow employee whom they paid to transport them.

APPEAL by plaintiffs from orders of North Carolina Industrial Commission entered 10 September 1975. Heard in the Court of Appeals 14 September 1976.

These three proceedings were brought to recover death benefits under the Workmen's Compensation Act. They were heard jointly before the Hearing Commissioner of the North Carolina Industrial Commission. Each of the deceased employees died as result of injuries received on 10 May 1971 when the truck in which they were riding was involved in a multi-vehicle collision while being driven on a State Highway. The only issue presented is whether the accident arose out of and in the course of their employment.

Evidence presented before the Hearing Commissioner showed the following:

At the date of the accident, the employer, Jack O. Farrell, Inc., was engaged in constructing a school building in Chatham County. The superintendent on this project was Bill Raynor, Sr., who lived in Oxford, N. C. The deceased employees also lived in Oxford and worked on the school project in Chatham County. The accident occurred when Raynor and the deceased employees were returning to Oxford after completing their day's work at the job site. They were riding in a truck which belonged to Raynor, who was also killed in the accident.

When Raynor was first employed, his employer had furnished him a company-owned truck to be used by him in going back and forth from his home to various construction job sites and to be used to get equipment and small items of materials to and from the jobs. Under this arrangement the employer paid for all gasoline, oil, and all other expenses of maintaining and operating the truck. Later, Raynor wanted to have his own truck, and approximately a year to a year and a half before May 1971, he bought his own truck. Thereafter, Raynor

paid for all gasoline, oil, maintenance, and all other expenses of owning and operating his truck, and his employer paid him, in addition to his salary, the sum of $25.00 per week plus 7 cents per mile for all miles put on the truck between Raynor's home and the various job sites and for all miles driven when the truck was used during the course of construction to pick up small material items or tools.

Raynor was authorized by his employer to hire such employees as he felt were needed to construct the school project for which he was superintendent and to pay them the hourly wage in accord with the scale agreed to by the employer, but he was not authorized to provide or promise to anyone he employed any benefits beyond the agreed hourly pay. The employer provided a time clock at the school job site, and it was the responsibility of each employee on arriving at the job site to punch in and at the termination of the day's work to punch out.

Raynor's truck was fitted with a cover on the back and with benches built into the back on which people could sit. The deceased employees rode with Raynor in his truck each work day between Oxford and the job site in Chatham County, and for this each employee paid Raynor $1.00 for each day's ride. Prior to purchasing his own truck, Raynor had at times also used the employer-owned truck in similar fashion to transport other empoyees to and from various job sites.

The Hearing Commissioner entered an order in each case making findings of fact which include the following:

"2. . . .

The deceased employee commuted every day from his place of employment to his home in Oxford in the truck of the job supervisor. . . . On May 10, 1971, the deceased employee was riding home in Raynor's truck when there was a motor vehicle accident resulting in deceased's death.

3. While the employer paid Raynor $25.00 per week for maintenance of the truck and seven cents a mile, which mileage included a stop in Oxford to pick up and drop off the deceased, this was paid to Raynor for Raynor's transportation and there was no understanding between the deceased employee and employer regarding the providing of transportation.

4. The deceased paid Raynor one dollar per day for transportation. The defendant employer paid the deceased on an hourly rate and had a time clock at the job site.

* * * *

7. Raynor had authority to hire and fire employees at the construction site. While it was not Raynor's responsibility to get workers to and from the job, it was Raynor's responsibility to get sufficient and qualified workmen to get the job done.

* * *

9. While Raynor's agreement regarding transportation with the deceased employee was to the employer's benefit, such agreement was not within the scope of Raynor's agency. The injury and subsequent death of the deceased therefore did not arise out of and in the course of the employment."

The Hearing Commissioner concluded as a matter of law that while the deceased employee sustained an injury by accident which resulted in his death, such injury by accident did not arise out of and in the course of this employment with defendant employer. Accordingly, the Hearing Commissioner in each case denied the claim for benefits under the Workmen's Compenstation Act. On appeal, the Full Commission adopted as its own the decision of the Hearing Commissioner in each case.

Clayton and Ballance by Frank W. Ballance, Jr., for plaintiff appellants.

Spears, Spears, Barnes, Baker & Boles by Alexander H. Barnes, for defendant appellees.

PARKER, Judge.

The findings of fact made by the Hearing Commissioner, which were adopted as its own by the Full Commission, are supported by competent evidence and are conclusive on this appeal. The determinative question presented by this appeal is whether the deceased employees died as result of injuries received "by accident arising out of and in the course of" their employment. G.S. 97-2(6) and (10). This is a mixed question of law and fact. *Allred v. Allred-Garner, Inc.*, 253 N.C. 554, 117 S.E. 2d 476 (1960). We agree with the Industrial Commission that while each of the deceased employees sustained an injury by

accident which resulted in his death, such injury by accident did not arise out of and in the course of his employment with defendant employer.

The fatal accident occurred after the employees had completed their day's work at the job site, had punched out on the time clock, had left the place of their employment, and had started homeward in a truck owned and operated by a fellow employee whom they paid to transport them. Generally, injuries sustained in accidents occurring off the employer's premises while the employee is going to or returning from work are not covered by the Workmen's Compensation Act, since in those cases there is not such a causal connection between the employment and the accident that the latter can properly be considered as "arising out of and in the course of" the former. *Humphrey v. Laundry,* 251 N.C. 47, 110 S.E. 2d 467 (1959); *Insurance Co. v. Curry,* 28 N.C. App. 286, 221 S.E. 2d 75 (1976); 1 Larson, Workmen's Compensation Law, § 15; 82 Am. Jur. 2d, Workmen's Compensation, § 255. An exception to this general rule is made, however, and "[s]uch an injury is compensable when it is established that the employer, as an incident of the contract of employment, provides the means of transportation to and from the place where the work of the employment is performed." *Hardy v. Small,* 246 N.C. 581, 585, 99 S.E. 2d 862, 866 (1957). Plaintiffs here cannot bring their claims for benefits within the exception. Contrary to their contention, the evidence did not compel a finding by the Commission that the employer had an established and long-standing practice of furnishing transportation to its employees, originally by the employer-owned truck and later by the employer-subsidized truck of its superintendent, such as to make the furnishing of transportation an incident of the contract of employment. Indeed, the uncontradicted evidence that the employees paid for their transportation negatives such a finding.

The orders appealed from are

Affirmed.

Judges BRITT and CLARK concur.

TERRY TATE MOORE v. BETTY FREEMAN ARCHIE, HUGHLEN LAFAYETTE McMAHAN, AND DAVID E. MOORE

No. 7626SC429

(Filed 20 October 1976)

1. **Automobiles § 57— intersectional accident — no negligence of defendant as matter of law**

In an action to recover for personal injuries sustained in an automobile accident occurring at an intersection, the trial court properly granted the motion for directed verdict made by one defendant, who was traveling on the dominant highway, where the evidence tended to show that defendant heeded the warning signs of a dangerous intersection and decreased his speed to below that recommended by the Highway Department, his speed was reasonable under the conditions, he kept a reasonable lookout in that he took notice of the warning sign before reaching the intersection and saw a car on the servient highway stopped at the intersection, and when the car on the servient road pulled into defendant's path, defendant took immediate action to try to avoid the collision.

2. **Automobiles § 87— intersectional accident — negligence of defendant — intervening negligence of another defendant**

In an action to recover for personal injuries sustained in an automobile accident occurring at an intersection, evidence that defendant, who was traveling north on the dominant highway and in whose vehicle plaintiff was a passenger, failed to heed a warning sign and reduce his speed was sufficient for the jury on the question of his negligence; however, the conduct of another defendant, who was driving on the servient highway, in pulling out into the path of a third defendant, who was traveling south on the dominant highway, constituted an intervening act that insulated the northbound defendant's conduct from any causal connection with plaintiff's injury.

APPEAL by plaintiff from *Snepp, Judge.* Judgment entered 27 January 1976 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 21 September 1976.

This appeal stems from an accident involving three automobiles which were driven by the defendants. Plaintiff was a passenger in one of the automobiles. On 3 July 1973 plaintiff instituted a civil action against the defendants alleging that each was negligent in the operation of his or her vehicle and that the negligence of each combined to jointly and concurrently cause plaintiff serious personal injury.

Plaintiff's evidence showed that the accident occurred at or near the intersection of North Carolina Highway No. 49 and North Carolina Highway No. 160 at approximately 5:05 p.m.

on Sunday, 12 November 1972. The weather was clear, and it was still daylight. Traffic was moderate to heavy.

In the vicinity of the accident, Highway 49 runs north and south and is the dominant or through thoroughfare. Highway 160 runs east and west. The intersection of these roads is controlled by traffic signs and electrical signals. A red, blinking light and stop sign govern Highdway 160, while on the north-south approaches along Highway 49 there are yellow caution lights and traffic signs recommending a speed of 45 miles per hour while traversing the intersection. The posted speed limit on Highway 49 is 55 miles per hour.

Defendant McMahan was to the north of the intersection traveling south on Highway 49. Defendant Archie, westbound on Highway 160, had halted at the stop sign on the eastern side of the intersection. Defendant Moore and plaintiff were south of the intersection traveling north on Highway 49.

While plaintiff testified that she did not see defendant McMahan's automobile prior to the accident, she called as plaintiff's witnesses Mr. McMahan and an eyewitness who was stopped on the western side of the intersection, each of whose testimony showed the following fact pattern. McMahan, who had been driving at approximately 50 to 55 miles per hour, slowed his vehicle to approximately 40 miles per hour after encountering the warning sign. When he was four to six car lengths from the intersection, defendant Archie pulled into the intersection, crossing the northbound lane of Highway 49 and turning left into the southbound lane. Upon seeing defendant Archie proceed into the intersection, defendant McMahan applied his brakes, skidding some twenty-five feet, and simultaneously turned his wheel, swerving to the right in an attempt to avoid the collision. The right front of Archie's car collided with McMahan's four-door sedan at the left front near the bumper and also at the left rear door. The collision caused defendant Archie's car to spin and head back across the center line at an angle into the northbound lane, where it collided almost head-on with the car containing defendant Moore and plaintiff.

Plaintiff testified that defendant Moore was driving at approximately 50 miles per hour when he passed the warning sign. He and plaintiff saw the Archie car pull into the intersection when their car was between 150 and 200 feet from the

intersection. Defendant Moore did not decrease his speed or alter his path of travel. There was only a very short time between the first and second collisions.

Plaintiff further offered evidence of the nature and extent of her injuries. At the close of plaintiff's evidence, defendants McMahan and Moore moved for directed verdicts in their favor. The directed verdicts were granted. Plaintiff took a voluntary dismissal without prejudice as to defendant Archie and appealed.

John D. Warren for the plaintiff.

Golding, Crews, Meekins, Gordon & Gray, by James P. Crews, for the defendant McMahan.

Kennedy, Covington, Lobdell & Hickman, by Hugh L. Lobdell and William C. Livingston, for the defendant Moore.

BROCK, Chief Judge.

In this appeal plaintiff contends that when the evidence she presented is viewed in the light most favorable to her, that evidence is sufficient to withstand a motion for directed verdict and to take the case to the jury on the question of McMahan's and Moore's negligence. We disagree.

[1] As to defendant McMahan, plaintiff argues that a jury could find that he did not keep a reasonable lookout, drove faster than reasonable under the conditions, failed to keep his car in control, or failed to exercise reasonable care to avoid the collision. Under the facts and circumstances of the case, plaintiff's argument is without merit. In *McNair v. Boyette,* 15 N.C. App. 69, 189 S.E. 2d 590 (1972), the Court held:

> "When the facts are admitted or established, negligence is a question of law and the court must say whether it does or does not exist and this rule extends to the question of proximate cause."

The facts clearly established at trial show that McMahan heeded the signs warning of a dangerous intersection. He even decreased his speed to below that recommended by the Highway Department. His speed was reasonable under the conditions. Further, he kept a reasonable lookout in that he took notice of the warning sign and saw the Archie car stopped at the intersection. The driver on the dominant road is entitled to assume until the

last moment that a motorist on a servient road who is stopped in obedience to a stop sign will yield to him. *Raper v. Byrum*, 265 N.C. 269, 144 S.E. 2d 38 (1965). Finally, when the Archie car pulled into his path, McMahan took immediate action to try to avoid the collision. The facts clearly establish that McMahan acted in a reasonable manner and was not negligent.

[2] As to defendant Moore, plaintiff argues the same failure to keep a reasonable lookout, failure to maintain a reasonable speed under the conditions, and failure to exercise reasonable care to avoid the collision. Moore's failure to heed the warning sign and reduce his speed under the facts in this case would constitute sufficient evidence to go to the jury on the question of his negligence. *Childers v. Seay*, 270 N.C. 721, 155 S.E. 2d 259 (1967).

However, even though a jury might find Moore's actions negligent, he would be liable only if his negligence were a proximate cause of the plaintiff's injuries. 6 Strong, N. C. Index 2d, Negligence, § 10, p. 25. Where the facts are admitted or established, the existence of proximate cause is a question of law. *McNair v. Boyette, supra.* If Moore's failure to heed the warning signs would have produced no injury except for the intervening act of another, his negligence would be insulated by the intervening act. The test by which the negligent conduct of one is to be insulated as a matter of law by the independent intervening act of another is the reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury. *McNair v. Boyette, supra.*

Moore, like McMahan, was entitled to assume that a motorist stopped on a servient street with clear visibility would obey the stop sign and yield the right of way. *Raper v. Byrum, supra.* The facts established that the Archie car traversed the northbound lane of Highway 49 and had turned into the southbound lane. Had defendant Archie not collided with McMahan and been knocked back into the northbound lane, her car would not have collided with defendant Moore's. Archie's conduct was not foreseeable, and except for that conduct and the presence of the McMahan car in the southbound lane, which plaintiff admits she did not see, the collision injuring the plaintiff would not have occurred. Archie's conduct constituted an intervening act that insulated defendant Moore's conduct from any causal connection with the injury.

The directed verdicts for defendants McMahan and Moore were proper. The judgment of the trial court is

Affirmed.

Judges VAUGHN and MARTIN concur.

MARY E. STAFFORD v. FOOD WORLD, INC.

No. 7618SC371

(Filed 20 October 1976)

1. **Negligence § 5.1— fall by store customer — no inference of negligence**

No inference of negligence on the part of a store owner arises from the mere fact that a customer falls on the floor of his store since the doctrine of *res ipsa loquitur* is inapplicable in such circumstances.

2. **Negligence § 5.1— duties to store customers**

A store proprietor owes his customers the duty to exercise ordinary care to maintain in a reasonably safe condition those portions of his premises which he may expect they will use during business hours and to give warning of hidden perils or unsafe conditions insofar as these can be ascertained by reasonable inspection and supervision.

3. **Negligence § 5.1— duties to store customers**

If an unsafe condition in a store is created by third parties or an independent agency, a showing must be made that it had existed for such length of time that the store proprietor knew or by the exercise of reasonable care should have known of its existence in time to have removed the danger or given warning of its presence.

4. **Negligence §§ 5.1, 57— fall on wet floor by store customer — insufficient evidence of negligence**

In an action to recover for injuries sustained by plaintiff when she fell on an allegedly wet terrazzo floor in defendant's grocery store, plaintiff's evidence was insufficient to be submitted to the jury on the issue of negligence by defendant where it tended to show only that defendant knew that the terrazzo floor was slippery when wet and that on the day plaintiff fell defendant knew that water from customers' shoes and returning grocery carts had accumulated on the floor from time to time, and where plaintiff's evidence disclosed that defendant mopped, cleaned and dried the floor periodically throughout the day and that the area where plaintiff fell had been cleaned and dried just ten minutes prior to plaintiff's accident.

Stafford v. Food World

APPEAL by plaintiff from *Long, Judge.* Judgment entered 1 March 1976 in Superior Court, GUILFORD County. Heard in Court of Appeals 15 September 1976.

This is a civil action wherein the plaintiff, Mary E. Stafford, seeks to recover damages for injuries sustained in a fall allegedly caused by defendant's negligence in that defendant "neglected and refused to exercise due care to keep its floor in a dry, clean and safe condition for plaintiff and other customers." The plaintiff's evidence is summarized as follows:

At about 10:30 a.m. on Saturday, 25 January 1975, plaintiff drove her car to Zayre's Shopping Center in High Point and parked her car alongside the curb next to the covered walkway in front of the stores. It had been raining all morning and was raining when plaintiff arrived at the shopping center. Plaintiff got out of her car on the side next to the walkway and went into Eckerd Drugs. After she left Eckerds she walked down the covered walkway to defendant's grocery store. The entrance door to the store opens automatically when a customer steps on a rubber mat just outside the door. Just inside the door past the electrical mat, there is a cloth and rubber mat. The mat is rubber on the bottom and around the edges and is approximately 2½′ wide and 4½′ long. The entire center consists of a "terry cloth like" material. She entered defendant's store through the automatic doors and walked across the cloth mat but did not wipe her feet. The grocery carts were located to the right of the door some three or four feet away. Plaintiff proceeded toward the carts with her attention focused on the carts rather than on the floor. As plaintiff stepped off the mat onto the terrazzo floor, she slipped and fell on her right hip and wrist. Plaintiff testified, "When I was laying there on the floor my hands were wet in the puddles of water that were around me. The puddles of water were all around there where I was laying." The raincoat plaintiff was wearing at the time of the accident was examined by Effie Reagan at the store shortly after the accident. She testified that the coat was wet on the right side "from the pocket down toward the tail of the coat." The shoes plaintiff was wearing were flat, rubber-soled nurses' oxfords.

The plaintiff read into evidence the depositon of Thomas Lee Watlington, the assistant manager of defendant's store. He testified that he was in charge of managing the store on

25 January 1975. Water from customers' feet and grocery carts coming back into the store caused water to accumulate on the floor. Since the terrazzo floor became slippery when wet, the entire store, including the area in which the accident occurred, had been mopped and cleaned periodically throughout the morning, and the area in which the plaintiff fell had been mopped and cleaned ten minutes prior to the accident. As to the manner in which the floor was cleaned Mr. Watlington testified, "Mr. Simpson rang out a mop just as dry as he could get it and mopped the area. Our policy is to take a dry towel and dry the area after we mop it even if it is a dry day because if it is not dry a buggy going across it would just track it right back up or leave a slick area from any moisture off of the mop. So to the best of recollection Mr. Simpson did use a towell to dry the spot after he mopped it."

At the close of plaintiff's evidence the court granted the defendant's motion for directed verdict. Plaintiff appealed.

Silas B. Casey, Jr. and Haworth, Riggs, Kuhn, Haworth & Miller by John Haworth for plaintiff appellant.

Henson & Donahue by Daniel W. Donahue for defendant appellee.

HEDRICK, Judge.

The one question presented on this appeal is whether the court erred in granting defendant's motion for a directed verdict. Plaintiff contends the court did err in granting the motion because the evidence established a *prima facie* case of defendant's actionable negligence.

[1] No inference of negligence on the part of the store owner arises from the mere fact that a customer falls on the floor of his store since the doctrine of *res ipsa loquitur* is inapplicable in such circumstances. *Hinson v. Cato's, Inc.*, 271 N.C. 738, 157 S.E. 2d 537 (1967); *Dawson v. Light Co.*, 265 N.C. 691, 144 S.E. 2d 831 (1965). Store owners are not the insurers of the safety of customers on their premises. *Long v. Food Stores*, 262 N.C. 57, 136 S.E. 2d 275 (1964); *Copeland v. Phthisic*, 245 N.C. 580, 96 S.E. 2d 697 (1957).

[2, 3] The proprietor does owe to his customers the duty to exercise ordinary care to maintain in a reasonably safe condition those portions of his premises which he may expect they

will use during business hours, and to give warning of hidden peril or unsafe conditions insofar as these can be ascertained by reasonable inspection and supervision. *Dawson v. Light Co., supra; Lee v. Green & Co.*, 236 N.C. 83, 72 S.E. 2d 33 (1952). If the unsafe condition is created by third parties or an independent agency, a showing must be made that it had existed for such length of time that the store proprietor knew or by the exercise of reasonable care should have known of its existence in time to have removed the danger or given warning of its presence. *Dawson v. Light Co., supra; Hughes v. Enterprises*, 245 N.C. 131, 95 S.E. 2d 577 (1956).

"The proprietor of a business establishment is not required to take extraordinary precautions for the safety of his invitees, the measure of his duty in this respect being to exercise reasonable or ordinary care. 65 C.J.S. Negligence § 63 (121), p. 888." *Gaskill v. A. and P. Tea Co.*, 6 N.C. App. 690, 694, 171 S.E. 2d 95, 97 (1969).

[4] Considering the evidence in this case in the light most favorable to the plaintiff and applying the foregoing principles of law, we are of the opinion that the evidence is not sufficient to support a findng that plaintiff's injuries were proximately caused by defendant's negligence. While the evidence does tend to show, as plaintiff contends, that defendant knew that the terrazzo floor was slippery when wet, and that on the day plaintiff fell the defendant knew that water accumulated on the floor from time to time, the evidence is not sufficient to raise the inference that the defendant did not take reasonable precautions to protect its patrons from any dangerous condition created by the accumulation of water on the floor. Indeed plaintiff's own evidence discloses that the defendant mopped, cleaned, and dried the floor periodically throughout the morning, and the area where plaintiff fell had been cleaned and dried just ten minutes prior to the accident complained of.

The case of *Powell v. Deifells, Inc.*, 251 N.C. 596, 112 S.E. 2d 56 (1960), cited and relied upon by plaintiff, is distinguishable by the fact that in that case defendant took no precaution at all to protect its customers from the dangerous condition created by a wet, slippery floor.

Affirmed.

Judges MORRIS and ARNOLD concur.

JESSIE B. HACKETT v. JOHN FLAVIUS HACKETT, JR.

No. 7618DC385

(Filed 20 October 1976)

1. **Ejectment § 1— order to convey part of property to defendant**

The trial court in a summary ejectment proceeding erred in directing plaintiff to convey to defendant two acres of the land in question where all the evidence and findings support the court's conclusion that plaintiff is the sole owner of the property and there is nothing in the record to support the court's order directing a conveyance to defendant.

2. **Betterments § 1— improvements made while tenant**

Defendant was not entitled to betterments where all the evidence showed that any improvements defendant made on the property in question were not made under any color of title but were made while he was a tenant of either his father or mother or both. G.S. 1-340.

APPEALS by plaintiff and defendant from *Kuykendall, Judge.* Judgment entered 13 February 1976 in District Court, GUILFORD County. Heard in Court of Appeals 16 September 1976.

This is a summary ejectment proceeding wherein the plaintiff, Jessie B. Hackett, seeks to have her son the defendant, John F. Hackett, Jr., removed from her farm in Guilford County, North Carolina. The proceeding was instituted before the magistrate who entered an order on 11 July 1974 that the defendant be removed from and the plaintiff be put in possession of the premises. The defendant appealed to the district court and filed an answer and counterclaim denying that plaintiff was the owner of the property and alleging among other things that he is entitled to compensation for improvements made by him on the property.

After a trial without a jury, the Court made the following pertinent findings and conclusions:

"FINDINGS OF FACT

* * *

4. On February 12, 1969, J. F. Hackett, Sr., at a time when he was of sound and discerning mind, knowing what he was doing and understanding the nature and effect of his act and its scope and effect, and of his own will, free of any undue or improper influence or compulsion,

made, executed, delivered, and caused to be recorded in the Guilford County Registry, Office of Register of Deeds, Deed Book 2420, at Page 714, a deed in lawful and proper form conveying to himself and his wife, the present plaintiff ('J. F. Hackett and wife, Jesse B. Hackett') in an estate by the entireties all of the farm and tracts of land which he owned and which are described above in paragraph 2 hereof.

5. J. F. Hackett, Sr., died on or about March 2, 1969. His wife, the plaintiff, and his son, the defendant, survived him. His said will was duly probated in this county and there has never been any caveat thereto nor contest thereof.

6. Thereafter, the plaintiff agreed and contracted orally with the defendant that the defendant should reside upon said lands, not in her home thereon, but in a house which the defendant had been instrumental in building near the southwest corner of the farm, as her farm tenant, so that he might tend the crops on the farm, including the tobacco crop, and that he should pay to her annually as rent one-half the income from the tobacco crop.

* * * *

10. Plaintiff is the lawful and rightful owner of said farm and premises described in paragraph 2 above, and defendant entered into possession thereof as the lessee and farm tenant of the plaintiff.

* * * *

14. The defendant was reared on the farm and premises by his parents, and lived with them. After reaching adulthood he married. Thereafter, at times, he resided on the farm, with his parents' consent, in the house where he now resides with his wife. He is also now permitting his own grown son to reside on the premises in a mobile home. Plaintiff's notice to vacate included defendant's son.

15. At various times defendant has performed work on the farm, including work toward constructing the house in which he now resides. His parents paid various bills in connection with the construction of the house, and made various other expenditures on behalf of the defendant.

* * * *

CONCLUSIONS OF LAW

* * * *

2. The deed executed by J. F. Hackett, Sr., on February 12, 1969, recorded in Deed Book 2420, at page 714, Guilford County Registry, mentioned in paragraph 4 above, is a good and lawful deed of conveyance and is in no way invalid.

3. At the time of the death of J. F. Hackett, Sr., his wife, the present plaintiff and her husband owned all of the farm and lands described in said deed, all as set forth in paragraph 2 of the above findings of fact, in an estate by the entireties.

4. Upon the death of the plaintiff's husband the plaintiff became the sole owner of said farm and lands in fee simple."

The Court entered an order that plaintiff be put in possession of the property, but that she convey to defendant the house in which he had resided on the property together with two acres of land surrounding the house.

Both plaintiff and defendant appealed from the order.

Cahoon & Swisher, by Robert S. Cahoon, for plaintiff appellant.

Henderson & Jennings, by Neill A. Jennings, Jr., for defendant appellant.

HEDRICK, Judge.

Plaintiff's Appeal:

[1] Plaintiff assigns as error the court's order directing her to convey two acres of the land in question to the defendant. Plaintiff insists that there are no findings or conclusions to support this order. We agree. All of the findings of fact made by the trial court support the conclusion that plaintiff is the sole owner of the property in question. The record supports these findings and conclusions and there is nothing in the record to support the court's order directing the plaintiff to convey any of the property to the defendant. Therefore that portion of the order challenged by plaintiff's appeal is vacated. The remainder of the judgment appealed from is affirmed. How-

ever, since the order that defendant be removed from and plaintiff be put in possession of the premises does not require that the defendant be removed from all of the property, the cause must be remanded to the district court for the entry of an order that the plaintiff be put in possession of and the defendant be removed from all of the property, including the two acres challenged by plaintiff's appeal.

Defendant's Appeal:

[2] Defendant's sole contention is that the court erred in not making findings and conclusions dispositive of his counterclaim for betterments. To be entitled to compensaton for betterments under G.S. 1-340, defendant must show that he made permanent improvements on the property under a *bona fide,* reasonable belief of good title. *Pamlico County v. Davis,* 249 N.C. 648, 107 S.E. 2d 306 (1959).

All of the evidence and the findings of fact in this case show that any improvements made on the property by the defendant were made, not under any color of title, but while he was a tenant of either his father or mother or both. The Court's findings and conclusions with respect to the property and defendant's interest therein preclude any compensation to defendant for any alleged betterments. Furthermore, the findings and conclusions made by the trial court are sufficient to support an order dismissing defendant's counterclaim for betterments pursuant to G.S. 1A-1, Rule 41(b). However, the trial court failed to enter an order specifically disposing of defendant's counterclaim for betterments. The cause, therefore, must be remanded to the district court for the entry of an order, based on the findings and conclusions already made, dismissing defendant's counterclaim for alleged betterments.

The result is: As to plaintiff's appeal, vacated in part, affirmed in part, and remanded with directions. As to defendant's appeal, remanded with directions.

Judges MORRIS and ARNOLD concur.

ACE CHEMICAL CORPORATION v. ATOMIC PAINT COMPANY, INC.

No. 7626SC425

(Filed 20 October 1976)

1. **Contracts § 27; Uniform Commercial Code § 20— contract for sale of acetone — acceptance of acetone — revocation of acceptance — sufficiency of evidence**

In an action to recover a sum due upon a contract whereby plaintiff sold acetone to defendant, the trial court did not err in failing to submit to the jury an issue as to whether defendant accepted the goods, and, if so, whether defendant revoked its acceptance of the goods, since all the evidence established that defendant took possession of the acetone and used it in manufacturing its finishing products, thereby making it clear that: (1) defendant accepted the goods because such use of the goods was an act inconsistent with the seller's ownership; and (2) defendant could not have revoked his acceptance of the goods because such a use created a substantial change in condition of the goods.

2. **Contracts § 29; Uniform Commercial Code § 20— contract breached — breach of warranty not considered in determining damages**

In an action to recover a sum due upon a contract for the sale of acetone to defendant where plaintiff claimed that the contract was for "reclaimed acetone" but defendant claimed it was for "virgin acetone," defendant could not have been prejudiced by any error in the court's failure to instruct that if the jury found that the contract was for virgin acetone then defendant would be entitled, as an offset to plaintiff's claim, the difference between the value of the goods accepted and the value they would have had if they had been as warranted, since the issue of defendant's damages for breach of warranty was not reached because the jury determined that the defendant did not give notification to the seller of the breach.

3. **Contracts § 29— breach — instruction on damages proper**

In an action to recover a sum due on a contract for the sale of acetone, the trial court properly instructed the jury on the amount of damages.

APPEAL by defendant from *Lewis, Judge.* Judgment entered 9 December 1975 in Superior Court, MECKLENBURG County. Heard in Court of Appeals 23 September 1976.

This is a civil action wherein the plaintiff, Ace Chemical Corp., seeks to recover $8,716 from the defendant, Atomic Paint Co., Inc., due upon a contract whereby plaintiff sold defendant 43,580 pounds of "acetone." Defendant counterclaimed

for breach of warranty. At a trial before a jury plaintiff offered evidence tending to show the following:

On 5 June 1974 plaintiff, acting through its Vice-President Fred Lewis Cormack, contracted with defendant, acting through its President Melvin Mingle, to sell it a tank truck of reclaimed acetone at $.20 per pound, and pursuant to the contract delivered 43,580 pounds of reclaimed acetone to defendant on 7 June 1974. Plaintiff mailed to defendant on 17 June 1974 an invoice for 43,580 pounds of "reclaimed acetone." After the acetone was delivered to defendant, Cormack met with Mingle on several occasions, and Mingle never complained about the quality of the acetone. Mingle did state on one occasion that he could not pay for the acetone because one of his larger customers had gone bankrupt and on another occasion because his money was tied up in stock.

Defendant offered evidence tending to show the following:

In its manufacturing of finishing materials such as stains, glazes and lacquers, defendant uses virgin acetone and has no use for reclaimed acetone. Defendant contracted with plaintiff for a tank truck of virgin acetone at a price of $.20 per pound. When the acetone was delivered to defendant, its quality control manager visually inspected a sample of the acetone, but did not discover that it was reclaimed acetone because it was identical in appearance to virgin acetone.

Later in June defendant received an invoice from plaintiff for 43,580 pounds of "reclaimed acetone." Mingle called Cormack to inquire as to whether plaintiff had delivered reclaimed or virgin acetone but was unable to reach him. Cormack did not return the call, as requested by Mingle, and Mingle made no further attempts to contact Cormack at that time. Mingle did inform Cormack in August that he did not intend to pay the contract price for the reclaimed acetone that was delivered. Defendant used the reclaimed acetone delivered by plaintiff in the manufacturing of its products.

Virgin acetone is 99.5 percent pure acetone, whereas reclaimed acetone has more than one-half percent unidentifiable properties in it. At the time of delivery the market price of virgin acetone was $.11 to $.15 per pound and the market price of reclaimed acetone was $.09 to $.10 per pound.

By issues submitted to the jury it was determined that the contract was for virgin acetone, but that defendant did not

notify the plaintiff that the goods did not conform to the contract within a reasonable time after discovery of the nonformity. From a judgment that plaintiff recover from defendant $8,716, defendant appealed.

Fairley, Hamrick, Monteith & Cobb by S. Dean Hamrick for plaintiff appellee.

G. C. Simmons III for defendant appellant.

HEDRICK, Judge.

[1] Defendant contends the court erred in not submitting to the jury an issue as to whether the defendant accepted the goods, and if it did, whether the defendant revoked its acceptance of the goods. G.S. 25-2-606(1)(c) provides, "Acceptance of the goods occurs when the buyer does any act inconsistent with the seller's ownership. . . ." G.S. 25-2-608(2) provides, "Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defect. . . ." All the evidence establishes that defendant took possession of the acetone and used it in manufacturing its finishing products. It is clear the defendant accepted the goods because such a use of the goods was an "act inconsistent with the seller's ownership." It is equally clear that the defendant could not have revoked his acceptance of the goods because such a use created a "substantial change in condition of the goods."

[2] Defendant next contends that the court erred in not instructing the jury that if it found that the contract was for virgin acetone then defendant would be entitled, pursuant to G.S. 25-2-714(2), as an offset to plaintiff's claim, the difference between the value of the goods accepted and the value they would have had if they had been as warranted. The court appears to have given an instruction in compliance with G.S. 25-2-714, but in any event, the defendant could not have been prejudiced by any error in the instruction complained of since the issue of defendant's damages for breach of warranty was not reached, because the jury determined that the defendant did not give notification to the seller of the breach, as provided by G.S. 25-2-607(3)(a).

[3] Defendant finally contends that the court erred in instructing the jury to answer the issue of damages in the amount of

$8,716 if it determined that defendant did not notify seller of the nonconformity within a reasonable time after it discovered or should have discovered the nonconformity. Both plaintiff and defendant offered evidence showing that the contract amount was 43,580 pounds, and that the price per pound was $.20. When defendant accepted the goods, he became liable for the goods at the contract rate. G.S. 25-2-607(1). The court properly instructed the jury on the amount of damages.

We hold the defendant had a fair trial free from prejudicial error.

No error.

Judges MORRIS and ARNOLD concur.

BLANCHE W. CALHOUN, MORTGAGEE, AND JOHN S. WILLARDSON, SUBSTITUTE TRUSTEE v. ETHEL E. DUNN, MORTGAGOR, AND HUSBAND WESLEY DUNN

No. 7623DC374

(Filed 20 October 1976)

Sales § 17— sale of house — breach of warranties — sufficiency of evidence for jury

Defendants' evidence was sufficient for submission to the jury of an issue as to plaintiff's breach of an express warranty that trash in the yard of an old house sold to defendants would be removed, but was insufficient for submission of issues as to plaintiff's alleged breach of warranties that painting, carpentry and roofing repairs would be made and the house would be in "good shape all around," and that the driveway to the house was located entirely within the boundaries of the lot purchased.

APPEAL by plaintiff from *Osborne, Judge.* Judgment entered 13 February 1976 in District Court, WILKES County. Heard in the Court of Appeals 15 September 1976.

Plaintiff sold a house to defendants and brought suit to recover $3,900 due on a note given to her by defendants as part of the purchase price. Defendants admitted the indebtedness due on the note but counterclaimed for breach of alleged express warranties given by plaintiff at the time of the sale.

Evidence by plaintiff tended to establish that in November 1973 she sold an old house to defendants for $11,500, and that defendants paid $5,000 in cash and executed a note for $6,500 to be paid in monthly installments. Defendants paid $2,600 on the note and made no complaints about the house until January 1975 when they stopped making payments. Plaintiff testified that she never promised to have any work done on the house, to have trash removed from the property, or to put the house in first class condition.

Defendants offered evidence to show that after they bought the house they returned to New Jersey and lived for a year before returning to live in the house purchased from plaintiff. When defendants came back they discovered the house in very poor condition, and they refused to make further payments on the note. Defendants inspected the property twice before purchasing it. They testified that plaintiff promised to remove trash in the yard, that general carpentry, painting, and roofing repairs would be made, and that plaintiff had either installed a new four-ply asphalt roof, or would install such a roof; and that she promised defendants that the house "would be in good shape all around." Defendants also stated that plaintiff orally warranted that the driveway to the house was located within the boundaries of the lot purchased.

When defendants moved into the house the trash had not been removed, and they found extensive damage to the roof, floors, electrical fixtures, windows, doors, plumbing, and the roof was not a new four-ply asphalt but patched by coal tar and pebbles. In addition, the driveway was discovered to be on a neighbor's property.

The trial court instructed the jury to find that defendants owed $3,900 to plaintiff on the note. The jury found also that plaintiff made certain warranties to defendants which were breached, and that defendants were entitled to $3,000 damages on their counterclaim. Plaintiff appealed.

Moore and Willardson, by Larry S. Moore and John S. Willardson, for plaintiff appellant.

No brief filed for defendant appellee.

ARNOLD, Judge.

Plaintiff contends that the trial court erred in denying her motion for directed verdict as to defendant's counterclaim for

alleged breach of express warranties. Looking at each of the alleged warranties, and viewing the evidence in the light most favorable to defendants, we find the following:

There was evidence by defendants that plaintiff specifically promised that she would remove trash which had accumulated on the property. Defendants testified that plaintiff did not remove the trash, and that it cost them $125 to have the trash hauled away. This evidence was sufficient to go to the jury.

The second alleged warranty was that general painting, carpentry and roofing repairs would be made, and that the house would be in "good shape all around." The record reflects no evidence of any promise by plaintiff to make any specific repairs, but to the contrary, as Mr. Dunn testified, there never was "any agreement as to specific things to be done to the house" but plaintiff stated that the house would be in "good shape." Evidence of any alleged warranty as to general paintting, carpentry, and roofing was too vague and uncertain to be submitted to the jury, and we know of no standard by which to measure the "good shape" of an old house.

Evidence was presented by defendants concerning an alleged promise by plaintiff to repair the roof. Mr. Dunn testified, "She said that it was to be—or that there was a new four-ply asphalt roof." We need not determine whether this evidence of an express warranty was sufficient to go to the jury, because defendants failed to present any evidence of damages resulting from this alleged warranty to install a particular roof. They only presented irrelevant evidence concerning the cost of replacing the flat roof with an "A" type roof.

Finally, defendants testified that plaintiff orally warranted that the driveway was located entirely within the boundaries of the lot purchased. Defendants offered evidence to show that the driveway in fact was on a neighbor's lot. We need not consider whether proof of this alleged warranty violates the parol evidence rule, *see Brown v. Hodges*, 232 N.C. 537, 61 S.E. 2d 603 (1950), *reh. den.*, 233 N.C. 617 (1951). The evidence was insufficient to submit the issue of this alleged warranty to the jury, because again defendants failed to offer evidence of any damages resulting from the breach.

In conclusion, we find no evidence sufficient to go to the jury on defendants' counterclaim except as to the alleged war-

ranty concerning the removal by plaintiff of trash on the property. Judgment on defendants' counterclaim is vacated. The cause is remanded to the District Court of Wilkes County for proceedings on defendants' counterclaim consistent with this opinion.

Vacated and remanded.

Judges MORRIS and HEDRICK concur.

THAD ARTIS v. RICHARD LLOYD WOLFE AND RICKEY BRILEY WOLFE

No. 768SC428

(Filed 20 October 1976)

Automobiles § 86— last clear chance — insufficiency of evidence

In an action to recover for personal injuries sustained by plaintiff pedestrian when he was struck by defendant's vehicle, evidence was insufficient to require submission of the issue of last clear chance to the jury where all the evidence indicated that until immediately before the accident plaintiff was in the westbound lane, safe from defendant's eastbound car; no evidence indicated that defendant should have expected plaintiff to walk on into danger; and all the evidence indicated that once defendant did recognize plaintiff's peril, it was too late to avoid the accident.

APPEAL by plaintiff from *Small, Judge.* Judgment entered 11 February 1976 in Superior Court, WAYNE County. Heard in the Court of Appeals 23 September 1976.

Thad Artis was injured when struck by a car driven by Rickey Briley Wolfe. Artis filed a complaint alleging negligence; Wolfe answered alleging contributory negligence, and Artis replied alleging last clear chance. At the trial the issues of negligence and contributory negligence were presented to the jury, but the trial court refused to present to the jury the issue of last clear chance. The jury's verdict found Wolfe negligent and Artis contributorily negligent. Artis appeals and assigns as error the court's refusal to submit the issue of last clear chance to the jury.

Dees, Dees, Smith, Powell & Jarrett, by Tommy W. Jarrett, for plaintiff appellant.

Bland, Wood & Thompson, by D. Reed Thompson and J. Darby Wood, for defendant appellees.

ARNOLD, Judge.

Plaintiff argues that the evidence raises a genuine issue of last clear chance which had to be submitted to the jury. We disagree.

As we construe the evidence, granting Artis every reasonable inference and resolving each conflict in his favor, we find it to show that the accident occurred in the following way.

Late in the afternoon of 10 April 1973, Thad Artis and his son Jerry were driving a small farm tractor west along a rural paved road. Jerry stopped the tractor and his father got off, secured a loose chain, stepped down into the ditch beside the road and told Jerry to drive home. Jerry drove ninety feet west and then, because his father called to him, stopped briefly. Thereafter, Jerry drove on, entering a curve in the road which was approximately 100 feet from the place where his father stood. At almost precisely this moment, a car driven by defendant rounded this curve heading east and passed the tractor. Wolfe was driving about 40 m.p.h., and was in his own lane at this time. Approximately 100 feet down the road Wolfe's car struck Thad Artis who was crossing the road. Skidmarks later found on the road indicated that the accident happened after Artis had crossed the middle line of the road into Wolfe's lane, although Artis did not remember doing so. Wolfe's car was damaged on the driver's side of the front end.

According to the testimony of Thad Artis's second son, James Artis, from the point of impact it was possible to see 400 feet back up the road and around the curve. Plaintiff testified that though he looked he never saw Wolfe. Wolfe admitted seeing Artis but said that while he braked hard he was unable to stop before hitting him. The road was eighteen feet wide with three-foot-wide soft shoulders and ditches on either side.

Last clear chance mitigates the sometimes harsh effects of the contributory negligence rule. However, last clear chance does not arise in every contributory negligence situation. To arise in the case at bar, there must be evidence tending to

prove the following material facts: First, some evidence would have to show that Thad Artis negligently placed himself in peril from Rickey Wolfe. Second, some evidence must show that Wolfe knew or should have known that Artis was in danger and, either because of impossibility or inattention, unable to escape. *Exum v. Boyles,* 272 N.C. 567, 158 S.E. 2d 845 (1968) (impossibility of escape); *Wanner v. Alsup,* 265 N.C. 308, 144 S.E. 2d 18 (1965) (inattention to danger). Third, some evidence must show that Wolfe, after he discovered or should have discovered Artis's peril, still had both the time and a reasonable means of avoiding him. Fourth, the evidence must show that Wolfe negligently failed to use the time and means available to avoid the accident. *See Exum v. Boyles, supra; Wade v. Sausage Co.,* 239 N.C. 524, 80 S.E. 2d 150 (1954).

When we compare the elements of last clear chance to the facts of this case, we conclude that the rule does not apply. All the evidence indicates that until immediately before the accident Thad Artis was in the westbound lane, safe from Rickey Wolfe's eastbound car. Further, no evidence indicates that Wolfe should have expected Artis to walk on into danger. Finally, all the evidence indicates that once Wolfe did recognize Artis's peril, it was too late to avoid the accident. Wolfe was driving 40 m.p.h. at the time of the accident. This is just less than 60 feet per second. At this speed less than two seconds passed from the time Wolfe left the turn and passed the tractor until he struck Artis. Under the circumstances, Wolfe may have had the last "possible" chance, but he did not have the necessary last clear chance to avoid the accident. *Battle v. Chavis,* 266 N.C. 778, 147 S.E. 2d 387 (1966); *Grant v. Greene,* 11 N.C. App. 537, 181 S.E. 2d 770 (1971).

Artis relies on the recent case of *Earle v. Wyrick,* 286 N.C. 175, 209 S.E. 2d 469 (1974). However, that case differs from this one in three respects, and does not control this case. There, the driver was traveling only 25 or 30 m.p.h. She was driving down a straight city street, and at all times the deceased was walking in the middle of the lane with her back to traffic, obviously inattentive to her danger.

We find no error in the refusal to instruct the jury on last clear chance.

Affirmed.

Judges MORRIS and HEDRICK concur.

KENNETH GARLAND OWEN v. SHIRLEY ANN OWENBY WATKINS OWEN

No. 7630DC409

(Filed 20 October 1976)

Divorce and Alimony § 24— child custody — subsequent hearing on change of custody — circumstances existing prior to original order — evidence inadmissible

In a hearing on a motion by plaintiff's parents seeking to have custody of plaintiff's and defendant's child awarded to them, the trial court did not err in excluding evidence of circumstances and plaintiff's conduct at times prior to the original order giving plaintiff custody of the child.

APPEAL by movants, Garland Owen and Edna Owen, from *McDarris, Judge.* Order entered 5 January 1976 in District Court, JACKSON County. Heard in the Court of Appeals 22 September 1976.

The movants are the mother and father of plaintiff in the above-entitled cause. The above action was instituted for absolute divorce and for custody of one minor child, Tammy Lynn Owen, born of the marriage of plaintiff and defendant. On 28 July 1975 District Judge Robert Leatherwood entered a judgment granting plaintiff an absolute divorce from defendant and granting plaintiff custody of Tammy Lynn Owen. Upon trial of the divorce action, Edna Owen, the feme movant, testified for the plaintiff.

On 26 November 1975 the feme movant and her husband filed a motion in this cause alleging that their son, the plaintiff, is not a fit and proper person to have custody of Tammy Lynn Owen and seeking to have her custody awarded to them. From the order finding facts against their contentions, dismissing their motion, and continuing custody with plaintiff, the movants have appealed.

Pope & Brown, by Ronald C. Brown, for the plaintiff.

Jones, Jones & Key, by R. S. Jones, Jr., for the movants.

BROCK, Chief Judge.

Movants are the mother and father of plaintiff and the paternal grandparents of the child whose custody is in question.

On 28 July 1975, with the feme movant testifying for plaintiff, custody of the minor child was awarded to plaintiff. Approximately four months later the feme movant joined in this motion in the cause seeking to have custody awarded to the paternal grandparents.

At the hearing on this motion in the cause, the trial judge excluded movants' evidence of circumstances and plaintiffs' conduct at times prior to the original order on 28 July 1975. These rulings by the trial judge are the basis of movants' arguments on appeal.

The law is clear that "[w]hile a decree making a judicial award of the custody of a child determines the present rights of the parties to the contest, it is not permanent in its nature, and may be modified by the court in the future as subsequent events and the welfare of the child may require." *Hardee v. Mitchell,* 230 N.C. 40, 51 S.E. 2d 884 (1949). Nevertheless, "[a] decree of custody is entitled to such stability as would end the vicious litigation so often accompanying such contests, unless it be found that some change of circumstances has occurred affecting the welfare of the child so as to require modification of the order. To hold otherwise would invite constant litigation by a dissatisfied party so as to keep the involved child constantly torn between parents and in a resulting state of turmoil and insecurity. This in itself would destroy the paramount aim of the court, that is, that the welfare of the child be promoted and subserved." *Shepherd v. Shepherd,* 273 N.C. 71, 159 S.E. 2d 357 (1968). In reversing an order modifying a former custody order, our Supreme Court has said:

> " . . . There is no evidence the fitness or unfitness of either party had changed between the hearings. There is no evidence the needs of the boys had changed during that time, or that they were not properly cared for by the father.
>
> "A judgment awarding custody is based upon the conditions found to exist at the time it was entered. The judgment is subject to such change as is necessary to make it conform to changed conditions when they occur." *Stanback v. Stanback,* 266 N.C. 72, 145 S.E. 2d 332 (1965).

Movants argue that our holding in *Paschall v. Paschall,* 21 N.C. App. 120, 203 S.E. 2d 337 (1974), permits the use of evidence of circumstances and conduct in existence and occurring

prior to the former order in a hearing on a motion to modify the former order. Movants point specifically to the following language in *Paschall:* "It may be that plaintiff did not know of defendant's adultery when he obtained his divorce, or it may be that he knew about it but could not prove it. But whatever the reasons for his failure to offer evidence of adultery at the 1971 divorce trial, the child should not be penalized. Such a decision would actually be more harmful for the child than for the plaintiff. A child should not be placed in the custody of an unfit parent merely because the other parent failed to introduce evidence at the proper stage of the litigation." *Paschall, supra,* p. 124. Admittedly, when taken out of context, the foregoing language seems to paint with a broad brush. It should be remembered, however, that an opinion must be read in the light of the factual situation it addressed.

In *Paschall* plaintiff (husband) obtained an absolute divorce from defendant (wife) on 26 July 1971. Custody of their minor daughter, age five years and nine months, was awarded to the defendant (wife). On 15 March 1973 plaintiff filed a motion for change of custody, alleging that defendant was maintaining an adulterous relationship with James Ronald Walters and that the exposure of the child to such relationship was emotionally disturbing and detrimental to the best interest and welfare of the child. In *Paschall* defendant testified that she in fact was maintaining an adulterous relationship with James Walters. She testified that when she went to spend the night in Walters' house trailer, she usually took her daughter with her. On these nights she would get into bed with her daughter, wait in bed for awhile, climb out of bed and go to Walters' room, have sexual intercourse with him, and get back into bed with her daughter. She and her daughter would get up at six or seven the next morning and return home. Most of these visits occurred in late 1972 and in 1973. It was upon the basis of this conduct that the trial judge in *Paschall* concluded that there had been a material change in circumstances since the custody order of 26 July 1971. On the appeal in *Paschall* defendant argued that because she had also testified that her relationship with Walters dated back to 1970, prior to the July 1971 custody order, in reality there had been no change of condition. The crux of the opinion of this Court in *Paschall* was the showing that when most of defendant's visits to Walters' house trailer occurred (late 1972 and 1973), the daughter was old enough

(age seven to eight) to have some partial understanding of the nature of her mother's relationship with Walters.

Surely the change in the child's powers of observation and susceptibility to influences consequent on the increased age of the child would constitute a sufficient change of circumstances to justify a modification. In *Paschall* the opinion suggested that had defendant's relationship been kept secret from the child, the trial court might have found defendant fit and proper for custody despite the adultery.

The broad language of *Paschall* quoted out of context above was addressed to the point that the mere fact that the mother now comes forward and says that her relationship with Walters antedated the original custody order does not prevent a finding of changed circumstances attendant upon the continuation of the relationship within the knowledge of an ever-maturing child. The quoted language from *Paschall* must not be taken as an approval of the relitigation of conduct and circumstances antedating a prior custody order.

Affirmed.

Judges VAUGHN and MARTIN concur.

RUTH WALTERS v. THE SANFORD HERALD, INC.

No. 7611DC222

(Filed 20 October 1976)

1. Libel and Slander § 1— libel action by private individual — proof of fault

A plaintiff in a civil action for libel, if he is a private citizen and not a public official or a public figure, can recover only if he alleges and proves fault, or at least negligence, on the part of defendant publisher in publishing false and defamatory statements.

2. Libel and Slander § 5— libel action — plaintiff charged with "public nuisance" — failure to show fault

The trial court properly dismissed a libel action by plaintiff, a private individual, based on defendant newspaper's alleged publication of a false statement that plaintiff had been charged with "public nuisance" where plaintiff failed to allege or show fault on the part of defendant either in the form of negligence or actual malice.

3. Libel and Slander § 7— refusal to retract — no showing of fault

A newspaper's failure to retract an alleged false statement after being requested to do so does not create the fault required in a private individual's action for libel.

Judge BRITT concurs in the result.

APPEAL by plaintiff from *Pridgen, Judge.* Judgment entered 15 January 1976 in District Court, LEE County. Heard in the Court of Appeals 10 June 1976.

This is a civil action to recover damages which the plaintiff alleges she sustained as the result of a publication in defendant's 9 September 1974 newspaper, under a column titled "Police Blotter," of the statement, "Ruth Walters, 503 Bragg Street, public nuisance." The defendant failed and refused to retract or correct the statement after it was requested to do so. Plaintiff further alleges that she was never charged with such offense and has suffered humiliation and damaged reputation to the extent of $4,000 as a result of the publication and is also entitled to $1,000 punitive damages.

Defendant answered and admitted publication of the statement but alleged as a defense that it was a fair and accurate report, published without malice, of charges against plaintiff found in a warrant stating that plaintiff "did unlawfully, wilfully, keep within the City a dog which, by prolonged and habitual barking, causes serious annoyance to neighboring residents in violation of an ordinance of the city of Sanford bearing the caption 'Nuisance' and constituting Section 5-12 of the City Ordinance." In its answer, defendant also alleged that the complaint failed to state a claim upon which relief can be granted and asked that the action be dismissed.

When the case came on for trial, the court proceeded to hear defendant's motion. In support of its motion, the defendant filed as exhibits a certified copy of the warrant, a certified copy of a paper entitled "Sanford Police Department Complaint Sheet" from which defendant got the information, and a certified copy of Section 5-12 of the Sanford City Code of Ordinances. The court found, at the request of plaintiff's attorney, that the words "Public Nuisance" did not appear in the warrant, the Complaint Sheet, or the City Ordinance and that there was no record kept by the Sanford Police Department titled "Police Blotter." The court also found that the word "Nuisance" did appear in the warrant, the Complaint Sheet, and the City Ordi-

nance. The trial judge then considered the pleadings, the aforesaid matters and exhibits outside of the pleadings, and the arguments of counsel and concluded that the action should be dismissed. The action was dismissed and plaintiff appealed.

J. W. Hoyle, for plaintiff.

Woodrow W. Seymour, and Lassiter & Walker, by Wm. C. Lassiter, for defendant.

MARTIN, Judge.

The crucial question in this case is whether the plaintiff, a private individual, is entitled to recover damages based upon the publication of an alleged defamatory falsehood without alleging and showing fault on the part of the defendant publisher.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347, 41 L.Ed. 2d 789, 809, 94 S.Ct. 2997, 3010 (1974), the Supreme Court of the United States established the following rule applicable to plaintiffs in libel actions who are not public officials or public figures:

> "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."

In a concurring opinion, Mr. Justice Blackmun pointed out that the Court in the *Gertz* case ". . . now conditions a libel action by a private person upon a showing of negligence. . . . " *Gertz v. Robert Welch, Inc., supra* at 353, 41 L.Ed. 2d at 813, 94 S.Ct. at 3014.

[1] Thus, under the *Gertz* decision, a plaintiff in a civil action for libel, if he is a private citizen and not a public official or a public figure, can recover only if he alleges and proves fault, or at least negligence, on the part of the defendant publisher in publishing false and defamatory statements.

Prior to the decision of the United States Supreme Court in the *Gertz* case, this jurisdiction, as well as others, clearly established that a publication charging that someone had committed a crime constituted libel per se and both malice and actual damages were presumed. See *Flake v. Greensboro News Company*, 212 N.C. 780, 195 S.E. 55 (1938). Under *Gertz*, there is no presumption of malice and damages, and fault must be

alleged and established by a private citizen who seeks to recover for a defamatory falsehood.

[2] The pleadings and matters outside the pleadings considered by the trial judge in the instant case fail to state a claim upon which relief can be granted under the Supreme Court decision in the *Gertz* case for the reason that they contain no allegation or showing of fault on the part of the defendant in publishing the item complained of. Moreover, there is no allegation that the defendant was guilty of negligence in making the publication, nor is there any allegation that the defendant published false and defamatory matter with knowledge of falsity or with reckless disregard.

[3] Plaintiff argues that defendant's failure to retract the news story after being requested to do so was sufficient to satisfy the fault requirement of the *Gertz* case. However, the fault required by the *Gertz* decision relates to some act or omission of the publisher at the time of publication. An allegation or showing of a failure to retract has no probative value or effect upon what a publisher did or failed to do at the time of the publication. Therefore, a failure to retract does not create the fault required by the *Gertz* decision.

The plaintiff made no allegation or showing of fault upon the part of the defendant either in the form of negligence or actual malice. The defendant's motion to dismiss having been made pursuant to Rule 12(b)(6), the trial court properly considered matters outside the pleadings, thereby treating the motion as one for summary judgment under Rule 56, and properly dismissed the case on its merits.

Affirmed.

Judge HEDRICK concurs.

Judge BRITT concurs in the result.

STATE OF NORTH CAROLINA v. CHARLES HENRY WILLIAMS

No. 762SC407

(Filed 20 October 1976)

1. **Arrest and Bail § 4; Criminal Law § 84— arrest made by city officer outside jurisdiction — arrest illegal but constitutional**

Though an arrest by a city police officer made more than three miles from the city limits was illegal, it was not unconstitutional and evidence obtained pursuant to the arrest was therefore constitutionally admissible; furthermore, the exclusion of the evidence was not required under G.S. 15A-974(2) on the ground that the arrest was a "substantial violation" of the Criminal Procedure Act since the arrest was in violation of G.S. 160A-286 and not the Criminal Procedure Act.

2. **Arrest and Bail § 4— lawful arrest by State Trooper — assist by city officer outside jurisdiction — arrest lawful**

A lawful arrest by a State Trooper would not become unlawful because the city policeman who joined in making the arrest was outside his territorial jurisdiction.

APPEAL by defendant from *Cohoon, Judge.* Judgments entered 14 January 1976 in Superior Court, WASHINGTON County. Heard in the Court of Appeals 21 September 1976.

The defendant was convicted on charges, consolidated for trial, of (1) driving a motor vehicle upon the public highways while under the influence of intoxicating liquor, a second offense, (2) speeding, and (3) failing to stop on signal from a law officer.

From judgments imposing concurrent sentences to imprisonment, defendant appeals.

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

Bailey & Cockrell by Arthur E. Cockrell for defendant appellant.

CLARK, Judge.

[1] The defendant's only assignment of error is the denial of his motion to suppress the evidence offered by Plymouth Policeman Ronald McKimmey and State Troopers Terry Toler and M. D. Foley on the ground that this evidence was obtained pursuant to the arrest by Policeman McKimmey which was illegal

because it was made more than three miles outside the town limits of Plymouth in violation of G.S. 160A-286.

All of the evidence tends to show that Officer McKimmey pursued defendant in his motor vehicle from the Town of Plymouth at high speed for a distance of about eight miles outside the town; that State Trooper Toler joined the pursuit about four miles outside of Plymouth; that when defendant stopped and stood beside his vehicle, both Officer McKimmey and Trooper Toler approached, searched and handcuffed him. Officer McKimmey arrested defendant and returned with him to Plymouth.

At the time of the offense, 11 May 1975, G.S. 160A-286, in part, provided that a city policeman could pursue an offender for a distance of three miles outside the corporate limits of the city for the purpose of making an arrest. The State concedes that under the law existing at that time defendant's arrest was illegal. "[T]he rule is that where the right and power of arrest without warrant is regulated by statute, an arrest without warrant except as authorized by statute is illegal." *State v. Mobley,* 240 N.C. 476, 480, 83 S.E. 2d 100, 103 (1954). It is noted that the foregoing provision of G.S. 160A-286 was deleted by a 1973 amendment, effective 1 September 1975.

Though the arrest of the defendant was illegal it was not unconstitutional because there was probable cause to make the arrest. Nor were there any oppressive circumstances surrounding the arrest warranting the exclusion of any evidence. In *State v. Eubanks,* 283 N.C. 556, 196 S.E. 2d 706 (1973), a law officer arrested defendant without a warrant on the charge of driving a motor vehicle upon a public highway while under the influence of intoxicating liquor though the offense was not committed in his presence. In holding the evidence of the breathalyzer test "and the officer's observations of this defendant admissible" the court observed: "We hold that nothing in our law requires the exclusion of evidence obtained following an arrest which is constitutionally valid but illegal for failure to first obtain an arrest warrant." 283 N.C. at 560.

We note, however, that the exclusionary rule in *Eubanks* has been broadened by the Criminal Procedure Act, G.S. Chap. 15A, effective 1 September 1975, which, in addition to the constitutionally required exclusions, provides in G.S. 15A-974(2) for suppression of evidence if

"It is obtained as a result of a substantial violation of the provisions of this Chapter. In determining whether a violation is substantial, the court must consider all the circumstances, including:

a. The importance of the particular interest violated;

b. The extent of the deviation from lawful conduct;

c. The extent to which the violation was willful;

d. The extent to which exclusion will tend to deter future violations of this Chapter."

This statute sets more stringent standards for arrest than those required by the federal constitution and requires a wider application of the exclusionary rule to meet these statutory standards relating not only to arrest and to search and seizure, but also "substantial violation" of all other provisions of the Criminal Procedure Act.

[2] The concession by the State that the arrest was illegal because made by a city policeman in violation of G.S. 160A-286 is questionable. In the case before us the offenses were committed by the defendant in the presence of both City Policeman McKimmey and State Trooper Toler. Both officers had the authority to arrest without a warrant under G.S. 15A-401(b) "any person who the officer has probable cause to believe has committed a criminal offense in the officer's presence." The evidence is uncontradicted that State Trooper Toler, whose authority to arrest was geographically limited only by State lines, joined in the pursuit, observed the offenses committed, and jointly with the city policeman apprehended and handcuffed the defendant. "An arrest consists in taking custody of another person under real or assumed authority for the purpose of detaining him to answer a criminal charge or civil demand." *Stancill v. Underwood,* 188 N.C. 475, 476-77, 124 S.E. 845, 846 (1924). A lawful arrest by the State Trooper would not become unlawful because the city policeman who joined in making the arrest was outside this territorial jurisdiction.

[1] In any event, there was probable cause to make the arrest. Assuming, *arguendo,* that the arrest was illegal, it was constitutionally valid. Nor should the evidence be suppressed under G.S. 15A-974(2) on the ground that the arrest was a "substantial violation" of the Criminal Procedure Act because the arrest

by the city policeman was in violation of G.S. 160A-286 and not the Criminal Procedure Act. We find

No error.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. BARBARA BLACKMAN GWALTNEY

No. 7611SC419

(Filed 20 October 1976)

1. **Criminal Law § 75— questioning prior to Miranda warnings — admissibility of evidence**

In a prosecution for driving under the influence of intoxicating liquor, the trial court properly determined that the failure of the officer who was investigating the accident in which defendant was involved to advise defendant of her Miranda rights before questioning her at the hospital did not render her admission that she was driving the automobile inadmissible, since defendant was not under arrest at the time the questions were asked, and the questions were investigatory and not accusatory in nature.

2. **Arrest and Bail § 3— warrantless arrest — no offense in officer's presence — constitutionality**

Even if defendant's warrantless arrest was illegal by virtue of the fact that she committed no felony or misdemeanor in the presence of the arresting officer, the officer had probable cause to arrest defendant, and the arrest was therefore constitutionally valid and would not warrant dismissal of the charges against defendant.

APPEAL by defendant from *Walker, Judge.* Judgment entered 16 December 1975 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 22 September 1976.

Defendant was charged in a warrant with the offense of operating a motor vehicle on a highway while under the influence of intoxicating liquor. From a conviction in district court, defendant appealed to the superior court, where she was tried *de novo* upon the original warrant.

Evidence for the State tended to show the following: At approximately 9:00 p.m. on 13 June 1975, defendant was driving her 1972 Cadillac on Highway 222 near Kenly. She lost

control of her automobile on a curve, ran into the ditch, and overturned. She was carried to Wilson Memorial Hospital by the Kenly Rescue Squad. Trooper Bullock of the North Carolina Highway Patrol arrived at the accident scene after defendant had been transported to the hospital. He completed his on-the-scene investigation and drove to the hospital, where he found defendant outside the emergency room awaiting treatment. Trooper Bullock advised defendant that he was investigating the accident and requested her driver's license and registration card. He inquired as to how the accident occurred, and defendant told him she was driving west on Highway 222 trying to elude a vehicle that had been following her. She stated that she lost control of her automobile on a curve, ran into the ditch, and overturned. As the trooper completed filling out the accident report, defendant was taken into the emergency room for examination and treatment. She remained in the emergency room twenty to twenty-five minutes.

While Trooper Bullock was obtaining the information for his accident report, he noticed that defendant's eyes were glassy, that she was unsteady on her feet, and that she had the odor of some alcoholic beverage on her breath. He formed the opinion that defendant was under the influence of intoxicating liquor. When defendant was released from the emergency room, the trooper advised her that she was under arrest for driving while under the influence and asked her to accompany him to the police station in Smithfield. The trooper did not question defendant further until after they arrived at the police station. At the police station Trooper Bullock advised defendant of her *Miranda* rights. Thereafter defendant told the trooper that she had been drinking vodka before the accident but had consumed no alcohol since the accident. Defendant agreed to a breathalyzer test, which resulted in a reading of 0.24.

Defendant offered no evidence.

Attorney General Edmisten, by Special Deputy Attorney General John M. Silverstein, for the State.

Barnes, Braswell & Haithcock, by Michael A. Ellis, for the defendant.

BROCK, Chief Judge.

[1] Defendant argues that the failure of the investigating officer to advise defendant of her *Miranda* rights before question-

ing her at the hospital renders her admission that she was driving the automobile inadmissible and that since this was the only evidence of who was driving, the arrest of defendant was unconstitutional.

The findings by the trial court on *voir dire* accurately sum up the situation:

> " . . . that the defendant had not been placed under arrest at the time of the preliminary questioning by Officer Bullock nor was she in custody of the said officer and . . . the questions related primarily to ownership and operation of the automobile involved and the facts leading up to the wreck. . . . "

Such questioning is necessary for the purpose of preparing the official accident report which is required to be filed. They are investigatory and not accusatory. The *Miranda* warnings and waiver of counsel are only required when a defendant is being subjected to custodial interrogation. *State v. Blackmon,* 284 N.C. 1, 199 S.E. 2d 431 (1973). *See also State v. Sykes,* 285 N.C. 202, 203 S.E. 2d 849 (1974). This argument is without merit.

[2] Defendant next argues that either her motions for nonsuit or her motion to set aside the verdict should have been allowed because her arrest was illegal under G.S. 15-41(1), which statute was in effect on the date of her arrest. General Statute 15-41(1) (repealed effective 1 July 1975) provided that a peace officer may arrest without a warrant "[w]hen the person to be arrested has committed a felony or misdemeanor in the presence of the officer, or when the officer has reasonable ground to believe that the person to be arrested has committed a felony or misdemeanor in his presence." Defendant argues that the statutory requirements were not met in this case. The reasoning in *State v. Eubanks,* 283 N.C. 556, 196 S.E. 2d 706 (1973), is applicable to this case. Clearly, Trooper Bullock had probable cause to arrest defendant, and the arrest was therefore constitutionally valid. "When an arrest is constitutionally valid but illegal under the law of North Carolina, must the facts discovered or the evidence obtained as a result of the arrest be excluded as evidence in the trial of the action? The answer is no. An unlawful arrest may not be equated, as defendant seeks to do, to an unlawful search and seizure. . . . " *State v. Eubanks, supra,* p. 560. A dismissal of charges because of an arrest

illegal under state law, but which is constitutionally valid, is likewise unwarranted. This argument is overruled.

Defendant's argument upon the admission of evidence is wholly without merit and is overruled.

No error.

Judges VAUGHN and MARTIN concur.

NCNB MORTGAGE CORPORATION AND NCNB CORPORATION v. J. HOWARD COBLE, SECRETARY OF REVENUE, STATE OF NORTH CAROLINA AND HIS SUCCESSORS

No. 7626SC357

(Filed 20 October 1976)

Taxation § 29— interest exceeding 6% paid to affiliated corporation — effect of former statutory provision

Provision formerly in G.S. 105-130.6 that, in determining the net income of a corporation, interest payments to a parent, subsidiary or affiliated corporation in excess of 6% "shall be considered excessive" created an absolute prohibition of a deduction for interest in excess of 6% paid to a designated corporation and not just a rebuttable presumption that interest in excess of 6% was excessive.

APPEAL by plaintiffs from *Snepp, Judge.* Judgment entered 12 February 1976 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 14 September 1976.

This is an action to recover an income tax assessment paid under protest.

There is no dispute over the facts.

Plaintiff NCNB Corporation was formed in North Carolina as a one bank holding company in 1968. This corporation owns all of the outstanding stock in its subsidiary, plaintiff NCNB Mortgage Corporation, a North Carolina corporation. NCNB Corporation relied on borrowed funds to finance the operation of its subsidiary Mortgage Corporation. NCNB Corporation was in a position to borrow money at a lower interest rate than Mortgage Corporation and made loans to Mortgage Corporation out of its short-term commercial paper borrowings. The prime

rate of interest on short-term commercial borrowings exceeded six percent during the period in question. NCNB Corporation borrowed at an interest rate in excess of six percent and loaned money to Mortgage Corporation at its cost plus a small charge. Mortgage Corporation deducted this interest on its tax returns for the years in question.

Mortgage Corporation was notified of a tax assessment. The assessment was based on G.S. 105-130.6 which was interpreted by the Secretary of Revenue so as to disallow as a deduction all interest the Mortgage Corporation paid to its parent corporation, NCNB Corporation, in excess of six percent. The Mortgage Corporation paid the tax assessment under protest. In apt time, the Mortgage Corporation filed a claim for refund and the claim was denied.

In this suit for the refund plaintiffs also ask, in the alternative if the refund is denied, that they be allowed to file consolidated income tax returns.

The judge made conclusions of law on the stipulated facts. He concluded that the statute (as written during the applicable period) prohibited any deduction for interest paid by the subsidiary corporation to the parent in excess of six percent. He further concluded that defendant could not be compelled to allow the filing of a consolidated return by plaintiffs.

Plaintiffs appealed from judgment dismissing the action.

Attorney General Edmisten, by Associate Attorney William H. Boone, for the State.

Helms, Mulliss & Johnston, by John W. Johnston and Robert B. Cordle, for plaintiff appellants.

VAUGHN, Judge.

At the time pertinent to this action the relevant part of the statute in question was as follows:

> G.S. 105-130.6 "SUBSIDIARY AND AFFILIATED CORPORATIONS. The net income of a corporation doing business in this State which is a parent, subsidiary or affiliate of another corporation shall be determined by eliminating all payments to or charges by a parent, subsidiary or affiliated corporation in excess of fair compensation in all inter-company transactions of any kind whatsoever. [Interest payments

between such corporations computed at a rate in excess of six percent (6%) per annum shall be considered excessive.] If the Commissioner of Revenue shall find as a fact that a report by such corporation does not disclose the true earnings of such corporation on its business carried on in this State, the Commissioner may require that such corporation file a consolidated return of the entire operations of the parent corporation or its subsidiaries and affiliates, including its own operations and income, and shall determine the true amount of net income earned by such corporation in this State as provided herein." (The sentence in brackets was deleted by a 1971 amendment, effective with respect to taxable years beginning on and after 1 January 1971, but does apply to the present action.)

Plaintiffs contend that the statute creates only a rebuttable presumption that interest in excess of six percent is excessive and that they should be allowed to overcome the presumption of facts showing that a higher rate can be fair compensation.

The Secretary of Revenue and the trial judge interpreted the language "shall be considered excessive" as an absolute prohibition of the deduction of interest in excess of six percent.

As plaintiffs suggest, it is the inclusion of the word "considered" that gives rise to the problem. Plaintiffs argue that if the General Assembly had intended to create more than a presumption the word "considered" could have been omitted. We must say, however, that if the General Assembly had intended to legislate less than a mandate it would have used the word "may" instead of "shall."

In an effort to ascertain the meaning of the Legislature, we have considered other statutory charges on the same subject as well as the "Report of the Tax Study Commission of the State of North Carolina (1966)" which recommended the amendment of the section to include substantially the language that was used in the amendment. We have also given due consideration to the interpretation given the statute by the Secretary of Revenue. Careful consideration of those factors and a contextual reading of the entire section leads us to the conclusion that the Legislature intended to prohibit the deduction of any interest in excess of six percent if paid to, as here, a parent corporation.

The judge was also correct when he concluded that the Commission could not be compelled to allow the plaintiffs to file consolidated returns.

The judgment is affirmed.

Chief Judge BROCK and Judge MARTIN concur.

WILLARD WYCOFF v. PRITCHARD PAINT & GLASS COMPANY

No. 7625SC402

(Filed 20 October 1976)

1. **Contracts § 27— damages for breach of contract sought — sufficiency of evidence**

In an action to recover damages for breach of contract to install windows and doors in plaintiff's motel, evidence was sufficient to be submitted to the jury where it tended to show that defendant contracted with plaintiff to furnish and install in plaintiff's motel doors and windows with 4" by 1¾" aluminum frames, but that defendant installed doors and windows with 1" by 3" aluminum frames, and that the doors and windows would not fit properly into the spaces left in the several motel units for that purpose, and that plaintiff was damaged by defendant's breach of the contract.

2. **Rules of Civil Procedure § 39— jury trial granted 2 years, 10 months after action commenced — no error**

The trial court did not abuse its discretion in allowing plaintiff's motion for a jury trial made some two years and ten months after the action was commenced.

APPEAL by plaintiff from *Kirby, Judge.* Judgment entered 13 January 1976 in Superior Court, CATAWBA County. Heard in Court of Appeals 22 September 1976.

This is a civil action wherein the plaintiff, Willard Wycoff, seeks to recover damages from the defendant, Pritchard Paint & Glass Co., for the breach of a contract to install windows and doors in plaintiff's motel. The action was tried before a jury, and at the close of plaintiff's evidence the court granted defendant's motion for a directed verdict. From the order granting the motion, plaintiff appealed.

Whitener and Austin, by Joe P. Whitener and Steve A. Austin, for plaintiff-appellant.

Butner, Rudisill & Brackett, by J. Steven Brackett, for defendant-appellee.

HEDRICK, Judge.

The one question raised by the plaintiff on this appeal is whether the trial court erred in directing a verdict for the defendant at the close of plaintiff's evidence. When the evidence is considered in the light most favorable to plaintiff, it tends to show the following:

Plaintiff had a motel constructed in Icard, North Carolina, and in connection therewith negotiated with the defendant for the latter's providing and installing the doors and windows in the several motel units. Pursuant to these negotiations the defendant forwarded to the plaintiff a written proposal in January, 1973 for the installation of the doors and windows.

Under the terms of the proposal the defendant was to install in each of the 36 motel units doors and windows " . . . set in 1¾" by 4" aluminum frames." The contract price for the work to be performed by defendant was $11,900. Each copy of the written proposal given to the plaintiff was signed by the defendant's agent. Plaintiff signed one of the copies of the proposal and returned it to the defendant.

Defendant began work on the motel in March of 1973. After defendant began work plaintiff made a payment to the defendant, pursuant to the terms of the contract, of $10,000. Plaintiff testified that defendant "ran into trouble because the frames were not as big as the doors was [sic]. The frames were 3" x 1" and they were supposed to have 4" frames by 1" and ¾"." As a result the doors and windows would not open and close correctly. Defendant attempted to remedy the problem but refused to take out the frames and replace them with 4" x 1¾" frames. Defendant terminated work in August 1973. Subsequently plaintiff contracted with Statesville Glass Company to take out 18 of the windows at a cost of $6,500.00 and to replace nine more of the windows at a cost of $3,250.00.

[1] In our opinion the evidence in the case is sufficient to require the submission of the case to the jury. The evidence raises inferences that the defendant contracted with plaintiff to furnish and install in plaintiff's motel doors and windows with 4" by 1¾" aluminum frames, but that the defendant installed doors and windows with 1" by 3" aluminum frames, and that the doors and windows would not fit properly into the spaces left in the several motel units for that purpose, and that the plaintiff was damaged by defendant's breach of the contract.

[2] By cross assignment of error made pursuant to Rule 10(d), N. C. Rules of Appellate Procedure, 287 N.C. 669, 700 (Appendix 1975), defendant contends the court erred in allowing the plaintiff's motion for a jury trial which was made some two years, ten months after the action was commenced. Even though a party has failed to demand a jury trial as prescribed by G.S. 1A-1, Rule 38(b), it is within the discretion of the trial judge to grant a subsequent motion for a jury trial. G.S. 1A-1, Rule 39(b); *Shankle v. Shankle*, 289 N.C. 473, 223 S.E. 2d 380 (1976). The defendant has failed to show any abuse of discretion on the part of the trial judge in allowing the plaintiff's motion for a jury trial. Defendant's cross assignment of error is not sustained.

For the reasons stated the judgment directing a verdict for the defendant is reversed and the cause is remanded to the superior court for a new trial.

Reversed and remanded.

Judges MORRIS and ARNOLD concur.

STATE OF NORTH CAROLINA v. BILLY GRAY HILL

No. 7621SC417

(Filed 20 October 1976)

Forgery § 2— indictment for uttering — failure to allege fraudulent intent

An indictment for uttering a forged check was fatally defective in failing to allege the check was uttered with intent to defraud where it alleged only that defendant uttered a check upon which the signature of a named person "had been forged with the intent to defraud," since the words "with the intent to defraud" modified the word "forged" and were irrelevant to the distinct charge of uttering.

APPEAL by defendant from *Crissman, Judge.* Judgment entered 19 February 1976 in Superior Court, FORSYTH County. Heard in the Court of Appeals 22 September 1976.

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

Joyce Riddle Neely and William G. Pfefferkorn for defendant appellant.

ARNOLD, Judge.

Defendant contends that the indictment upon which he was tried and convicted for uttering a forged check was fatally defective. He contends that an essential element of the crime of uttering a forged check, that it was uttered with intent to defraud, was not alleged, and that consequently the court lacked jurisdiction.

G.S. 14-120 provides:

> "If any person, directly or indirectly, whether for the sake of gain or with intent to defraud or injure any other person, shall utter or publish any such false, forged or counterfeit bill, note, order, check or security. . . , or shall pass or deliver, or attempt to pass or deliver, any of them to another person (knowing the same to be falsely forged or counterfeit) the person so offending shall be punished by imprisonment . . . . "

The essential elements of the crime of uttering a forged check are (1) the offer of a forged check to another, (2) with knowledge that the check is false, and (3) with the intent to defraud or injure another. *State v. McAllister,* 287 N.C. 178, 214 S.E. 2d 75 (1975); *State v. Faulkner,* 18 N.C. App. 296, 196 S.E. 2d 566 (1973).

The question is whether the indictment alleges each of these essential elements "in a plain, intelligible and explicit manner." G.S. 15-153; *State v. McBane,* 276 N.C. 60, 170 S.E. 2d 913 (1969). Unless it does, it is insufficient and invalid. The indictment reads:

> "THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Billy Gray Hill late of the County of Forsyth on the 6th day of December 1974 with force and arms, at and in the County aforesaid, that the said Billy Gray Hill, afterward, to wit; on the day and year aforesaid, at and in the county aforesaid, wittingly unlawfully and feloniously did utter and publish as true a certain false, forged, and counterfeit check, which said false, forged and counterfeit check is as follows: A check drawn upon the account of Craven Steel Company, Inc., Route # 11, Box 430, Greensboro, North Carolina, dated October 29, 1974, check # 2394 payable to the order of Billy G. Hill in the amount of $123.33, and drawn upon The Northwestern Bank,

Greensboro, North Carolina, upon which the signature of Betty Bush had been forged with the intent to defraud, he the said Billy Gray Hill, at the time he so uttered and published the said false, forged, and counterfeit check, then and there well knowing the same to be false, forged and counterfeit."

Nowhere does the indictment allege that defendant uttered the check with the intent to defraud others. The words "with the intent to defraud," as they appear in the indictment, modify the word "forged" and are irrelevant to the distinct charge of uttering. The indictment is thus void and judgment must be arrested. Since the indictment was void, jeopardy did not attach and the State may try defendant again.

Judgment arrested.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. ANDREW ARTHUR BEST

No. 763SC338

(Filed 3 November 1976)

1. **Physicians, Surgeons and Allied Professions § 1; Narcotics § 1— Controlled Substances Act — regulation of drug prescriptions — consistency of provisions**

The N. C. Controlled Substances Act, G.S. 90-86 *et seq.*, is not unconstitutional by virtue of its being inconsistent within itself in delineating when a physician's actions in the prescribing of drugs are lawful or unlawful, since sections of the Act defining "practitioner" as one licensed to dispense a controlled substance so long as such activity is "within the normal course of professional practice or research in this State" and "prescription" as an order for a controlled substance issued by a practitioner licensed to prescribe drugs "in the course of *his* professional practice" mean that a lawful prescription must be one that is issued by a practitioner, who is licensed to prescribe drugs in the course of his practice, within the normal course of professional practice in this State. G.S. 90-87(22)a and G.S. 90-87(23)a.

2. **Narcotics § 1— regulation of drug prescriptions — no vagueness — constitutionality of Controlled Substances Act**

Provisions of the N. C. Controlled Substances Act prohibiting a practitioner from distributing drugs other than for a legitimate

medical purpose "within the normal course of professional practice" are not unconstitutionally vague because they forbid conduct in such terms that men of common intelligence must necessarily guess at their meaning and application.

3. Criminal Law § 124; Narcotics § 5— sale of controlled substance — prescription of drug by doctor — refills — conviction for refills but not original prescription — inconsistency not prejudicial

In a prosecution of defendant doctor for felonious sale and delivery of controlled substances based upon defendant's prescription of a drug for an SBI agent, two refills of the prescription, and prescription of another drug, the trial court did not err in denying defendant's motion for judgment n.o.v. or in allowing to stand the verdicts of guilty as to the refills of the prescription, though defendant was acquitted on the indictment relating to the initial prescription on which the subsequent refills were based, since there was evidence sufficient to support a conviction on each of the charges for which defendant was tried, but the jury was at liberty to accept or reject that evidence and was not required to be consistent.

Judge CLARK dissenting.

APPEAL by defendant from *Tillery, Judge.* Judgment entered 19 November 1975 in Superior Court, PITT County. Heard in the Court of Appeals 1 September 1976.

Defendant, Dr. Best, was charged in six bills of indictment with the felonious sale and delivery of controlled substances. He pleaded not guilty.

The State offered evidence tending to show the following:

M. T. Owens, an SBI agent, visited defendant's office on four occasions posing as a patient. On the first three visits she received prescriptions for the controlled substance, Methylphenidate, in the form of Ritalin, and on the final visit she received the controlled substance, Phenobarbital, in tablet form.

Agent Owens first visited defendant's office on 4 February 1975, using the alias of Martha Ann Taylor. She told defendant's receptionist that she was a waitress and waited approximately one hour to see defendant. Before seeing defendant she was weighed and her blood pressure and temperature were taken and recorded by a nurse. When defendant came into the examination room where she had been placed by the nurse, he asked her what he could do for her. She then told him that she was working as a waitress at the bus station and needed something to stay awake. She informed him that she had been taking Dexadrine and "other junk." Defendant then noted that the Dexa-

drine was probably causing her high blood pressure and said "let me see if I can get you something better." The defendant then left the room and returned in about two minutes saying that he had checked the bus schedule and found that there were no buses coming in late at night. She then explained that she worked at Hardee's from 9:00 to 5:00 and from 8:00 until 2:00 or 3:00 in the morning she was at the bus station "hustling." Defendant, after a slight pause, looked at her and said, "oh, you are doing that kind of work." Defendant told her that she should be careful with Dexadrine because the "heat" is on it. When she asked what he meant by that statement, he made no response. Defendant then requested that she return to the reception area.

Defendant then gave the receptionist a prescription, which read, "Martha Taylor, Apartment 22, Cherry Court, dated 2-4-75, Ritalin tablets, No. 36, one tablet b.i.d." Agent Owens received the prescription from the receptionist in return for the $5.00 fee, for which she was given a receipt. She left the office and, after meeting with other SBI officers, went to a drugstore and had the prescription filled.

Agent Owens visited defendant's office again on 27 February 1975, where she handed the bottle that she had received from the drugstore to the receptionist and requested a refill. The receptionist took the bottle, wrote something down on a piece of paper, moved to a filing cabinet, pulled out a yellow card and told her to have a seat. Later the receptionist returned and asked to see the bottle again. Owens testified that she watched the receptionist write out the prescription. Defendant signed the prescription and his only statement to the agent was, "here it is." Defendant made no inquiry or examination of the agent. The prescription was the same as the one set forth above and the charge was, again, $5.00. The same routine was followed when Owens next visited defendant's office on 19 March 1975 except (1) she asked to see defendant after she had been given the refill prescription and (2) the prescription was signed in blank form by the defendant before it was completed by the receptionist. She did not see the doctor on this visit, and once again she paid $5.00 for the prescription.

Owens' final visit to the defendant's office was on 25 March 1975, at which time she told the receptionist that she would like to see the doctor and signed the register. On this occasion her blood pressure and temperature were taken by the

nurse, though she was not weighed or questioned by the nurse. When Dr. Best came into the examination room he greeted the agent and asked what he might do for her. She told him that the pills that he had prescribed for her had been making her nervous. Defendant then told her that she should have been taking the pills every other day instead of every day and asked if she was still taking Ritalin. He then said that he could give her something to calm her down and left the examination room without asking her any more questions. Defendant placed a vial of 115 Phenobarbital tablets and handwritten instructions to take one tablet before supper and 2 at bedtime on the counter in the waiting room. Owens paid $8.00 for the pills and consultation.

Dr. Edward G. Bond was qualified as an expert witness and testified as follows: He is familiar with the controlled substance Ritalin. There are three legitimate uses of that drug, and they are (1) for the so-called hyperactive child, (2) in cases of narcolepsy (a sleep disorder), and (3) for people with a mild depression.

Dr. Bond was asked the following set of hypothetical questions:

> " . . . If the jury should find as a fact from the evidence beyond a reasonable doubt that a young woman, aged twenty-nine, came to a doctor's office for the first time; that the woman signed a yellow pad and was asked by a receptionist for her name, address, date of birth, occupation and the names of her parents; that thereafter she was weighed by a nurse and her weight was recorded at a hundred forty-seven pounds; that the nurse took her blood pressure and temperature and recorded them at a hundred sixty over eighty and her temperature at 99.6; that she had a conversation in an examining room with the doctor in which she asked for something to stay awake because she was working late; that the doctor asked what she had been taking to stay awake and she answered, Dexadrine and some other junk; that the doctor said that the Dexadrine is probably the reason your blood pressure is up, let me see if I can give you something better, and left the room; that the doctor returned to ask her about her hours and she indicated that she worked at Hardee's from nine until five during the day and at night from eight until two or three in the morning she worked as a prostitute; that the

doctor said, That Dexadrine, be real careful with it, the heat's on that; that the doctor wrote a script without including the date or the name of the patient; that he took the script and the woman to the reception desk and gave the script to a receptionist and instructed her to write the woman's name on the prescription; that the receptionist wrote the woman's name on the script, and charged the woman five dollars; that the script called for thirty-six Ritalin, ten milligrams, with the signa, One tab twice daily, with no refills indicated; that Ritalin, ten milligrams, is a trade name for the Schedule II substance Methylphenidate; that during the time the woman was in the doctor's office, no medical history was obtained by the doctor; that the doctor asked the woman no questions concerning her health; that the doctor never examined or touched the woman in any way. Based upon these facts, Doctor, and your experience as a medical practitioner and medical expert, do you have an opinion satisfactory to yourself as to whether such a prescription was outside the usual course of a doctor's professional practice in this State?

* * *

A. Yes, sir.

Q. What is that opinion, Doctor?

* * *

A. I feel that this is outside the usual customary practice.

Q. Based on those same facts, Doctor, and your experience as a medical expert and as a medical practitioner, do you have an opinion satisfactory to yourself as to whether such a prescription was written for a legitimate medical purpose?

* * *

A. Yes, sir.

Q. What is that opinion, Doctor?

A. I would say it was not written for a legitimate medical purpose.

* * *

Q. Based upon those same facts, Doctor in your experience as a medical expert and medical practitioner, do you have

an opinion satisfactory to yourself as to whether the doctor in writing such a prescription was acting outside the normal course of a doctor's professional practice of medicine in this State?

* * *

A. Yes, sir.

Q. What is that opinion, Doctor?

* * *

A. I would say that he was acting outside of the normal course, in my opinion, of practice in the State.

* * *

Q. Upon what do you base your opinions, Doctor?

* * *

A. I think the problem here the drug used was not a legitimate use of this drug. Like I've stated before, even if the drug was to be used legitimately, apparently, from what you cited, there wasn't any examination of the patient to find out, even if the drug was to be used, might be used properly without any harm to the patient.

* * *

Q. Doctor, I ask you to assume the same facts in the immediately preceding question about the lady, and if the jury should find as a fact from the evidence beyond a reasonable doubt those facts and further that the same woman returned to the doctor's office twenty-three days later; that the woman showed the receptionist the prescription bottle she had obtained previously and stated that she wanted to get it refilled; that the receptionist took the script bottle, wrote something, left the room and returned, at which time she took a script pad and wrote out a prescription; that the receptionist left the room and went into the examining area with the script; that shortly thereafter, the doctor came out to the counter, put the script on the counter and stated, Here it is; that the script was for thirty-six Ritalin, ten milligrams; that Ritalin is the Schedule II Substance, Methylphenidate; that the woman paid the receptionist five dollars for the prescription; that on this visit no medical history was taken by the doctor or by anyone else; that the woman's blood pressure was not

checked; that her weight was not checked; that her temperature was not taken; that the doctor asked the woman no questions; that the doctor never examined or touched the woman in any way on this visit. Now, Doctor, based on these facts and your experience as a medical practitioner and as a medical expert, do you have an opinion satisfactory to yourself as to whether such a prescription was outside the usual course of a doctor's professional practice in this State?

* * *

A. Yes, sir.

Q. And what is that opinion?

* * *

A. My opinion would be that it is outside the usual customary practice in this State.

* * *

Q. Based on the facts I have mentioned in the two factual situations I have asked you to consider and on your experience as a medical expert, do you now have an opinion satisfactory to yourself as to whether such a prescription was written for a legitimate medical purpose?

* * *

A. Yes, sir.

Q. What is that opinion?

* * *

A. My opinion would be that it was not written for a legitimate medical purpose.

* * *

Q. Based on these facts I just recited, Doctor, and your experience as a medical expert and medical practitioner, do you have an opinion satisfactory to yourself as to whether the doctor in writing such a prescription was acting outside the normal course of a doctor's professional practice of medicine in this State?

* * *

A. Yes, sir.

Q. What is that opinion?

* * *

A. That he was acting outside of the usual customary practice in this State.

* * *

Q. Doctor, I ask you to assume the facts as I have recited in the two preceding circumstances, and if the jury should find as a fact beyond a reasonable doubt from the evidence the facts that I recited there and further that twenty days after the second visit and forty-four days after the first visit, the woman visited the doctor's office a third time; that she entered the office and spoke with the receptionist identifying herself and asking to get her prescription refilled; that she showed the receptionist the prescription bottle; that the receptionist looked at the bottle, walked to a card file, pulled a card and left the desk and walked out of sight into the examining area and returned shortly with the card and a script signed with the doctor's name; that there was no writing on the script except the doctor's signature; that the receptionist wrote out the script and gave it to the woman charging her five dollars; that the woman asked to see the doctor for a minute and was refused; that the prescription was for thirty-six Ritalin tablets, ten milligrams, with the signa, one tablet twice daily; that Ritalin is the Schedule II controlled substance, Methylphenidate; that on this third visit no one examined the woman or took any medical history; that no one took or recorded her blood pressure; that no one took or recorded her weight; that no one took or recorded her temperature; that she never saw the doctor; that the doctor had no conversation with her; that the doctor never examined or touched the woman in any way. Now, Dr. Bond, based upon these facts, these three factual situations I have recited; and your experience as a medical expert, do you have an opinion satisfactory to yourself as to whether such a prescription was outside the usual course of a doctor's professional practice in this State?

* * *

A. Yes, sir.

Q. And what is that opinion?

* * *

A. My opinion is that it is outside the usual customary practice.

* * *

Q. And, Doctor, based upon these facts and your experience as a medical expert and medical practitioner, do you have an opinion satisfactory to yourself as to whether such a prescription was written for a legitimate medical purpose?

* * *

A. Yes, sir.

Q. What is that opinion, Doctor?

* * *

A. My opinion would be that it was not written for a legitimate medical purpose.

* * *

Q. Now, Doctor, based upon these facts and your experience as a medical practitioner and medical expert, do you have an opinion satisfactory to yourself as to whether the doctor in writing such a prescription was acting outside the normal course of a doctor's professional practice of medicine in this State?

* * *

A. Yes, sir.

Q. And what is that opinion?

* * *

A. My opinion is that he was acting outside the normal customary practice in this State.

* * *

Q. Doctor, on what do you base your opinion?

* * *

A. There again I think the primary thing is that it wasn't a legitimate medical reason to use it in this fashion, and there again also to use a medicine of this type even if the indications are good, certainly an adequate examination and history, adequate physical examination should be carried out.

* * *

Q. Doctor, if the jury should find as a fact from the evidence and beyond a reasonable doubt the facts that I have

recited to you in the last three hypothetical questions, and further that six days after the third visit the woman returned to the doctor's office for a fourth visit; that the woman entered the office, spoke to the receptionist and signed a patient register; that a nurse took her back into the examining area where she took her blood pressure and temperature readings and left the room; that the doctor entered the room directly after the nurse left stating, What can I do for you today? That the woman stated, The pills you've been giving me are making me nervous; that the doctor stated, What you should have done was skip a day and take a pill and I have some pills here that I will give you to calm you down; that the doctor left the examining room and met the woman at the receptionist desk; that the doctor came out with a clear plastic vial with a white top and placed it on the counter; that the vial contained a hundred fifteen small, white, single-scored tablets and bore a label in handwriting reading, One tablet before supper, two at bedtime; that the doctor said Here you are; that the woman paid eight dollars and left; that the tablets were the Schedule IV controlled substance, Phenobarbital. The doctor asked the woman no other questions except, What can I do for you today? and he never examined the woman or touched her in any way. Based on those facts, doctor, and your experience as a medical practitioner and as a medical expert, do you have an opinion satisfactory to yourself as to whether the delivery of Phenobarbital was outside the usual course of a doctor's professional practice in this State?

* * *

A. Yes, sir.

Q. What is that opinion?

* * *

A. My opinion is that it would be outside of the usual customary practice of a physician practicing in the State.

* * *

Q. Now, Doctor, based on those facts again and your experience as a medical practitioner and medical expert, do you have an opinion satisfactory to yourself as to whether such delivery was for a legitimate medical purpose?

* * *

A. Yes, sir.

Q. What is the opinion?

* * *

A. My opinion would be that it was not for a legitimate medical purpose."

There was also evidence tending to show defendant's unlawful delivery of the controlled substance, Phenmetrazine, to two other S.B.I. agents.

Evidence for the defendant was as follows:

Defendant, Dr. Andrew Best, testified that he is a family practitioner who, on an average day, sees between eighty and ninety people. He has been practicing family medicine in Greenville for 21 years. The defendant was offered and found to be by the court an expert in the field of general practice.

The defendant testified that Agent Owens visited his office on several occasions using the alias of Martha Ann Taylor. On the initial visit her weight, blood pressure and temperature were taken and recorded by his nurse. The nurse assistant also recorded on the card that she, the agent, was working at night and needed something to stay awake. When defendant talked with the agent in the examining room he got the impression that she was working as a waitress on two jobs and that she had just moved to town. She told him that she had a tendency to fall asleep on her customers and that she was afraid that she would be fired if she didn't get something to control the situation. At this point, the defendant stated that he reviewed the clinical information on her weight, blood pressure and temperature and then formed the diagnostic impression that the patient was suffering from intermittent narcolepsy. He relied solely on her history in forming his diagnosis, and his treatment plan for the agent was to prescribe small controlled doses of Ritalin, monitoring results of the medication by getting information from the patient on return visits. He did prescribe Ritalin in ten milligram strength with instructions to take one tablet twice per day for eighteen days.

Agent Owens returned to the defendant's office on 27 February 1975, according to his testimony, twenty-three days after she had received her original prescription. Without seeing the

agent, the defendant wrote a refill prescription because his receptionist did not report any complaint of side effects or any other difficulty with the drug. On 19 March 1975, the agent returned to his office and asked for a third prescription for a refill. It was on this occasion that defendant told the agent, as he handed her the prescription for a refill, that she could not stay with this medication forever.

On 25 March 1975, the defendant saw and talked with the agent after his nurse had taken her blood pressure and temperature. On this occasion the agent complained of nervousness which she thought was a reaction to the Ritalin. Defendant asked the agent if she had stopped taking the drug, and the agent responded that she had. The defendant testified that he formed the diagnostic impression that the agent could very well have been having some side effects from the Ritalin. He stated that he determined that the agent should discontinue the use of Ritalin and should begin taking some Phenobarbital to control the symptoms she was experiencing from Ritalin. He testified that he prescribed and dispensed directly to the agent some Phenobarbital, which was in half grain tablet form, because he felt that by dispensing the drug directly to her that he could save her some money. Agent Owens paid $8.00 for the consultation and the Phenobarbital.

The defendant testified that he prescribed Ritalin and dispensed Phenobarbital to the agent for a legitimate medical purpose and that he believed that his conduct was within the normal course of professional practice of family medicine within this State. He stated that he did so in good faith based on representations made to him by the patient.

During cross-examination defendant was asked substantially the same hypothetical questions which were asked of the State's expert witness, Dr. Edward G. Bond. The defendant answered the first and last hypothetical questions in the same manner as Dr. Bond had, but disagreed with the State's witness on the second and third hypotheticals stating that he felt that these prescriptions had been written and delivered to Agent Owens for a legitimate medical purpose and that such conduct was within the normal course of professional practice in this State.

Defense expert witness Dr. Malene Grant Irons was asked substantially the same hypothetical questions by the prosecu-

tion as were asked of Dr. Bond. Dr. Irons answered the first three hypotheticals in the same manner as the State's witness Dr. Bond, but she found the facts set out in the fourth question to be within the normal course of professional practice in this State, except that she would have dispensed fewer Phenobarital tablets under the circumstances set forth in the fourth hypothetical.

Defense witness Dr. Jack Wilkerson, who was asked substantially the same four hypothetical questions, stated that in his opinion all of the prescribing and dispensing which had been described in the four hypotheticals had been done for legitimate medical purposes and within the usual course of a doctor's professional practice in this State.

Defendant's evidence also tends to show him to be a person of good character, one who enjoys a good reputation in the community and that he is a hardworking doctor and civic leader.

The jury returned a verdict of guilty on two of the six bills of indictment. The guilty verdicts related to the second and third visits by Agent Owens to defendant's office. He was acquitted in connection with the events that took place on the first and fourth visits. He was also acquitted on two other charges which related to alleged illegal delivery of drugs to two other agents.

Judgments imposing a twelve months' sentence were entered on both convictions. Each sentence was suspended upon the payment of a fine of $1,000.00 and costs.

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

James, Hite, Cavendish & Blount, by Marvin Blount, Jr., for defendant appellant.

VAUGHN, Judge.

Defendant's first argument is that the court erred "in failing to find G.S. 90-86, et seq. [North Carolina Controlled Substances Act] to be so imprecise in delineating the parameters of the lawful prescription of controlled substances by a physician as to be unconstitutionally vague, and thus violative of the Fourteenth Amendment to the Constitution of the United States."

[1] In support of this argument, defendant contends that the act is inconsistent within itself in delineating when a physician's actions in the prescribing of drugs are lawful or unlawful. Defendant refers to the definitions given for a "Practitioner" and a "Prescription."

The statute defines a "Practitioner" as:

"a. A physician, dentist, veterinarian, scientific investigator, or other person licensed, registered or otherwise permitted to distribute, dispense, conduct research with respect to or to administer a controlled substance so long as such activity is within the normal course of professional practice or research in this State." G.S. 90-87(22)a.

A "Prescription" is defined as:

"a. A written order or other order which is promptly reduced to writing for a controlled substance as defined in this Article, or for a preparation, combination, or mixture thereof, issued by a practitioner who is licensed in this State to administer or prescribe drugs in the course of his professional practice; a prescription does not include an order entered in a chart or other medical record of a patient by a practitioner for the administration of a drug. . . ." G.S. 90-87(23)a.

Defendant's quarrel is with the use of "the normal course of professional practice" in the section defining a practitioner and "in the course of *his* professional practice" in the section defining a prescription. (Emphasis added.) We see no substance in the argument.

The clause "who is licensed . . . to . . . prescribe drugs in the course of his professional practice" in subsection (23)a is an adjective clause modifying the preceding noun "practitioner." It describes the one issuing the prescription. It does not change the definition of practitioner as given in subsection (22)a. A practitioner who is licensed to issue a prescription in the course of "his" professional practice may not do so unless that "activity is within the normal course of professional practice." In other words, a lawful prescription must be one that is issued by a practitioner, who is licensed to prescribe drugs in the course of his practice, within the normal course of professional practice in this State.

[2] In further support of his first argument defendant contends that the statute is unconstitutionally vague because it forbids conduct in such terms that men of common intelligence must necessarily guess at their meaning and application.

The statute is explicit:

> "Except as authorized by this Article, it is unlawful for any person:
>
> (1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance. . . ." G.S. 90-95(a)(1).

For perfectly obvious reasons a practitioner cannot be immune from the law solely because of his status. Defendant must bring himself within an exception to the foregoing prohibition. G.S. 90-113.1. He argues, nevertheless, that to allow conduct otherwise proscribed by the statute only if it is by a practitioner "within *the* normal course of professional practice" necessarily requires a finding of unconstitutionality. (Emphasis added.) The argument is without merit.

A practitioner who distributes drugs other than for a legitimate medical purpose within the normal course of professional practice has no more exemption from the law than does an illicit street vendor.

The term "within the normal course of professional practice" is not vague. It gives every practitioner fair notice of the standard he must follow if his conduct is to come within the exception of the statute. That is all the Constitution requires. *U. S. v. Moore,* 423 U.S. 122, 46 L.Ed. 2d 333, 96 S.Ct. 335; *U.S. v. Rosenburg,* 515 F. 2d 190, (9th Cir. 1975) *cert. den.* 423 U.S. 1031. *See also U. S. v. Collier,* 478 F. 2d 268 (5th Cir. 1973) and cases cited therein.

The clarity of the standard of conduct required and the burden placed on the State in this case is illustrated by the following excerpts from the judge's instruction to the jury:

> "Now, within that term 'normal course of professional practice in this State,' there comes the question of what is normal. . . . The Court instructs you that the meaning you will apply in approaching this case as to the word 'normal' is as follows: Within a principle of right action binding upon the members of a group and serving to guide,

control or regulate proper and acceptable behavior of the members of that group.

* * *

So, I charge you that if you find from the evidence and beyond a reasonable doubt that . . . the defendant, Andrew Arthur Best, knowingly, wilfully and intentionally delivered a prescription for Ritalin to Martha Owens for the sole purpose of keeping her awake while working jobs as waitresses and while working as a prostitute; and if you further find that such purpose was not in the normal course of a doctor's professional practice in North Carolina, and that as a result of the delivery of the prescription, Martha Owens obtained a quantity of Ritalin, a controlled substance, it would be your duty to return a verdict of guilty. If you fail to so find or have a reasonable doubt as to any one of those elements, you should give him the benefit of that doubt and you should acquit him.

* * *

Now, ladies and gentlemen of the jury, when you come to consider the guilt or innocence of Dr. Andrew Best, the Court instructs you, as I have touched on before that a physician may in *good faith* and in *the course of his* professional practice within the State of North Carolina prescribe, administer and dispense narcotic drugs or have them administered by an assistant under his direct supervision. I further charge you that to determine *good faith* refers to the defendant's *honest belief* that the patient was suffering from a condition which required the administration of drugs in accordance with accepted medical practice. If you find that Dr. Andrew Best believed the prescription he issued served a legitimate medical purpose, then the dispensation or prescription or both of such controlled substances would not be unlawful, even though the doctor's medical judgment may have been faulty. You may not find absence of good faith on the part of Dr. Best beyond a reasonable doubt solely by reason of prescribed doses in excess of present needs. A physician violates the law when he prescribes drugs only if he does so without good faith, that is to say, only when in so prescribing he was acting outside the normal course of professional practice in the State.

* * *

The fact that the defendant may have made a medical mistake in prescribing the drugs does not establish that he failed to prescribe them in good faith. You are entitled to consider all of the circumstances surrounding the prescription or dispensation in question to determine whether the defendant acted in good faith, but if you find that the *defendant honestly thought* the prescription or dispensation would serve a legitimate medical purpose, then these prescriptions and dispensations would not be unlawful even if the defendant exhibited poor professional judgment." (Emphasis added.)

Defendant's second argument is that there is a fatal variance between the allegation that defendant distributed controlled substance not in the course of his professional practice and the proof and instruction to the jury that the distribution was not in the normal course of a doctor's professional practice in North Carolina. For the reasons we have indicated elsewhere in this opinion, we find no merit in the argument.

[3] Defendant's third and fourth arguments should be considered together. In the third, he contends the court erred in allowing to stand the verdicts of guilty as to the two prescriptions in view of the alleged inconsistent verdicts acquitting defendant on the indictment relating to the initial prescription on which the subsequent refills were based. In his fourth argument he contends the court erred in denying "the motion for judgment notwithstanding the verdict and to set aside the verdict as contrary to the weight of evidence." In support of the latter argument he stresses that the State's hypothetical questions tied the refills to the initial prescription with regard to which defendant was acquitted. He argues that when the jury acquitted defendant as to the initial prescription it necessarily rejected the evidence of its unlawfulness and that evidence was essential to the unlawfulness of the refills.

Both arguments require the same answer. A jury is not required to be consistent. *State v. Davis*, 214 N.C. 787, 1 S.E. 2d 104. Speaking through then Chief Judge Mallard, this Court has said:

"In short, defendant says that he was either guilty on both counts or not guilty on both counts. From the purely logical standpoint, this may or may not be true, but where the

evidence on each separate count was sufficient to support a conviction, we are not at liberty to speculate as to why a jury may convict on one count and not on another. 'In any event, a jury is not required to be consistent and mere inconsistency will not invalidate the verdict.'" *State v. Black,* 14 N.C. App. 373, 376, 377, 188 S.E. 2d 634.

There is evidence in this record sufficient to have supported a conviction on each of the charges for which defendant was tried. The jury was at liberty to accept or reject that evidence and the inferences arising thereon, in whole or in part.

The judge who presided over the trial denied defendant's motion to set the verdicts aside. These motions were addressed to his discretion. *State v. Moore,* 279 N.C. 455, 183 S.E. 2d 546. No abuse of discretion has been shown and, therefore, the decision of the trial judge is not reviewable on appeal. *State v. Bridgers,* 267 N.C. 121, 147 S.E. 2d 555.

We have carefully reviewed every assignment of error brought forward on this appeal. In these, defendant has failed to show any prejudicial errors of law that would require a reversal.

No error.

Judge MORRIS concurs.

Judge CLARK dissents.

Judge CLARK dissenting:

The jury by its verdict found the defendant not guilty of the charged violation in originally prescribing and dispensing Methylphenidate to Martha T. Owens, but guilty in refilling the prescription on her second and third visits to defendant's office. The time lapse between visits (23 days and 20 days) was such that the patient Owens would have consumed the 36 tablets of Methylphenidate at the rate of two per day as prescribed.

On the second and third visits to defendant's office for prescription refills Owens did not complain of any harmful effects from the drug. Thus, the defendant could reasonably

assume without further examination that the prescribed drug had no harmful effects upon her; that the drug had been effective in the treatment of the patient; and that refilling the prescription was justifiable under the circumstances.

To find the defendant guilty under the charge of the trial court, the jury had to find, from the evidence beyond a reasonable doubt, that defendant knowingly, wilfully and intentionally delivered the drug to the patient, not in the normal course of his professional practice and not in good faith. In my opinion the evidence was insufficient to support the verdicts of the jury, and the trial court erred in denying defendant's motion to set aside the verdicts.

SALLIE M. SCOTT (WIDOW); HAZEL IRENE SCOTT SMITHERMAN (WIDOW); SHERMAN GRAY SCOTT AND WIFE, KATE ELUIRA FULK SCOTT; AND MAUDE SCOTT MIKLES (WIDOW), PLAINTIFFS v. RUBY JUANITA SCOTT MOSER AND HUSBAND, HAROLD MOSER; SHIRLEY GRAY MIKLES HESTER AND HUSBAND, ROGER HESTER; SHELBY JEAN MIKLES DORSETT AND HUSBAND, JAMES W. DORSETT, JR.; JIMMY DARRELL MIKLES AND WIFE, ELLEN WALLEN MIKLES; BARBARA ANN SCOTT CARROLL AND HUSBAND, BARRY GYNN CARROLL; AUDREY GRAY SCOTT ISACCS AND HUSBAND, TED L. ISACCS; JUDY KAY SCOTT GOODWIN AND HUSBAND, GRADY JOHN GOODWIN; PEGGY PAULINE O'NEAL SMITHERMAN, WIFE OF FREDERICK GRAY SMITHERMAN (DECEASED); GEORGE NEAL SMITHERMAN AND WIFE, HILDA ELIZABETH HIATT SMITHERMAN; GLENDA GAY SMITHERMAN WALL AND HUSBAND, GLENN RAY WALL; PEGGY SUE SMITHERMAN MOORE AND HUSBAND, DONNIE RAY MOORE; GARY J. MOSER AND WIFE, PHYLLIS PARDUE MOSER; BRIAN KEITH MOSER, A MINOR; KAREN DAWN ELLIOTT, A MINOR; CARMEN JOY ELLIOTT, A MINOR; LISA LORENE ELLIOTT, A MINOR; RINA ARLENE ELLIOTT, A MINOR; DEBRA LYNN DORSETT, A MINOR; KIMBERLY MICHELLE DORSETT, A MINOR; BARRY GYNN CARROLL, JR., A MINOR; BYRAIN SCOTT CARROLL, A MINOR; SCOTT EUGENE GOODWIN, A MINOR; DONNA REENA SMITHERMAN, A MINOR; PAMELA KAY SMITHERMAN, A MINOR; SHARRON DENISE SMITHERMAN, A MINOR; DEBORAH SUE WALL, A MINOR; KIMBERLY GAY WALL, A MINOR; RANDY GRAY MOORE, A MINOR; RHONDA GAIL MOORE, A MINOR; ANY UNBORN AND UNKNOWN PERSONS WHO MAY BE CHILDREN OF HAZEL IRENE SCOTT SMITHERMAN, SHERMAN GRAY SCOTT, AND MAUDE SCOTT MIKLES; ANY UNBORN OR UNKNOWN PERSONS WHO MAY BE HEIRS OF G. WES SCOTT (DECEASED) AT THE DEATH OF HAZEL IRENE SCOTT SMITHERMAN, SHERMAN GRAY SCOTT, OR MAUDE SCOTT MIKLES; ANY UNBORN AND UNKNOWN CHILDREN OF RUBY JUANITA SCOTT MOSER AND MAUDE

SCOTT MIKLES AT THE TIME OF THE DEATH OF THE LAST SURVIVOR OF THE TWO; AND ANY UNBORN AND UNKNOWN PERSONS WHO MAY BE THE HEIRS OF THE CHILDREN OF RUBY JUANITA SCOTT MOSER AND MAUDE SCOTT MIKLES, MICHAEL WESLEY DORSETT, A MINOR; HOKE F. HENDERSON, GUARDIAN AD LITEM FOR ALL MINOR DEFENDANTS AND FOR THE UNKNOWN AND UNBORN CHILDREN OR HEIRS SET FORTH IN THE ORDER OF JULY 14, 1975, DEFENDANTS

No. 7617DC304

(Filed 3 November 1976)

Partition § 12; Descent and Distribution § 2— partition deeds — tenant and others named as grantees — no title conveyed to others

Where three children of an intestate, being the fee simple owners of intestate's lands as tenants in common, agreed among themselves upon a division of the lands into three portions and executed cross deeds of partition to carry out their agreement, the deed for one child's share was made to her and to her daughter, the deed for a second child's share was made to her and to her husband, and all three deeds purported to convey remainder interests after a life estate or estates in the named grantee or grantees, it was *held* that the cross deeds of partition operated only to sever the unity of possession and conveyed no title, and thus neither the first child's daughter, the second child's husband nor any of the remaindermen obtained any title or interest by virture of the partition deeds.

APPEAL by defendant guardian ad litem from *Van Noppen, Judge.* Judgment entered 27 January 1976 in District Court, SURRY County. Heard in the Court of Appeals 25 August 1976.

This is an action under the Declaratory Judgment Act to obtain a declaration of the rights of the parties under three deeds recorded in Surry County, N. C. In the alternative plaintiffs seek reformation of the deeds on the grounds of mutual mistake. All adult defendants filed answers admitting the allegations of the complaint and joining in the prayer for relief. The guardian ad litem, appointed by order dated 14 July 1975 for all minor defendants and for the unknown and unborn children or heirs, filed answer asserting the rights of his wards under the deeds in question.

Copies of the deeds, all of which are dated 11 February 1956, are attached to the complaint as Exhibits A, B, AND C. Exhibit A, contains the following recitals:

"WHEREAS, G. Wes Scott died intestate in Surry County, N. C. on January 20, 1956 leaving as his sole and

only heirs at law, Sallie M. Scott, widow, Gray Scott, a son, and Irene Scott Smitherman and Maude S. Mikels (sic), daughters; and

WHEREAS, the heirs at law of the decedent knew what disposition the decedent wanted made of his property and intended before death to make deeds or a Will dividing his property as he desired and said heirs are desirous of carrying out the intentions of the decedent;

NOW, THEREFORE, in consideration of the premises, the execution of cross deeds between the children of the decedent and their spouses, if any, the exchange of interest in the properties of the decedent, the execution of a written contract between the children of the decedent for the care and benefit of the widow, and other valuable considerations. . . ."

Exhibits B and C contain essentially the same recitals, although there are slight variations in wording in each. For example, Exhibit B contains the recital that all of the heirs are desirous of carrying out the intentions of the decedent "by executing partition deeds."

In Exhibit A, which is recorded in the office of the Register of Deeds for Surry County in Book 203 page 61, the parties of the first part are Irene Smitherman and husband, A. F. Smitherman; Sallie M. Scott, widow of G. Wes Scott; and Maude S. Mikels (sic) (divorced). The party of the second part is Gray Scott. By this deed the parties of the first part purported to convey all of their right, title and interest in and to certain described tracts of land to the party of the second part "for and during his natural life and at his death to his children, if any, and if no children survive him, then to the heirs and descendants of said decedent." The habendum is to the party of the second part "for and during his natural life and at his death to his children, or the survivor of his children if any, and if no children or the survivor of any child of his does not (sic) survive him, then unto the heirs at law and descendants of G. W. Scott."

In Exhibit B, which is recorded in Book 203 page 71, the parties of the first part are Sallie M. Scott, widow of G. Wes Scott; Irene Smitherman and husband, A. F. Smitherman; and Gray Scott and wife Kate Scott. The parties of the second part are Maude S. Mikels (sic) and Juanita Scott Moser (daughter

of Maude S. Mikles). By this deed the parties of the first part purported to convey all of their right, title and interest in and to certain described tracts of land to the parties of the second part "for and during their natural lives and at the death of the survivor of the parties of the second part, to the children of the parties of the second part." The habendum is to the parties of the second part "for and during their natural lives and at the death of the survivor of the parties of the second part, then to the children of the parties of the second part and if the parties of the second part should die without leaving children, then said lands shall go to the heirs at law and descendents of G. W. Scott."

In Exhibit C, which is recorded in Book 203, page 64, the parties of the first part are Sallie M. Scott, widow of G. Wes Scott; Gray Scott and wife, Kate Scott; and Maude S. Mikels (sic) (divorced). The parties of the second part are Irene Scott Smitherman and husband, A. F. Smitherman. By this deed the parties of the first part purported to convey all of their right, title and interest in and to certain described tracts of land to the parties of the second part "for and during their natural lives and at the death of a (sic) survivor of the parties of the second part to the children born to the marriage of the parties of the second part and if no children of parties of the second part survive them, then upon the death of the survivor of parties of the second part, then to the heirs and descendents of G. Wes Scott." The habendum is to the parties of the second part "for and during their natural lives and at the death of the survivor of parties of the second part, then to the children born to the marriage of parties of the second part and if no children survive the survivor of parties of the second part, then to the heirs and descendents of G. Wes Scott."

The case was tried without a jury. The court entered judgment making findings of fact which, insofar as pertinent to this appeal, may be summarized as follows:

G. Wes Scott died intestate on 20 January 1956. At the time of his death he owned in fee simple all of the lands described in the deeds involved in this action. He left surviving his widow, Sallie M. Scott, and as his only heirs at law his three children, Sherman Gray Scott, Maude Scott Mikles, and Hazel Irene Scott Smitherman, all of whom are plaintiffs in this action. Shortly before his death he told his son, Sherman Gray Scott, how he would like to have his property divided

among his three children. At no time in the discussions did he indicate any desire that any restrictions be placed on the property when it was divided. After G. Wes Scott died, plaintiffs desired to divide the property as he had indicated he wished it to be divided. His widow, Sallie M. Scott, indicated that she did not wish to own any property but that she preferred to deed any interest she might have in return for an agreement by her children to see that she was taken care of during her lifetime. This agreement with Sallie M. Scott, who was over 90 years of age at the time of the trial, has in all respects been complied with.

As a result of the discussions between the plaintiffs as to a proper partition and division of the real property owned by G. Wes Scott, the plaintiffs agreed that Sherman Gray Scott was authorized to employ an attorney at law to draw cross deeds of partition to divide the property as G. Wes Scott had desired the property to be divided. Sherman Gray Scott was concerned that when Hazel Irene Scott Smitherman received her portion of the property, her husband, A. F. Smitherman, who was then living but is now deceased, would make some effort to force Hazel to sell her property. Sherman Gray Scott discussed this matter with Hazel, and they agreed some method should be used to restrict any right that A. F. Smitherman might have in trying to force his wife to sell her portion of the lands. Sherman Gray Scott suggested to the other plaintiffs that if such restrictions were to be placed on the lands of Hazel, the same restrictions should be placed upon the lands of the other two children of G. Wes Scott to avoid the appearance of any unfair treatment of Hazel. In furtherance of this plan of division, Sherman Gray Scott attempted to devise a method for preparing the deeds so that the husband of Hazel Irene Scott Smitherman would not be able to require his wife to sell her property during his lifetime. Sherman Gray Scott was not trained in the law; he had completed only 6 grades of school. He did not know the legal effect of a deed in which he and his sisters would have only a life estate in the property. It was not the intention of either Sherman Gray Scott, Maude Scott Mikles, or Hazel Irene Scott Smitherman to limit their rights to do what they wanted to do with their land, and they still thought at the time of the execution of the deeds that they, themselves, would be able to do whatever they desired with the land. The deeds were prepared by an attorney according to the instructions provided by Sherman Gray Scott. At the

time of the execution of the deeds the plaintiffs did not know that they were signing documents which purported to divest fee simple interest in the properties from Sherman Gray Scott, Maude Scott Mikles, and Hazel Irene Scott Smitherman.

After the cross deeds were executed in 1956, plaintiffs occupied their separate tracts of land without incident until about 1972, when the State sought to purchase portions of the lands described in the deeds, which are plaintiffs' exhibits A and B, for an expansion of Pilot Mountain State Park. For the first time, plaintiffs then learned that a question existed as to their right to convey fee simple title to the lands.

Based on its findings of fact, the court concluded as a matter of law that plaintiffs were under a mutual mistake of fact and of law such as to entitle them to have the deeds reformed to conform with the true intent of the parties at the time the deeds were executed. The court also concluded as a matter of law that the deeds are cross deeds of partition and that the only effect of the deeds was to divide the properties owned by G. Wes Scott at the time of his death and to provide for the disposition of the dower interest of the widow, Sallie M. Scott.

The court entered judgment that the deeds be reformed to accord with its findings and conclusions. Specifically, the court adjudged that Sherman Gray Scott is the owner in fee simple of all lands described in Exhibit A, that Maude Scott Mikles is the owner in fee simple of all lands described in Exhibit B, and that Hazel Irene Scott Smitherman is the owner in fee simple of all of the lands described in Exhibit C.

From this judgment, the guardian ad litem appealed.

Folger & Folger by Fred Folger, Jr., and Larry Bowman for plaintiff appellees.

Allen, Henderson & Allen for Hoke F. Henderson, guardian ad litem, appellant.

PARKER, Judge.

The trial court rested its judgment upon two grounds: first, that the plaintiffs were under a mutual mistake of fact and of law such as to entitle them to have the deeds reformed; and second, that the deeds were cross deeds of partition which conveyed no rights to the wards of the appellant. We find the second ground sufficient to support the judgment and affirm.

When G. Wes Scott died intestate, fee simple title to his lands vested in his three children, Gray, Irene, and Maude, as tenants in common. (Their title was, of course, subject to their mother's dower rights, but such rights were released in exchange for their agreement to support their mother; the record indicates that this agreement has been honored and no question concerning the widow's dower rights has been raised on this appeal.) The three children, being the fee simple owners of the lands as tenants in common, agreed among themselves upon a division of the lands into three portions and agreed which portion each should receive. Cross deeds of partition were executed to carry out this partition agreement. The deed for Maude's share (Exhibit B) was made to her and to her daughter. The deed for Irene's share (Exhibit C) was made to her and to her husband. All three deeds purported to convey remainder interests to appellant's wards after a life estate or estates in the named grantee or grantees.

We find decision of this case controlled by the decision in *Harrison v. Ray,* 108 N.C. 215, 12 S.E. 993 (1891). In that case one Oakley Harrison and his brothers and sisters divided lands, inherited by them from their father, by deeds of partition. The deed for Oakley Harrison's share was made to him and his wife, Juda. Thereafter Oakley died and Juda married the defendant, David Ray. The plaintiffs, who were Oakley Harrison's children by his first wife, brought suit against Juda and her new husband, David Ray, to recover the land described in the deed to Oakley and Juda. They alleged that the name of Juda was inserted in the deed by mistake and inadvertence of the draftsman. At the trial, the court submitted as the first issue whether the name of Juda was inserted in the deed by mistake. The jury answered the issue against the plaintiffs, who then moved for judgment n.o.v. and excepted to refusal of the motion. On appeal, our Supreme Court reversed. The opinion of the Court, written by Clark, J. (later C.J.), contains the following:

> "[T]he deed to Oakley Harrison and wife operated merely as a partition of the lands and conveyed no estate to them. The land in controversy was the share of Oakley Harrison in the lands inherited by him and his brothers and sisters. This tract was ascertained to be his share by the consent partition, which was had in lieu of legal proceedings to appoint commissioners to mark it off and assign it. It is not claimed that Juda, the wife, had any interest in the land

so that anything should have been assigned her, but it is contended that by Oakley Harrison's direction the deed was drawn to him and his wife jointly. Suppose this to be so. The grantors were not conveying any additional estate or interest to Oakley Harrison. He had bought nothing and they were not making him a present of anything. The deed only assigned to him in severalty and by metes and bounds what was already his. The grantors conveyed no part of their shares. They had no interest in the share embraced in the deed to Oakley Harrison, and could convey no interest therein to him or anyone else. It was his by the conveyance from his father. He received no title nor estate by virture of the deed from his brothers and sisters, nor could his wife. His direction to the other heirs (if given) to convey to himself and wife could not have the effect to make the deed a conveyance of anything to his wife, when it was not such as to himself. The title being already in him, the deed merely designated his share by metes and bounds, and allotted it to be held in severalty. No title passed by the deed, nor by any of the deeds. 'Partition makes no degree. It only adjusts the different rights of the parties to the possession. Each does not take the allotment by purchase, but is as much seized of it by descent from the common ancestor as of the undivided share before partition.' Allnatt on Partition, 124. The deed of partition destroys the unity of possession, and henceforward each holds his share in severalty, but such deed confers no new title or additional estate in the land. 2 Bl. Com., 186. Hence it is that, in partition, whatever the form of the deed, there is an implied warranty of title by each tenant to all the others. *Huntley v. Cline,* 93 N.C., 458." *Harrison v. Ray, supra* at 216-217.

The principles announced in *Harrison v. Ray, supra,* have been consistently followed in the years since that case was decided. For example, in *Elledge v. Welch,* 238 N.C. 61, 76 S.E. 2d 340 (1953), Johnson, J., speaking for our Supreme Court, said (at page 66) :

"Deeds between tenants in common, when the purpose is partition, operate only to sever the unity of possession and convey no title. Each party holds precisely the same title which he had before the partition, and neither cotenant derives any title or interest from his cotenants, the

theory being that the undivided interest held by each in the whole tract is severed by the partition from the interests of the others and concentrated in the parcel set apart to each, with the interests of the others being excluded therefrom. (Citations omitted.)

Accordingly a deed made by one tenant in common to a cotenant and the latter's spouse in partitioning inherited land or land held as a tenancy in common, does not create an estate by the entirety or enlarge the marital rights of the spouse as previously fixed by law."

Applying the principles announced in *Harrison v. Ray, supra,* and in *Elledge v. Welch, supra,* to the case now before us, the cross deeds of partition which were executed between the tenants in common operated only to sever the unity of possession. They conveyed no title. Thus, neither Maude's daughter, nor Irene's husband, nor any ward represented by the defendant guardian ad litem obtained any title or interest by virtue of any of the partition deeds.

The judgment appealed from is

Affirmed.

Chief Judge BROCK and Judge ARNOLD concur.

L. DEAN SANDERS v. THE TROPICANA, A CORPORATION

No. 7626DC411

(Filed 3 November 1976)

1. **Associations § 2; Corporations § 18— cooperative association — board of directors — refusal to approve stock transfer**

The action of the board of directors of a cooperative apartment association in withholding consent to a transfer of stock in the cooperative should be based on reasons necessary to carry out the cooperative purposes, and consent arbitrarily withheld is invalid.

2. **Associations § 1; Corporations § 1— cooperative association — treatment as corporation**

A cooperative association organized in corporate form is basically a corporation and is generally treated as such.

3. Associations § 2; Corporations § 18— restraints on transfer of stock — cooperative apartments

Restraints on alienation of corporate stock in the form of consent requirements are generally disfavored but are viewed differently when the hybrid relationship in a cooperative apartment is involved.

4. Associations § 2; Corporations § 18; Landlord and Tenant § 11— cooperative apartment association — restraint on stock and lease transfer

Since a proprietary lease as well as stock is involved in the relationship between a tenant-stockholder and an owner-cooperative, the restraint on the transfer of the stock and lease is governed by the general rule that reasonable restraints on the assignment of leases are valid.

5. Associations § 2; Corporations § 18— cooperative associations — restrictions on stock transfer — effect of statute

The statute requiring a cooperative association to reserve the right of purchasing the stock of any member whose stock is for sale and authorizing the restriction of a transfer of stock to persons made eligible to membership in the bylaws, G.S. 54-120, does not authorize restraints only in the form of a right of first refusal.

6. Associations § 2; Corporations § 18— cooperative associations — restraint on stock and lease transfer

A restraint on the transfer of the stock and lease in a cooperative association is valid when provided for by statute and reasonably necessary for the cooperative purposes.

7. Associations § 2; Corporations § 1— cooperative association — general corporation law

The statute providing that a cooperative association organized in corporate form shall be "maintained in accordance with the general corporation law" does not convert a cooperative association into a general corporation, does not destroy the identity of the cooperative, and does not destroy the relationship between the tenant-shareholder and the owner-cooperative, which is based primarily on the long-term corporate stock. G.S. 54-117.

8. Associations § 2; Corporations § 18— cooperative associations — transfer restrictions — general corporation law

There is no applicable general corporation law which supplants the authority of the board of directors of a cooperative association in the enforcement of transfer restrictions contained in the proprietary lease and authorized by G.S. 54-120.

9. Associations § 2; Corporations § 18— cooperative apartment association — refusal of directors to approve stock and lease transfer — action not arbitrary

The board of directors of a cooperative apartment association did not act arbitrarily and capriciously in refusing to approve the sale of a stock subscription and lease to a purchaser who intended to sublet rather than occupy the purchased apartment, notwithstanding

the board of directors had no written guidelines detailing when approval of a stock and lease transfer would be refused and the board had previously approved the subletting of two other apartments to non-owners.

APPEAL by defendant from Order of *Johnson, Judge*. Order entered 2 January 1976 in District Court of MECKLENBURG County. Heard in the Court of Appeals 23 September 1976.

By assignment on 1 June 1969 the plaintiff became a subscriber for Stock Certificate No. 228-B in the defendant cooperative corporation, the owner of a 22-unit apartment complex in Charlotte known as The Tropicana. Plaintiff assumed the payment of the balance due on a promissory note to defendant in the principal sum of $19,000.00, payable at the rate of $136.13 per month for 240 consecutive months beginning 1 February 1966, which note was secured by pledge of his stock certificate.

He also acquired the rights and assumed the obligation of his assignor in a Shareholders' Lease, which entitled him to occupy apartment No. 228. Under the Shareholders' Lease the lessee contracted to pay rent in such aggregate sum as the Board of Directors, in its judgment, should assess. Further, the Board was given the power to determine the manner of maintaining and operating the apartment building and to establish such house rules as it determined reasonable. The lessee could not sublet the apartment without the consent of the Board, and could not assign the lease without the "written consent to said assignment executed and signed by a majority of the Board of Directors."

Plaintiff later married, had a child, and because of the need for space, purchased a home, vacated apartment 228 late in 1972, and offered the stock subscription and lease for sale. On 12 March 1973, plaintiff received a written offer to purchase from one Edward Pientka.

When he submitted the assignment to the Board of Directors for their consent, plaintiff indicated that Pientka would "sublease the apartment prior to the time when he anticipated that he would occupy the apartment."

The Board of Directors refused to consent to the assignment of the stock subscription and lease because Pientka intended to sublet rather than occupy the apartment. Plaintiff terminated

monthly payments to defendant after March 1973. Plaintiff finally found another purchaser in July 1974, and the Board of Directors consented to this assignment.

Plaintiff began this action in October 1973 and sought a temporary restraining order and damages after defendant's Board of Directors attempted to terminate plaintiff's rights under his lease agreement. The trial court entered the restraining order which, after a hearing, was continued pending trial.

Defendant in its answer and counterclaim sought to recover delinquent payments for the period from April 1973 until July 1974 in the sum of $2,772.17, and legal expenses, late payment penalty and interest charges in the sum of $614.86, amounting to the total sum of $3,387.03.

At trial without jury the plaintiff's evidence tended to show that plaintiff was Vice President and a member of the Board of Directors of The Tropicana during the calendar year 1972, and that he knew of at least two other sales to subscribers who proceeded to sublet their apartments immediately following the time of sale with approval by the Board of Directors.

Evidence for defendant tended to show that the Board of Directors disapproved plaintiff's sale to Pientka because at that time four apartments were being sublet and the Board wanted to put a halt to leasing; that prior to plaintiff's application the Board had disapproved three or four sales to purchasers who intended to lease their apartments; that two sales were disapproved after plaintiff's application; and that in accordance with this policy no rental tenants were living in the complex by the time of the trial. The minutes of the meetings of the Board of Directors as early as 1968 reflected that the stockholders preferred that apartment units not be rented. Evidence was offered to support defendants' counterclaim for damages in the sum of $3,387.03.

The District Court found facts substantially as set out above, concluded that the refusal by the defendant's Board of Directors to approve the sale by plaintiff to Pientka "was arbitrary and capricious and was a breach of the agreements . . . " , and that plaintiff recover of defendant the sum of $1,366.72, the difference between the proposed sale in March 1973 and the actual sale in July 1974, and that defendant recover nothing.

Defendant appealed.

Francis O. Clarkson, Jr., for plaintiff appellee.

William H. Elam for defendant appellant.

CLARK, Judge.

The issue presented by this appeal is whether the Board of Directors of defendant cooperative corporation had the authority to deny consent to the transfer by the plaintiff of his stock subscription and proprietary lease. Relevant to the determination of this issue are the history and purpose of the cooperative apartment and the relationship between the owner-cooperative and the tenant-shareholder.

The defendant corporation was the owner of a cooperative apartment. A cooperative apartment is a multi-unit dwelling in which, as a general rule, each resident has (1) an interest in the entity owning the building evidenced by his stock subscription or share, and (2) a proprietary lease entitling him to occupy a particular apartment within the building.

Cooperative apartments flourished following both world wars for both economic and social reasons. They provided a ready means for an equity investment since a mortgage could be obtained more readily by the cooperative and then each tenant-shareholder was assessed a pro rata share of the mortgage payments, taxes, and maintenance costs.

One disadvantage of the cooperative apartment, which may explain the more popular current use of the condominium form of apartment ownership, is that each tenant-shareholder is dependent upon the financial condition of the others. The failure of one to pay his proportionate share of the mortgage payment results in a default that must be cured by the other tenants if foreclosure on the whole property is to be avoided. Because of this characteristic many cooperative apartments failed during the great depression of the 1930's. Berger, Condominium: Shelter on a Statutory Foundation, 63 Columbia L. Rev. 987, 993 (1963); Note, Co-operative Apartment Housing, 61 Harv. L. Rev. 1407 (1948). The cooperative apartment may be rare in North Carolina for this is a case of first impression here. Rare also are cases dealing with the alienation of stock in corporations or other cooperative organizations. R. Robinson, N. C.

Corp. Law, § 7-10 (2d Ed. 1974). For precedent we must examine the decisions in other jurisdictions.

Apart from the already noted economic purpose of the cooperative apartment, there is the social purpose of choosing one's neighbors. A common provision in the proprietary lease of the tenant-shareholder is the restriction on transfer of the stock and the lease. This is essential because it is the only effective means by which tenants may control occupancy of the apartment, which is of primary interest to tenants who live in close proximity to each other and share common facilities. From the cases examined it appears that this restraint almost always takes the form of prohibiting transfer except with the consent of the board of directors. See Annot., 99 A.L.R. 2d 236 (1965).

[1] The action of the board of directors in withholding consent to a transfer of stock should be based on reasons necessary to carry out the cooperative purposes. *Penthouse Properties Inc. v. 1158 Fifth Ave.*, 256 App. Div. 685, 11 N.Y.S. 2d 417 (1939). Consent arbitrarily withheld is invalid. *Mowatt v. 1540 Lake Shore Drive*, 385 F. 2d 135 (7th Cir. 1967). "Each case must be examined in the light of all the circumstances to determine whether the objective sought to be accomplished by the restraint is worth attaining at the cost of interfering with the freedom of alienation. . . . " Restatement of Property § 406, Comment i, § 410, Comment g (1944).

[2-4] The defendant is a cooperative association organized in corporate form and under G.S. 54-117, "maintained in accordance with the general corporation law except as otherwise provided for in this Subchapter." It is basically a corporation and is generally treated as such. 18 Am. Jur. 2d Cooperative Associations § 1 (1965). But in fact a cooperative is somewhat of a "legal hybrid" in that the stockholder possesses both stock and a lease, and the relationship between the tenant-shareholder and the owner-cooperative is largely determined by reading together the certificate of incorporation, stock offering prospectus, the stock subscription agreement, and the proprietary lease. 15 Am. Jur. 2d Condominiums and Cooperative Apartments § 23 (1964). Restraints on alienation of corporate stock in the form of consent requirements are generally disfavored. Annot., 65 A.L.R. 1159 (1930); Supplemental Annot., 61 A.L.R 2d 1318 (1958); H. Henn, Handbook on the Law of Corporations 544 (2d Ed. 1970). They are viewed differently when the hybrid relationship in a cooperative apartment is involved. Since a

proprietary lease as well as stock is involved in the peculiar relationship between a tenant-stockholder and the owner-cooperative, the restraint is governed by the general rule that reasonable restraints on the assignment of leases are valid. *Penthouse Properties, Inc. v. 1158 Fifth Ave., supra.*

[5] Applying these principles in this case, we note that the shareholders' lease contained a restraint on the transfer of the stock subscription and the lease at the time plaintiff signed it. This restraint was authorized by G.S. 54-120, which states that

> " . . . A mutual association shall reserve the right of purchasing the stock of any member whose stock is for sale, and may restrict the transfer of stock to such persons as are made eligible to membership in the bylaws."

Plaintiff contends that this statute authorizes restraints only in the form of a right of first refusal, but we think this interpretation is too narrow.

[6] In only one case have our courts been called upon to determine the validity of a restraint on the alienation of corporate stock. There, even in the absence of a related proprietary lease, the court upheld the consent requirement, placing particular importance on the fact that there was no statute in our general corporate law prohibiting such a restraint and that the restraint was included in the charter when the complaining party acquired his stock. *Wright v. Tel. Co.*, 182 N.C. 308, 108 S.E. 744 (1921). We hold that a restraint such as the one challenged here is valid when provided for by statute reasonably necessary for the cooperative purposes.

In *68 Beacon St., Inc. v. Sohier*, 289 Mass. 354, 194 N.E. 303 (1935), the court upheld the board of directors in withholding consent to the transfer of stock and lease because it determined the transferee to be without financial responsibility. In *Mowatt v. 1540 Lake Shore Drive Corp., supra,* the court held that the refusal of the board of directors to consent to a transfer because of insolvency, association with people of disreputable character, and noisiness of the prospective transferee, was based on reasonable criteria.

The liberality of the New York courts in upholding the denial of consent by the board of directors of the cooperative is illustrated by the case of *Weisner v. 791 Park Avenue Corp.*, 6 N.Y. 2d 426, 160 N.E. 2d 720, 190 N.Y.S. 2d 70 (1959), *rev'g,*

7 A.D. 2d 75, 180 N.Y.S. 2d 734 (1958), where the complaint alleged that the treasurer and member of the cooperative board of directors had personal animus against a relative of the proposed transferee, improperly used his influence on the other members of the board, and negotiated another transfer wherein he would receive a brokerage fee. The court held that the complaint did not state a cause of action, and stated in substance that, absent a violation of statutory standards prohibiting discrimination because of race, color, religion, national origin or ancestry, under the cooperative plan of organization in effect, "there is no reason why the owners of the co-operative apartment house could not decide for themselves with whom they wished to share their elevators, their common halls and facilities, their stockholders' meetings, their management problems and responsibilities, and their homes." 190 N.Y.S. 2d at 75.

[7, 8] In North Carolina a cooperative association may be organized in corporate form. If so organized, under G.S. 54-117 the association shall be "maintained in accordance with the general corporation law." However, this statute does not convert a cooperative association into a general corporation, does not destroy the identity of the cooperative, and does not destroy the relationship between the tenant-shareholder and the owner-cooperative, which is based primarily on the long-term proprietary lease rather than the corporate stock. We find no applicable general corporation law which would supplant the authority of the defendant's board of directors in the enforcement of the transfer restrictions contained in the proprietary lease and authorized by G.S. 54-120.

[9] In this case the conclusion of trial court that the refusal to consent to the transfer by the board of directors was arbitrary and capricious was based on findings of fact, largely uncontradicted, as set out in the initial statement of the case, and on the last "finding of fact," as follows:

> "10. That there appeared to be no guidelines within which the board of directors of the defendant corporation may operate when they exercise their discretion as to whether or not to permit the transfer of its stock (and/or subscription to stock) and subsequent lease of one of its apartment units and that up until March of 1973 the Board of Directors had not formally declined to approve the transfer of any of its stock and/or subscriptions to stock for the reason that the purchaser was not going to occupy the

apartment complex but was in fact going to sub-rent same and had in fact approved at least two of these transactions."

In our opinion the findings of fact do not support the conclusion that the action of the board of directors in denying consent to the proposed transfer of his stock and proprietary lease by the plaintiff to Pientka in March 1973, was arbitrary and capricious. The cooperative has a social purpose as well as an economic one. The plaintiff purchased his interest in the defendant cooperative with knowledge of the restraint on transfer included in his proprietary lease. The board of directors adopted a policy of limiting apartment occupancy to owners. This decision was reasonably necessary to carry out the cooperative purpose. The board's approval of subletting to at least two non-owners does not render the decision arbitrary and capricious. It would be unreasonable to expect the Board of Directors to have written guidelines detailing every instance in which it will refuse its consent. To so hold would unreasonably restrict the board of directors in the exercise of their authority in the government of the cooperative apartment for the mutual benefit of its tenant-shareholders.

The judgment is

Reversed and this cause Remanded for proceedings on defendant's counterclaim consistent with this opinion.

Judges BRITT and PARKER concur.

LOUIE J. CRAWLEY v. SOUTHERN DEVICES, INC. AND ZURICH-AMERICAN INS. CO., CARRIER

No. 7625IC383

(Filed 3 November 1976)

1. **Master and Servant § 69— workmen's compensation — compensation for disability during healing period**

Disability compensation under G.S. 97-31 is awarded for physical impairment irrespective of ability to work or loss of wage earning power, and is in lieu of all other compensation.

2. **Master and Servant § 69— workmen's compensation — compensation during healing period — healing period defined**

The healing period, within the meaning of G.S. 97-31, is the time when the claimant is unable to work because of his injury, is submit-

ting to treatment, which may include an operation or operations, or is convalescing; and this period of temporary total disability contemplates that eventually there will be either complete recovery or an impaired bodily condition which is stabilized.

3. Master and Servant § 69— workmen's compensation — compensation for disability during healing period — healing period defined

When a claimant for workmen's compensation pursuant to G.S. 97-31 has an operation to correct or improve the impairment resulting from his injury, the healing period continues after recovery from the operation until he reaches maximum recovery; that is, it continues until, after a course of treatment and observation, the injury is discovered to be permanent and that fact is duly established.

4. Master and Servant § 94— workmen's compensation — Commission's finding as to length of healing period — sufficiency of evidence

In an action pursuant to G.S. 97-31 for compensation for temporary disability during the healing period of plaintiff's injury and for permanent disability at the end of the healing period when maximum recovery had been achieved, evidence was sufficient to support the finding of the Industrial Commission that plaintiff claimant's healing period extended beyond the period of maximum recovery from his operation to the time when there was such stabilization of his impaired bodily condition that it was established to be permanent.

5. Master and Servant § 94— workmen's compensation — Commission's finding as to termination of healing period — insufficiency of evidence

In an action pursuant to G.S. 97-31 for compensation for temporary disability during the healing period of plaintiff's injury, evidence was insufficient to support the finding of the Industrial Commission that the healing period terminated in December 1973 rather than in March 1973 as found by the Hearing Commissioner where such evidence tended to show that plaintiff's doctor dismissed him in March 1973 upon a determination that maximum recovery had been achieved; moreover, the Commission found as a fact that between March and December 1973 the plaintiff's condition was basically unchanged, and the Commission apparently erroneously considered plaintiff's continued inability to work as a determinative factor in awarding temporary disability under G.S. 97-31.

6. Master and Servant § 93— workmen's compensation — refusal of claimant to have surgery — bar to claim

The general rule in workmen's compensation is that where the surgery is of serious magnitude and risk, involves much pain and suffering and is of uncertain benefit, the refusal of the claimant to undergo surgery is reasonable and will not prejudice his claim; however, where a statute provides the employer with a means to determine the necessity and reasonableness of surgery, the employer cannot raise the refusal as a bar to the employee's claim in the absence of a showing that the employer previously sought to have the operation performed.

7. **Master and Servant § 93— workmen's compensation — refusal of claimant to have surgery — failure of employer to seek statutory relief**

Failure of defendant employer to seek relief from the Industrial Commission pursuant to G.S. 97-25 precluded the employer from raising plaintiff employee's refusal to submit to an operation in opposition to the employee's claim for compensation.

8. **Master and Servant § 96— evidence supporting Commission's finding — review in Court of Appeals**

Where the evidence from plaintiff's own doctors supported the finding of the Industrial Commission that plaintiff's permanent partial disability was 30%, the Court of Appeals was bound by such evidence, even though there was evidence that would have supported a finding to the contrary.

APPEAL by plaintiff and defendants from order of North Carolina Industrial Commission entered 11 February 1976. Heard in the Court of Appeals 16 September 1976.

In this workmen's compensation claim plaintiff seeks to recover for a back injury admittedly suffered by accident arising out of and in the course of his employment. Plaintiff sustained an injury to his lower left rib cage on 10 September 1971. He was treated by Dr. William A. Kirksey, a general practitioner in Morganton, and returned to work on 4 October 1971. He continued to complain of chest pains, and was examined by Dr. Kirksey on 20 October 1971, 27 December 1971, 10 January 1972, 14 January 1972, and 28 January 1972. On 29 May 1972 he returned to Dr. Kirksey, complaining of an aggravation of his original injury resulting in severe lower back pains. Dr. Kirksey referred him to Dr. Richard N. Wrenn, an orthopedic specialist in Charlotte, and also recommended that plaintiff cease work, which he did as of 1 June 1972. He has not returned to work since that date.

Dr. Wrenn examined plaintiff and performed a laminectomy on 28 June 1972. Plaintiff was released on 5 July 1972, and was examined by Dr. Wrenn on 25 July 1972. At that time Dr. Wrenn felt there had been "an excellent early result" and "dramatic relief of his discomfort," and preliminarily rated plaintiff's permanent disability at 10% to 15%, which he regarded as the minimum for an injury of this type. Upon Dr. Wrenn's advice that he try to work, plaintiff attempted to mow his lawn, but suffered pain and stopped.

Plaintiff returned to Dr. Kirksey on 27 September 1972 with complaints of continued pain and numbness in his left leg and

toes. At Dr. Kirksey's suggestion he was examined by Dr. Wrenn on 2 October 1972. Both doctors examined plaintiff again in March 1973, and Dr. Wrenn suggested surgery to relieve the continuing pain and discomfort. On 1 May 1973, apparently on the basis of the March examination, Dr .Wrenn reported to the Industrial Commission stating that plaintiff had been "dismissed with maximum improvement." Plaintiff returned to Dr. Wrenn in August and upon recommendation entered the hospital for surgery on 15 October 1973. While in the hospital his symptoms disappeared and he was discharged without having had surgery. He returned to Dr. Wrenn in November and December with renewed complaints about pain in his back. At the examination on 28 December 1973, Dr. Wrenn explained that the alternative to continued pain and discomfort was surgery, probably a spinal fusion. Plaintiff said he did not want any more surgery. Due to the continued pain Dr. Wrenn revised his rating of permanent disability to 30%.

The hearing before the Industrial Commission was delayed because of difficulties in obtaining Dr. Wrenn's testimony. On 16 December 1975, an Opinion and Award was entered by Deputy Commissioner Ben E. Roney, Jr. Pursuant to said award, defendants were ordered to accept at the weekly rate of fifty-six dollars ($56.00), compensation for temporary total disability from 12 September 1971, through 3 October 1971 (subject to a deduction for compensation paid from 23 September 1971, through 3 October 1971), compensation for temporary, total disability from 2 June 1972 through 20 March 1973, and compensation for permanent, partial disability to the back commencing on 21 March 1973, and continuing for ninety (90) weeks. Said sums were to be paid in a lump sum, subject to attorney's fees. Defendants were to pay all medical expenses.

Appeal was taken from said Opinion and Award to the Full Commission which appeal was argued in Raleigh on 9 February 1976.

The Full Commission on 11 February 1976, entered an Opinion and Award by the terms of which the Opinion and Award of the Deputy Commissioner was affirmed and adopted as the Opinion and Award of the Full Commission, except that the 20 March 1973 date for determination of temporary, total disability benefits was stricken, and replaced by the date, 28 December 1973. Additional attorney's fees were awarded.

From the Opinion and Award of the Industrial Commission, the claimant and the defendants appeal.

James A. Simpson for plaintiff appellant.

Patton, Starnes, Thompson & Daniel, P.A., by Robert L. Thompson for defendant appellants.

CLARK, Judge.

[1] Plaintiff seeks to recover for a schedule injury under G.S. 97-31(23). G.S. 97-31 provides for compensation for temporary disability *during the healing period* of the injury and for permanent disability at the end of the healing period, when maximum recovery has been achieved. Disability compensation under G.S. 97-31 is awarded for physical impairment irrespective of ability to work or loss of wage earning power, and is in lieu of all other compensation. *Loflin v. Loflin,* 13 N.C. App. 574, 186 S.E. 2d 660 (1972).

Defendants assign error to the determinations with respect to both temporary and permanent disability. Defendants contend that both the Deputy Commissioner and the Full Commission erred in extending the period of temporary disability beyond the healing period for the operation performed on 28 June 1972. They would have temporary benefits terminated in July 1972 rather than March or December 1973. The determination of the termination of a healing period is a question of fact. The Commission is the fact-finding body under the Workmen's Compensation Act. *Brewer v. Trucking Co.,* 256 N.C. 175, 123 S.E. 2d 608 (1962). The rule is, as fixed by statute and the uniform decisions of this Court, that findings of fact made by the Commission are conclusive on appeal when supported by competent evidence. G.S. 97-86; *McMahan v. Supermarket,* 24 N.C. App. 113, 210 S.E. 2d 214 (1974). The Commission's legal conclusions are subject to court review. *Jackson v. Highway Commission,* 272 N.C. 697, 158 S.E. 2d 865 (1968).

[2, 3] Defendant's first contention amounts to defining healing period in G.S. 97-31 as the period of maximum recovery from an operation. The error in this is that plaintiff's claim is based upon an injury, not an operation, and maximum recovery from the injury, not from an operation, is what signifies termination of the healing period. The healing period, within the meaning of G.S. 97-31, is the time when the claim-

ant is unable to work because of his injury, is submitting to treatment, which may include an operation or operations, or is convalescing. 99 C.J.S., Workmen's Compensation, § 304 (1958). This period of temporary total disability contemplates that eventually there will be either complete recovery, or an impaired bodily condition which is stabilized. *Franks v. Dept. of Labor and Industries,* 35 Wash. 2d 763, 215 P. 2d 416 (1950). When the claimant has an operation to correct or improve the impairment resulting from his injury, the healing period continues after recovery from the operation until he reaches maximum recovery. The healing period continues until, after a course of treatment and observation, the injury is discovered to be permanent and that fact is duly established. *Chapman v. Atlantic Trans. Co.,* 21 N.J. Super. 589, 91 A. 2d 502 (1952), *cert. denied,* 11 N.J. 213, 94 A. 2d 215 (1953).

[4] In this case we conclude that plaintiff claimant's healing period extended beyond the period of maximum recovery from his operation to the time when there was such stabilization of his impaired bodily condition that it was established to be permanent. This period must be determined in this case primarily from the somewhat inconclusive testimony of the treating physicians, orthopedist Richard C. Wrenn, and general practitioner William A. Kirksey. Though their testimony indicates that normally maximum recovery from an operation for a ruptured intervertebral disc could be expected in about one month, their testimony tends to show that stabilization of plaintiff's injury did not occur until March 1973, and this evidence supports the finding of the Hearing Commissioner that claimant was temporarily totally disabled through 20 March 1973. Though Dr. Wrenn testified that thereafter in December 1973, it was his opinion that claimant's permanent disability rating had increased to 30%, he also testified, and the Full Commission found, that claimant's condition was basically unchanged between March and December 1973. It is obvious, therefore, that Dr. Wrenn changed his opinion on the degree of disability but that his opinion was not based on any change in claimant's physical condition.

[5] We do, therefore, agree with defendants' second contention that there is no evidence to support the decision of the Commission to modify the determination of the Hearing Commissioner with respect to the termination of the healing period. The testimony of Dr. Wrenn was that he dismissed the plaintiff after

the examination in March 1973 upon a determination that maximum recovery had been achieved. The Commission found as a fact that between March and December 1973 the plaintiff's condition was basically unchanged. The only reasonable conclusion is that healing did not continue through December but had reached a maximum improvement and stabilized in March 1973. While findings of fact of the Industrial Commission are conclusive on appeal when supported by evidence, the courts must review the reasonableness of the inferences of facts deduced from the basic facts found and the conclusions of law predicated upon them. *Evans v. Lumber Co.*, 232 N.C. 111, 59 S.E. 2d 612 (1950). The Commission also seems to have considered plaintiff's continued inability to work as a determinative factor in awarding temporary disability under G.S. 97-31, but this was in error. Compensation under G.S. 97-31(23) is made without regard to the loss of wage-earning power. *Loflin v. Loflin, supra,* holds that the healing period is terminated when the claimant has reached maximum improvement.

We find that there was sufficient evidence to support the Hearing Commissioner's finding of fact that the period of total temporary disability terminated on 20 March 1973 and that permanent partial disability began on the following day, and that the evidence does not support the finding of the Full Commission that total temporary disability continued until 28 December 1973.

[6] Defendants also assign error to the rating of 30% permanent partial disability under G.S. 97-31(23), and contend that the award should be reduced because of plaintiff's refusal to undergo surgery. The general rule is that where the surgery is of serious magnitude and risk, involves much pain and suffering and is of uncertain benefit, the refusal of the claimant to undergo surgery is reasonable and will not prejudice his claim. Annot., 6 A.L.R. 1260 (1920); Annot., 105 A.L.R. 1470 (1936); 81 Am. Jur. 2d Workmen's Compensation § 395 (1976). However, where a statute provides the employer with a means to determine the necessity and reasonableness of surgery, the employer cannot raise the refusal as a bar to the employee's claim in the absence of a showing that it had previously sought to have the operation performed. Annot., 6 A.L.R. 1262 (1920); Annot., 73 A.L.R. 1303 (1931). G.S. 97-25 provides such a means.

"*Medical treatment and supplies.*—Medical, surgical, hospital, nursing services, medicines, sick travel, rehabilitation services, and other treatment including medical and surgical supplies as may reasonably be required to effect a cure or give relief and for such additional time as in the judgment of the Commission will tend to lessen the period of disability, and in addition thereto such original artificial members as may be reasonably necessary at the end of the healing period shall be provided by the employer. In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatment, the Industrial Commission may order such further treatments as may in the discretion of the Commission be necessary.

* * * *

The refusal of the employee to accept any medical, hospital, surgical or other treatment or rehabilitative procedure when ordered by the Industrial Commission shall bar said employee from further compensation until such refusal ceases, and no compensation shall at any time be paid for the period of suspension unless in the opinion of the Industrial Commission the circumstances justified the refusal, in which case, the Industrial Commission may order a change in the medical or hospital service."

[7] The failure to seek relief from the Commission precludes the employer from raising the refusal to submit to an operation in opposition to the employee's claim for compensation.

We have examined defendant's other assignments of error and find no merit in them.

[8] Plaintiff also appealed from the order of the Commission and assigned as error the failure to rate permanent disability at 100%. Plaintiff concedes and we agree that there is competent evidence from plaintiff's own doctors to support the findings of the Commission. This Court does not sit to reweigh the evidence. If there is evidence of substance which directly or by reasonable inference tends to support the findings, the Court is bound by such evidence, even though there is evidence that would have supported a finding to the contrary. *Crawford v. Warehouse,* 263 N.C. 826, 140 S.E. 2d 548 (1965). *Russell v. Yarns, Inc.,* 18 N.C. App. 249, 196 S.E. 2d 571 (1973). We find no merit to plaintiff's assignment of error.

That part of the order of the Commission rating plaintiff at 30% permanent partial disability is affirmed.

That part of the order of the Commission ending the period of temporary disability and beginning the period of permanent disability on 28 December 1973, is modified to conform to the order of the Deputy Commissioner, setting such date as 20 March 1973, with permanent partial disability beginning on 21 March 1973.

The order of the Full Commission is

Modified and affirmed.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. TYRONE WOODROW WARE

No. 7621SC479

(Filed 3 November 1976)

1. **Assault and Battery § 15— felonious assault — inflicting serious injury — sufficiency of charge**

The trial court did not give an incomplete charge with respect to the four elements of assault with a deadly weapon with intent to kill inflicting serious injury where the court charged that the State must prove beyond a reasonable doubt that defendant (1) assaulted the victim, (2) with a deadly weapon, (3) with an intent to kill, the court then digressed to define "intent" to the jury, and immediately thereafter the court properly charged as to all elements of the crime, including the fourth element of "inflicting serious injury."

2. **Assault and Battery § 17; Criminal Law § 124— unresponsive verdict — inquiry by clerk — acceptance of verdict by court**

In this prosecution for felonious assault, the trial court submitted issues as to defendant's guilt of (1) assault with a deadly weapon with intent to kill inflicting serious injury or (2) assault with a deadly weapon inflicting serious injury; the court, in response to an inquiry by the jury, gave an additional instruction that the only difference between the degrees of assault submitted was the "intent to kill"; the jury foreman stated that the jury's verdict was "guilty of assault with a deadly weapon with intent to kill"; the clerk asked, "Inflicting serious injury?" and the foreman replied in the affirmative; and each juror upon being polled stated that his verdict was guilty of assault with a deadly weapon with intent to kill inflicting serious injury and that he still assented thereto. *Held:* The clerk's

question was a proper inquiry to an unresponsive verdict, and the trial court did not err in accepting the verdict of guilty of assault with a deadly weapon with intent to kill inflicting serious injury.

APPEAL by defendant from *Crissman, Judge.* Judgments entered 12 February 1976 in Superior Court, FORSYTH County. Heard in the Court of Appeals 19 October 1976.

Upon pleas of not guilty defendant was tried in superior court on (1) a warrant (appealed from district court) charging him with assault with a deadly weapon on David E. Harris, and (2) a bill of indictment charging him with assault with a deadly weapon with intent to kill inflicting serious injury on Lillie Mae Gould. Both offenses allegedly occurred on 10 March 1975 and the weapon allegedly used was a pistol.

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

On the afternoon of the day in question defendant went to the home of Ruby Harris and asked to see her sister, Lillie Gould. Defendant and Lillie had lived together for about four years prior to 5 March 1975 when she left defendant and moved in with her sister. Defendant entered the room where Lillie was watching television and asked her to talk with him. They went into another room to discuss Lillie's returning to live with defendant. After the two talked briefly and Lillie stated that she would not resume living with him, defendant pulled a pistol and shot her four times. One bullet entered her neck and three bullets entered her abdomen. Defendant then ran to the front part of the house and shot Lillie's nephew, David Harris, in his wrist, after which he left. That evening defendant talked with Lillie's niece on the telephone and, upon learning that Lillie was still alive, he stated that he would return and "finish the job." As a result of the shooting, Lillie is permanently paralyzed from her waist down.

Defendant presented no evidence.

The "JUDGMENT AND COMMITMENT" signed by the trial judge in the two cases recite that the jury found defendant guilty of assault with a deadly weapon in the misdemeanor case and assault with a deadly weapon with intent to kill inflicting serious injury in the felony case. On the felony charge the court entered judgment imposing a prison sentence of twenty years. On the misdemeanor charge it entered judgment

imposing a prison sentence of two years, this sentence to begin at the expiration of the twenty year sentence. Defendant appealed

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

Wilson and Degraw, by David L. Wilson, Jr., for defendant appellant.

BRITT, Judge.

All of defendant's assignments of error relate to the felony charge, therefore, no question is presented with respect to the misdemeanor charge.

[1] Defendant first contends that the trial court gave an incomplete charge with respect to the four elements of assault with a deadly weapon with intent to kill inflicting serious injury. This contention has no merit.

The court charged the jury that the State must prove beyond a reasonable doubt that defendant (1) assaulted the victim, (2) with a deadly weapon, (3) with an intent to kill. At that point His Honor digressed momentarily to define "intent" to the jury, but following that digression, he properly charged as to all four elements of this crime, specifically including the fourth element of "inflicting serious injury." At most, this digression constituted a *lapsus linguae* which was immediately corrected in the instructions that followed. It has been held that a *lapsus linguae* in the instructions not called to the attention of the court will not be held prejudicial error when it is apparent from the record that the jury could not have been misled thereby. *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). The court's charge to the jury is to be construed contextually and will not be held prejudicial when the charge as a whole is free from error. We think the charge more than adequately instructed the jury on all of the elements of the crime charged in the bill of indictment.

[2] Defendant's second contention is that the trial court erred in failing to accept and enter the verdict as returned by the jury foreman. This contention is also without merit.

On the felony charge, the court instructed the jury to return a verdict of (1) guilty of assault with a deadly weapon

with intent to kill inflicting serious injury, (2) guilty of assault with a deadly weapon inflicting serious injury, or (3) not guilty.

The series of events that transpired must be scrutinized for an understanding of the question presented. After beginning their deliberations, the jury returned to open court with a question:

> "FOREMAN: We would like for you to clarify the assault with a deadly weapon with intent to kill, the difference between that and assault with a deadly weapon causing bodily injury.
>
> "COURT: Well, really, the difference between—he is charged with an assault with a deadly weapon with intent to kill inflicting serious injury in the bill of indictment, and the lesser charge is an assault with a deadly weapon inflicting serious injury which leaves out the element of intent to kill. So, the two are actually the same except for the intent to kill. Does that—give you—
>
> "FOREMAN: That settles my mind.
>
> "COURT: The elements are absolutely the same except for the lack of that one . . . ."

The jury then resumed their deliberations and upon returning into court, the following occurred:

> "CLERK: How say you find the defendant, Tyrone Ware, as charged in 75 Cr 37662, guilty of assault with a deadly weapon with intent to kill inflicting serious injury, guilty of assault with a deadly weapon inflicting serious injury, or not guilty?
>
> "FOREMAN: We find him guilty of assault with a deadly weapon with intent to kill.
>
> "CLERK: Inflicting serious injury?
>
> "FOREMAN: Yes.
>
> "CLERK: Is this your verdict, so say you all?"
> (affirmative indication)

Thereafter, each member of the jury was polled as to whether guilty of assault with a deadly weapon with intent to

kill inflicting serious injury was their verdict and whether they assented thereto. Each juror answered affirmatively.

Although obviously not the best procedure, we think the clerk's inquiry of the jury was permissible in the present case. *State v. May,* 22 N.C. App. 71, 205 S.E. 2d 355 (1974). In *Davis v. State,* 273 N.C. 533, 538, 160 S.E. 2d 697, 702 (1968), the Supreme Court stated: "In accepting or refusing a verdict the trial judge cannot exercise unrestrained discretion. The trial judge should examine a verdict with respect to its form and substance to prevent a doubtful and insufficient verdict from becoming the record of the court, but his power to accept or refuse the jury's finding is not absolute. (Citations omitted.) It is well settled in this jurisdiction that the verdict should be taken in conjunction with the issue being tried, the evidence, and the charge of the court. . . ."

The uncontradicted evidence in this case shows that the victim was shot four times and is now paralyzed from the waist down. Based on this evidence the trial court correctly submitted the possible verdicts of guilty of assault with a deadly weapon with intent to kill inflicting serious injury, guilty of assault with a deadly weapon inflicting serious injury and not guilty. The trial court's final instructions to the jury, in response to their question, emphasized that the only difference between the varying degrees of assault charged upon was the "intent to kill." In light of the plenary evidence presented and the charge to the jury, we think that the foreman's initial statement was both nonresponsive and insensible to the issues presented.

The better procedure to be followed in this situation is well stated in *State v. Perry,* 225 N.C. 174, 176, 33 S.E. 2d 869, 870 (1945), that: "When, and only when, an incomplete, imperfect, insensible, or repugant verdict or a verdict which is not responsive to the issues or indictment is returned, the court may decline to accept it and direct the jury to retire, reconsider the matter, and bring in a proper verdict." Nevertheless, we think the clerk's inquiry in this case was proper to clarify the jury's response relating to the court's charge. A jury pronouncement is not a verdict until accepted by the court. *State v. Rhinehart,* 267 N.C. 470, 148 S.E. 2d 651 (1966). The verdict accepted by the trial court in this case was guilty of assault with a deadly weapon with intent to kill inflicting serious injury.

Verdicts in criminal cases ought to be clear and free from ambiguities and uncertainties. *Davis v. State, supra.* We think the foreman's pronouncement in response to the submitted verdicts was uncertain and nonresponsive. That uncertainty was completely removed by the polling of the jury and their answers to the court upon polling. Any error, which we do not admit, was cured by the polling.

As stated in *State v. Best,* 265 N.C. 477, 481, 144 S.E. 2d 416, 419 (1965), "[a] verdict, apparently ambiguous, 'may be given significance and correctly interpreted by reference to the allegations, the facts in evidence, and the instructions of the court.' (Citation omitted.) 'The verdict should be taken in connection with the charge of His Honor and the evidence in the case. . . .'" The charge of the trial court reflected the uncontradicted evidence of serious injury presented in this case. Moreover, the jury after beginning deliberations, returned to the court to ask the trial judge to clarify the two verdicts of assault upon which they had been charged. Both verdicts included the "inflicting of serious injury" and the trial court instructed that the only difference between those two verdicts was whether the defendant had an intent to kill. Therefore, when the jury foreman stated the pronouncement of guilty of assault with a deadly weapon with an intent to kill, the verdict was unresponsive to the issues submitted and the evidence presented. The clerk's inquiry was proper under the circumstances.

Defendant cites *State v. Burris,* 3 N.C. App. 35, 164 S.E. 2d 52 (1968), as authority for the proposition that the verdict as first stated by the jury foreman was complete, clear, and responsive. In that case, the defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury. The jury foreman announced a verdict of assault with a deadly weapon with intent to kill, whereupon, the clerk asked for clarification. Each member of the jury was polled and assented to a verdict of assault with a deadly weapon with intent to kill inflicting serious injury. That case is distinguishable from this case since the trial judge in *Burris* charged the jury that they could find the defendant guilty of assault with a deadly weapon with intent to kill or guilty of assault with a deadly weapon. Under those circumstances the verdict of assault with a deadly weapon with intent to kill was responsive to the court's instructions. In our case the jury foreman re-

sponded with a verdict upon which the jury was not charged and which was unresponsive and uncertain in light of the evidence presented.

The facts presented in *State v. Robinson,* 13 N.C. App. 628, 186 S.E. 2d 593 (1972), are also distinguishable. In that case the jury was instructed that they could return one of three possible verdicts: guilty of assault with a deadly weapon with intent to kill inflicting serious injury, guilty of an assault with a firearm inflicting serious injury, or not guilty. The following transpired:

> "THE JURY FOREMAN: We find him guilty with intent to kill.
>
> "THE COURT: Do you find him guilty of assault with a deadly weapon with intent to kill, in that language?
>
> "THE JURY FOREMAN: Yes.
>
> "THE COURT: Is that the verdict of all of you so say you all?
>
> "THE JURY: Yes, sir."

The court then recited that the jury had found defendant guilty of an assault with a deadly weapon with intent to kill *inflicting serious injury* and imposed a prison sentence of five years. Apparently, the trial judge felt that the original verdict was nonresponsive to the charges and sought clarification. Nevertheless, when His Honor inquired of the jury as to their verdict, he left off the words "inflicting serious injury." In fact, the jury never assented to the words "inflicting serious injury" as being part of their verdict. This court held that by leaving off the words "inflicting serious injury" the jury had found defendant guilty of assault with a deadly weapon with intent to kill and therefore defendant was improperly sentenced. In this case, the clerk sought clarification of the jury's verdict and properly included the words "inflicting serious injury" to which the jury assented and were individually polled. We do not think that the clerk's inquiry was suggestive, but rather was a proper inquiry to an unresponsive verdict.

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

No error.

Judges VAUGHN and MARTIN concur.

E. ALEXANDER STEVENSON, JR. v. NORTH CAROLINA DEPARTMENT OF INSURANCE AND JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE

No. 7610SC680

(Filed 3 November 1976)

1. **Administrative Law § 5— decisions of State Personnel Commission — judicial review**

Decisions of the State Personnel Commission are subject to judicial review under Article 4, Ch. 150A of the Administrative Procedure Act once the aggrieved person has exhausted all administrative remedies made available to him by a statute or agency rule.

2. **Administrative Law § 5; Injunctions § 11— dismissal of State employee — stay order prior to exhaustion of administrative remedies**

The superior court had no authority under G.S. 150A-48 to enter a stay order of a State employee's dismissal before the exhaustion of the employee's administrative remedies before the State Personnel Commission.

3. **Administrative Law § 4— appeal to State Personnel Commission — delay of decision — court order compelling action**

If a decision by the State Personnel Commission on a State employee's appeal of his dismissal has been unduly delayed, the employee may seek a court order under G.S. 150A-44 compelling action by the Commission.

Judge CLARK concurring.

ON *writ of certiorari* to review the orders of *Smith, Judge,* entered 16 July 1976 and 27 July 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 14 October 1976.

Allegations of plaintiff's complaint, filed 16 July 1976, are summarized in pertinent part as follows:

Defendant Department of Insurance (department) is an agency of the State of North Carolina as defined by G.S. 150A-2(1), and is subject to the provisions of the Administrative Procedure Act, G.S. Chapter 150A. Defendant Ingram is the chief officer of the department, with general power, subject to the provisions of the State Personnel Act, G.S. Chapter 126, and other limitations of law, to hire and fire department employees.

Plaintiff was employed by the department from 1966 through 2 June 1976, his last position being classified "Insurance Company Examiner I." On or about 27 May 1976 plaintiff

was summoned before defendant Ingram and was accused of misconduct in connection with his employment, namely, making false statements about his supervisor. Plaintiff denies that he ever knowingly made any false statement about his supervisor or any other employee of the department.

On 2 June 1976 plaintiff received from the budget and personnel officer of the department written notice of termination of his employment. The notice stated the following as the sole reason for his dismissal:

> "Gross misconduct and conduct unbecoming a State employee by making a false statement about your immediate supervisor and participation in an action that seriously disrupted the normal operation of the Department of Insurance."

Plaintiff denies that his conversation with any employee of the department resulted in any disruption in the normal operations of the department.

Plaintiff, as a permanent employee of the department, was and is, under G.S. 126-5(a), subject to the provisions and protections of the State Personnel Act. Under G.S. 126-35 a permanent employee subject to said act shall not be discharged except for "JUST CAUSE." On 16 July 1976 plaintiff, through his attorney, gave notice to the department of his intention to appeal his dismissal and requested immediate reinstatement.

Under G.S. 126-4(9) the State Personnel Commission (commission) has jurisdiction to hear appeals concerning dismissal of employees subject to the State Personnel Act. Pursuant to authority granted by G.S. 126-4(6) the commission has adopted policies and rules governing the appointment, promotion, transfer, demotion, suspension and termination of State employees.

The departmental action dismissing plaintiff from his employment was not in compliance with the rules adopted by the commission and was therefore unlawful. Plaintiff is a person aggrieved within the meaning of G.S. 150A-2(6).

Plaintiff's appeal has not been scheduled for hearing by the commission and he is informed and believes that a substantial period of time will elapse before a hearing is scheduled and a decision is rendered. Since 2 June 1976 plaintiff has made efforts to obtain other employment but without success;

he has had no source of income since 1 July 1976 sufficient to meet the expenses of maintaining his home and supporting his family.

There is no statutory procedure other than that provided by G.S. 150A-48 by which plaintiff can obtain review of the departmental action terminating his employment prior to the setting of a hearing by the State Personnel Commission.

Plaintiff asked that the court issue a restraining order and an injunction staying the operation of the department's decision terminating his employment, pending final review of his appeal under the provisions of the Administrative Procedure Act.

On 16 July 1976 Judge Smith issued an order temporarily staying the decision terminating plaintiff's employment, ordering his reinstatement and directing that defendants appear on 26 July 1976 and show cause why the stay order should not be continued.

A hearing was conducted on 26 July 1976. Based on plaintiff's verified complaint and affidavits presented by defendants the court entered an order making findings of fact and conclusions of law and granting a preliminary injunction staying the order of the department pending the outcome of plaintiff's appeal under the Personnel Act and the Administrative Procedure Act. The court ordered that plaintiff be reinstated to a position comparable to that held prior to 2 June 1976 with full pay and benefits as of 16 July 1976.

Defendants objected and excepted to the orders entered by Judge Smith and their application to this court for a writ of certiorari to review said orders was allowed.

Bailey, Dixon, Wooten, McDonald & Fountain, by J. Ruffin Bailey, Ralph McDonald and Richard G. Chaney, for plaintiff appellee.

Attorney General Edmisten, by Special Deputy Attorney General T. Buie Costen, for defendant appellants.

BRITT, Judge.

Defendants contend first that the superior court had no authority to enter a stay order of plaintiff's dismissal before

the exhaustion of his administrative remedies before the State Personnel Commission. We agree with this contention.

Under G.S. 126-35 of our State Personnel Act, ". . . [t]he employee, if he is not satisfied with the final decision of the head of the department, or if he is unable, within a reasonable period of time, to obtain a final decision by the head of the department, may appeal to the State Personnel Commission." By virtue of G.S. 126-4(9) the commission's authority now includes "the investigation of complaints and the hearing of appeals of applicants, employees, and former employees and the issuing of such binding corrective orders or such other appropriate action concerning employment, promotion, demotion, transfer, discharge, and reinstatement in all cases as the Commission shall find justified."

[1] Under G.S. 126-43 the provisions of the Administrative Procedure Act, Chapter 150A, apply to the State Personnel System and hearing and appeal matters before the State Personnel Commission. Therefore, final agency decisions of the commission are subject to judicial review under Article 4, Chapter 150A of the Administrative Procedure Act once the aggrieved person has exhausted all available administrative remedies made available to him by statute or agency rule.

[2] In the present case, plaintiff is in the process of exhausting his administrative remedies by appealing his dismissal to the commission. He is not seeking "judicial review" at this time nor would it be appropriate since he has not exhausted his administrative remedies as required by statute. Nevertheless, he contends that Judge Smith's orders were proper pending the outcome of final review of plaintiff's appeal under the State Personnel Act and the Administrative Procedure Act. Plaintiff relies on G.S. 150A-48 which states that:

> "At any time before or during the review proceeding, the person aggrieved may apply to the reviewing court for an order staying the operation of the agency decision pending the outcome of the review. The court may grant or deny the stay in its discretion upon such terms as it deems proper and subject to the provisions of G.S. 1A-1, Rule 65."

Although we recognize the vagueness of the quoted statute, we feel that taken in its proper context, it authorizes a stay order only of those final agency decisions in which the per-

son aggrieved has exhausted his administrative remedies. G.S. 150A-48 must be construed *in pari materia* with the rest of Article 4, Chapter 150A, entitled "Judicial Review," and particularly G.S. 150A-43 which states that "[a]ny person who is aggrieved by a final agency decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of such decision under this Article . . . ."

[3] We think that G.S. 150A-48 was meant to entitle the aggrieved person to a stay order only after the final agency decision and either before or after the initiation of judicial review. Final agency decisions should be rendered after a hearing held without undue delay under G.S. 150A-23. G.S. 150A-44 provides that "[u]nreasonable delay on the part of any agency in reaching a final decision shall be justification for any person whose rights, duties, or privileges are adversely affected by such delay to seek a court order compelling action by the agency." In the present case, this right may be asserted to prevent unreasonable delay in reaching a final agency decision but we do not think the superior court had authority to enter a stay order respecting plaintiff's dismissal pending final administrative review. *King v. Baldwin,* 276 N.C. 316, 172 S.E. 2d 12 (1970).

In view of our holding that the superior court did not have authority to enter the orders appealed from, we find it unnecessary to discuss and pass upon the other contentions argued in defendants' brief.

For the reasons stated, the orders appealed from are

Reversed.

Judges PARKER and CLARK concur.

Judge CLARK concurring:

I concur in the result, and I agree that in the ordinary case injunctive relief should not be granted before the employee has exhausted his administrative remedy. The majority, in "holding that the superior court did not have *authority* to enter the orders," is apparently ruling that our courts under no circumstances have jurisdiction or authority to grant injunctive relief to an employee before administrative relief under the

Personnel Act and Administrative Procedure Act has been exhausted. In my opinion there may be extraordinary circumstances where the administrative remedy is so inadequate and the damage so irreparable that the courts should protect the rights of an employee by the use of its equity jurisdiction in granting an injunction before administrative remedy is exhausted.

HARRY LANIER, ADMINISTRATOR OF THE ESTATE OF THEODOCIA LANIER v. NORTH CAROLINA STATE HIGHWAY COMMISSION

No. 762IC384

(Filed 3 November 1976)

1. **Negligence § 60— deceased as trespasser — defendant's duty toward**

In a wrongful death action where plaintiff claimed that his intestate drowned in a pit negligently maintained by defendant, deceased, who was at the site without invitation or license from defendant, was a trespasser to whom the defendant owed the duty not to injure wilfully or wantonly.

2. **Negligence § 51— attractive nuisance — required elements**

Generally, the attractive nuisance doctrine is applicable when, and only when, the following elements are present: (1) the instrumentality or condition must be dangerous in itself; (2) it must be attractive and enticing to young children; (3) the children must be incapable, by reason of their youth, of comprehending the danger involved; (4) the instrumentality or condition must be left unguarded and exposed at a place where children of tender years are accustomed to resort or where it is reasonably to be expected that they will resort; (5) it must be reasonably practical either to prevent access to the instrumentality or else render it innocuous without obstructing any reasonable purpose or use for which it was intended.

3. **Negligence § 51— body of water — no attractive nuisance per se — presence of sharp drops and holes — no exception to rule**

In a wrongful death action where plaintiff claimed that his intestate drowned when she stepped from shallow water into deep water in a pit maintained by defendant, the presence of sharp drops and deep holes in the pit did not bring this case within an exception to the rule that bodies of water do not *per se* constitute attractive nuisances, since every body of water is potentially subject to sharp drops and deep holes; moreover, the possible danger of drop offs and holes was, or should have been, known to claimant's intestate.

4. Negligence § 51— 14 year old drowning in pit — attractive nuisance doctrine inapplicable

In an action for wrongful death where plaintiff's intestate, a 13 or 14 year old of at least average intelligence, drowned in a pit maintained by defendant, the doctrine of attractive nuisance was inapplicable, since that doctrine applies only to children who, because of their youth, do not discover the condition or realize the risk involved in intermeddling with it. The doctrine does not extend to those conditions the existence of which is obvious even to children and the risk of which is fully realized by them.

APPEAL by claimant from order of North Carolina Industrial Commission. Order entered by Commission, sitting in full, on 3 November 1975. Heard in the Court of Appeals 16 September 1976.

This action arose as a wrongful death claim filed on 4 May 1973 by Harry Lanier (hereinafter called "claimant") as administrator of the estate of Theodocia Lanier against the North Carolina State Highway Commission (hereinafter called "Commission") for the negligence of D. W. Patrick, a Division Engineer for the Commission. In the affidavit that formed the basis of his claim, claimant stated under oath that

> "The death of Theodocia Lanier upon which this claim is based occurred on July 9, 1971, in Martin County, North Carolina. The claim arises out of the death by drowning of Theodocia Lanier, age 14, on the above-mentioned date at a sand pit located about one mile off U. S. 64, three and one-half miles east of Williamston in Martin County.
>
> The pit in question was constructed by the State Highway Commission (Project No. 6.092073) pursuant to an agreement entered into between the Commission and Harry Lanier and wife, Thelma M. Lanier; Rose Bolden; Cheldon Lanier and wife, Frances Lanier, which provided that the Highway Commission could enter on the lands of the above-named persons for the purpose of excavating and removing such material therefrom as it may find suitable for the construction and for maintenance of public roads.
>
> Pursuant to the agreement, large quantities of sand were removed from the land in question. Ultimately, a large pit filled with water. The pond was, on the date in question, L-shaped, and approximately 500 feet long and 50 feet in width. The pond ranged in depth from shallow to some 12 feet in depth at other points.

> On July 9, 1971, Theodocia Lanier, in the company of Emma Scott, age 11, and Leslye (sic) King, then age 11, were wading in a shallow portion of the pond on a sandbar just off the point of the instep of the "L" in the pond. Theodocia Lanier and Emma Scott slipped off the sandbar and into water approximately 10-12 feet in depth. As a result, both girls lost their lives by accidental drowning.
>
> The pit in question was open, unguarded in any manner and near the road. For a substantial period of time children of all ages had frequented the pit playing in and near the water. As such, the pond constituted and was known to the employees of respondent to constitute an attractive nuisance to children. Respondent was negligent in constructing the pit with an extremely uneven bottom which greatly increased the possibility of an accidental death by drowning should a child playing in the pit step off into a deep area. It was foreseeable at the time of construction that the pit, being located over an underground natural spring, would rapidly fill with water."

The Commission filed an "Answer, Demurrer or Other Pleading of Defendant to Plaintiff's Affidavit," in which it raised a number of defenses. The defense pertinent to this appeal is as follows:

> "As a Sixth Further Answer and Defense, the defendant says and alleges that the deceased, as a trespasser to the defendant, was only owed a duty not to be willfully or wantonly injured, which is not alleged, and that the attractive nuisance doctrine would not apply to the deceased."

On 4 March 1975, the claim was heard before Deputy Commissioner W. C. Delbridge. Claimant's evidence tended to show that the pit in question was located on land in Martin County leased by the Commission which had permission to excavate and remove sand, gravel and other materials from the land. Beginning in 1969, the Commission extracted soil from the land which resulted in water collecting in the pit. Local residents, including deceased's father, saw area children swimming in the pit in the summer of 1971, although her father testified that he was not aware his daughter swam there and that he had never warned his children to stay away from the pit. Deceased's father constructed a cable across the road which led to the pit while his family conducted negotiations for compensation by

the Commission, but he never erected warning signs near the entranceway. Three witnesses testified that there were no warning signs near the pit prior to the date of the drowning.

On 9 July 1971, Theodocia Lanier and Emma Scott suggested to their companion, Leslie Lane King, that they go swimming in the pit. They waded in the shallow end of the pit where the water came up to their knees. Theodocia said, "This is the way my brother and them used to ride piggy-back, like this," whereupon one began to "ride" on the other's back. While in this position, they apparently walked off the shallow sandbar and fell into the deep water. Both girls drowned. Theodocia was 13 years old at the time of her death. Her father testified that "[s]he was average. She appeared to be intelligent." Her mother stated that ". . . she was intelligent. Just like an ordinary child was her understanding of right and wrong and the thing around her" while her brother testified "[s]he was intelligent. She was average in school."

The Commission introduced evidence which tended to show that the Commission had entered into an agreement in May 1969, which provided for a 15-year lease of the property in question. A dispute over the compensation arose, and the final lease was not completed until December 1975. Pursuant to the preliminary agreement of May 1969, the Commission began excavating soil from the property. In accordance with its standard procedure, the Commission placed signs reading "STATE HIGHWAY COMMISSION LEASED PROPERTY—KEEP OFF" near the pit in question in May, 1969. From time to time, the signs were taken, whereupon the Commission replaced them. William Sessoms, a District Engineer with the Commission at the time of the drowning, testified that he visited the pit on the Monday following the accident and that he saw "Keep Off" signs on each side of the driveway leading to the pit. W. E. Moore, then a District Engineer for the Commission, testified on cross-examination that "It never occurred to me people were using the pit. We have built many pits similar to this. I have heard that others have been used as swimming pools. . . . I am familiar with the fact that people use pits as swimming holes." M. S. Raynor, an Area Foreman for the Commission, testified he was aware that children "use 'em for swimming holes. I have heard of this before."

On 19 June 1975, the Deputy Commissioner filed a "Decision and Order" in the matter which contained the following findings of fact and conclusions of law:

"FINDINGS OF FACT

1. This action was filed on May 4, 1973, by the plaintiff, Harry Lanier, as the Administrator of the Estate of Theodocia Lanier, against the State Highway Commission for damages as a result of the death of plaintiff's intestate by drowning.

2. D. W. Patrick was the Division Engineer of this area of the State and a regular employee of the State Highway Commission.

3. On July 9, 1971, Theodocia Lanier, age 14; Emma Scott, age 11, and Leslie Lane King, age 11, went wading in an excavation area with standing water. Both Theodocia Lanier and Emma Scott waded a few yards into the water, slipped off a sandbar into a drop-off, and drowned.

4. The land on which the excavation was located was owned by several brothers and sisters including plaintiff. It was leased on May 3, 1969, by the State Highway Commission for fifteen years for the purpose of excavating sand for use by the defendant. The defendant had erected poles at the entrance with a sign on each pole which read: 'State Highway Commission Leased Property—Keep Off.'

5. The defendant began the excavation of the land in May 1969, but was not working the area for the few months surrounding the unfortunate drownings since there was a disagreement about payment, and the area foreman advised his workmen that they were denied entry.

6. Nevertheless during this entire period of time from the lease of the property until at least Monday after the accident on Friday various Highway Commission personnel including M. S. Raynor, the area foreman; and William Sessoms, then District Engineer, rode by the excavation site on numerous occasions and never saw children playing in the water, nor did any Highway Commission personnel receive complaints of children using the area for swimming.

7. Children did on occasions use the area for swimming, but there is no evidence that anyone ever advised the High-

way Commission of this, nor is there any evidence that Highway Commission personnel traveled the area when children were swimming.

8. The plaintiff had seen one of his sons using the excavation site for swimming but had not told that son, his deceased daughter, or other of his children not to swim at the site.

9. The defendant Highway Commission had no notice either actual or constructive that children were swimming at the excavation site.

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

CONCLUSIONS OF LAW

1. There was no negligence on the part of employees of the defendant which led to the unfortunate death of plaintiff's intestate. G.S. 143-291, et seq.

2. As stated by the Supreme Court in a per curiam opinion, 'A person has the right to maintain an unenclosed pond or pool on his premises. It is not an act of negligence to do so.' BURNS v. GARDNER, 244 N.C. 602. As in McLEAN v. WARD, 1 N.C. App. 572, there is evidence that the lessor, Highway Commission, through its agents, was at the site, and there is evidence that the children used the area for swimming. These did not occur simultaneously, and there is insufficient evidence therefore to put the defendant on notice of a potential attractive nuisance.

Based upon the foregoing findings of fact and conclusions of law, the undersigned enters the following

ORDER

1. Plaintiff's claim is hereby DENIED, and the action is DISMISSED."

On 8 July 1975, claimant filed an application for review of the case by the North Carolina Industrial Commission sitting in full. On 3 November 1975, the Full Commission entered a "Decision and Order" which stated, inter alia, that

"Based upon the evidence of record, the Full Commission hereby AFFIRMS and adopts as its own the Decision and

Order of Deputy Commissioner W. C. Delbridge in its entirety.

There is no evidence of any overtly negligent conduct on the part of employees of the defendant. Nor is the doctrine of attractive nuisance applicable to the facts of this case. . . . ."

Claimant appeals from this order.

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

Milton E. Moore for claimant appellant.

MORRIS, Judge.

In his sole assignment of error, claimant contends that the Commission erred in its failure to find, as a matter of law, that the pit in question was an attractive nuisance. In reviewing an order of the Industrial Commission, we are guided by the principle that the order will stand if its findings of fact are supported by competent evidence and if its conclusions of law are supported by the findings of fact. *Tanner v. Dept. of Correction,* 19 N.C. App. 689, 200 S.E. 2d 350 (1973).

[1, 2] At the time of the drowning, deceased was at the excavation site without invitation or license from the Commission. As such, she was a trespasser, to whom the Commission owed only the duty not to injure her willfully or wantonly. *Dean v. Construction Co.,* 251 N.C. 581, 111 S.E. 2d 827 (1960); *McLamb v. Jones,* 23 N.C. App. 670, 209 S.E. 2d 854 (1974). The attractive nuisance doctrine, however, represents an exception to the general rule regarding the liability of landowners for injuries sustained on the premises by trespassers. This Court has stated:

"Generally, the attractive nuisance doctrine is applicable when, and only when, the following elements are present: (1) The instrumentality or condition must be dangerous in itself, that is, it must be an agency which is likely to, or probably will, result in injury to those attracted by, and coming into contact with, it. (2) It must be attractive and alluring, or enticing, to young children. (3) The children must have been incapable, by reason of their youth, of comprehending the danger involved. (4) The instrumen-

> tality or condition must have been left unguarded and exposed at a place where children of tender years are accustomed to resort, or where it is reasonably to be expected that they will resort for play or amusement, or for the gratification of youthful curiosity. (5) It must have been reasonably practicable and feasible either to prevent access to the instrumentality or condition, or else to render it innocuous, without obstructing any reasonable purpose or use for which it was intended." *McCombs v. City of Asheboro,* 6 N.C. App. 234, 242-43, 170 S.E. 2d 169 (1969), citing 65 C.J.S., Negligence, § 63(76), p. 815.

[3] North Carolina has consistently ruled that ponds, pools, lakes, streams, reservoirs, and other bodies of water do not *per se* constitute attractive nuisances. *Matheny v. Mills Corp.,* 249 N.C. 575, 107 S.E. 2d 143 (1959); *Stribbling v. Lamm,* 239 N.C. 529, 80 S.E. 2d 270 (1954); *Fitch v. Selwyn Village,* 234 N.C. 632, 68 S.E. 2d 255 (1951). Claimant recognizes the general rule but argues that the presence of the sharp drops and deep holes in the pit bring this case within an exception to the rule. We cannot agree. Every body of water is potentially subject to sharp drops and deep holes such as existed in this case. This possible danger was, or should have been, known to claimant's intestate.

[4] There is an additional reason that the attractive nuisance doctrine is not applicable in this case. In *Dean v. Construction Co., supra,* at 588, Bobbitt, Judge, stated:

> "[T]he attractive nuisance doctrine is designed to protect 'small children' or 'children of tender age'. 38 Am. Jur., Negligence § 157. It applies to children who, 'because of their youth do not discover the condition or realize the risk involved in intermeddling in it or coming within the area made dangerous by it.' Restatement of the Law of Torts, § 339(c). *'It does not extend to those conditions the existence of which is obvious even to children and the risk of which is fully realized by them.'* Restatement of the Law of Torts, § 339, Comment, p. 922." (Emphasis supplied.)

And in *Briscoe v. Lighting & Power Co.,* 148 N.C. 396, 414, 62 S.E. 600 (1908), it was said that " . . . in the numerous cases which we have examined we do not find any in which a boy of thirteen years, 'with the usual intelligence of boys of that age,'

has been permitted to rely upon the attractive allurement of machinery to children." Here, the testimony indicated that claimants' intestate was 13 or 14 years old and that she possessed at least average intelligence. Accordingly, the doctrine of attractive nuisance is inappropriate in this case.

Having reviewed the entire record we hold that the Industrial Commission's findings of fact were supported by competent evidence and that its conclusions are supported by its findings and by sound legal principles. Therefore, the order of the Full Commission is

Affirmed.

Judges HEDRICK and ARNOLD concur.

BRYON ALLEN BULLARD, JR., MINOR, BY HIS GUARDIAN AD LITEM, BRYON ALLEN BULLARD v. NORTH CAROLINA NATIONAL BANK, EXECUTOR OF THE ESTATE OF WILLIAM D. WRIGHT, DECEASED, PHILLIPS J. CARTER, M.D., AND GREENSBORO ORTHOPEDIC ASSOCIATES, P.A.

No. 7618SC352

(Filed 3 November 1976)

1. **Jury § 1; Rules of Civil Procedure § 39— belated motion for jury trial — discretion of court**

The trial court did not abuse its discretion in granting defendants' motion for a jury trial made some two years and ten months after the time for requesting a jury trial under G.S. 1A-1, Rule 38(b) had expired. G.S. 1A-1, Rule 39(b).

2. **Evidence § 50; Physicians, Surgeons and Allied Professions § 15— practice in "similar communities"**

The trial court properly allowed defendants' medical experts to answer hypothetical questions as to whether treatment of a compound fracture administered by defendant doctors was in conformity with approved medical practices "in this community and similar communities."

3. **Evidence § 50; Physicians, Surgeons, and Allied Professions § 15— expert medical testimony — hypothetical questions — inclusion of opinion of another doctor**

The trial court did not err in allowing expert medical witnesses to answer hypothetical questions that included, as facts assumed to be found by the jury, the opinion of another physician since the opin-

ion of the other physician was considered by defendant doctor in determining his course of treatment of plaintiff and was properly considered by the expert witnesses in stating their opinions as to whether the treatment rendered by defendant conformed to approved medical practices and procedures.

4. **Evidence § 50; Physicians, Surgeons and Allied Professions § 15— expert medical testimony — hypothetical questions — responses that treatment "appropriate" or "good medical care"**

The trial court did not err in allowing expert medical witnesses to use expressions such as "entirely appropriate" and "good medical care" in responding to hypothetical questions as to whether treatment rendered by defendant doctors conformed to approved medical practices and procedures since, when considered in context, the responses meant that defendants' treatment did conform to such practices and were so understood by the jury.

5. **Appeal and Error § 49— exclusion of portions of depositions — harmless error**

The trial court did not commit prejudicial error in excluding portions of the depositions of defendant doctor and his medical witness where evidence of the same import was placed before the jury and part of the excluded evidence was the result of improper hypothetical questions.

6. **Physicians, Surgeons and Allied Professions § 16— action against professional association — no negligence by doctors — respondeat superior**

A jury verdict of no liability on the part of defendant doctors rendered moot any question of error by the court in directing a verdict for a professional association of which the doctors were members where plaintiff alleged no independent wrongful acts on the part of the professional association and its liability could have been based only upon the doctrine of respondeat superior.

APPEAL from *Walker, Judge.* Judgment entered 10 October 1975 in Superior Court, GUILFORD County. Heard in Court of Appeals 2 September 1976.

This is a civil action wherein the plaintff, Bryon Allen Bullard, Jr., seeks to recover damages for personal injuries allegedly resulting from defendants' negligence in the treatment and care of his broken arm.

The evidence offered at trial tends to show the following:

On 21 August 1971 plaintiff, age 4, fell from a swing and suffered a compound fracture of the left forearm. He was taken to the emergency room of Wesley Long Hospital where

he was treated by defendant Dr. William D. Wright,* admitted to the hospital, and subsequently released on 23 August 1971.

The next day, 24 August 1971, the plaintiff's parents became concerned because he remained irritable and appeared to lose the feeling in his fingers. About 9:00 p.m. they contacted defendant Dr. Phillips J. Carter, Dr. Wright's associate at Greensboro Orthopedic Associates, P.A., who was taking Dr. Wright's calls. After being told the plaintiff's symptoms, Dr. Carter told his parents that there was no immediate emergency, but they should return him to Dr. Wright the next morning.

The following morning, 25 August 1971, the plaintiff's fingers had turned blue, and his mother called Dr. Wright between 7:00 and 7:30 a.m. Dr. Wright saw the plaintiff at his office at 9:00 a.m., diagonsed the problem as circulation impairment caused by a tightcast, and readmitted him to the hospital. Upon readmission to the hospital, the cast was completely removed, but the color and the swelling of plaintiff's fingers did not improve, and he remained feverish.

Around 6:30 p.m. Dr. Wright determined that exploratory surgery was necessary, and after the surgery was performed, he suspected a gangrene infection. He administered antitoxins and antibiotics in an attempt to prevent the infection from spreading. Plaintiff's arm was amputated above the elbow at 3:00 p.m. on 26 August 1971.

At the close of plaintiff's evidence the court directed a verdict for the defendant Greensboro Orthopedic Associates, P.A. The jury found no negligence on the part of either Dr. Wright or Dr. Carter. Plaintiff appealed.

Dees, Johnson, Tart, Giles & Tedder by J. Sam Johnson, Jr., and Charles M. Tate for plaintiff appellant.

Henson & Donahue by Perry C. Henson and Richard L. Vanore for defendant appellees.

HEDRICK, Judge.

[1] Plaintiff contends the court erred in granting defendants' motion for a jury trial made some two years and ten months

* Subsequent to the commencement of this action, Dr. Wright died and North Carolina National Bank, executor of his estate, was substituted as a party defendant.

after the time for requesting a jury trial under G.S. 1A-1, Rule 38(b), had expired. The trial court has discretion to grant a jury trial under G.S. 1A-1, Rule 39(b) even though jury trial has been waived pursuant to G.S. 1A-1, Rule 38(b). *Shankle v. Shankle*, 289 N.C. 473, 223 S.E. 2d 380 (1976). Plaintiff has shown no abuse of discretion by the trial judge in granting defendants' motion for a jury trial.

[2] Plaintiff next contends the court erred by allowing into evidence answers to hypothetical questions asked by defendants of their expert witnesses as to whether the treatment administered by Drs. Wright and Carter was in conformity with approved medical practices "in this community and similar communities." Citing *Rucker v. Hospital*, 285 N.C. 519, 206 S.E. 2d 196 (1974), the plaintiff argues that the "similar locality" rule is no longer applicable in situations in which the particular medical problem confronting the physician lends itself to uniform standards of medical treatment without regard to locality. We do not agree. In *Rucker* the plaintiff alleged that the defendant doctor and the defendant hospital, an accredited hospital in High Point, were negligent in the treatment of his shotgun wound. Plaintiff's expert witness, a physician from Louisiana, testified that he was familiar with standards of practice and procedure in accredited hospitals and that such standards and procedures were essentially the same throughout the United States with regard to gunshot wounds. Even though plaintiff's expert was not familiar with that particular hospital or its staff, the Supreme Court held that the trial court erred in refusing to allow his testimony into evidence. *Rucker* simply stands for the proposition that all localities are similar with respect to standards of medical care when the particular medical problem lends itself to uniform standards of treatment, and that a physician familiar with those uniform standards is a qualified expert witness. Obviously defendants' witnesses whose testimony is challenged by this assignment of error were familiar with approved medical practices and procedures in the treatment of compound fractures, and the court did not err in allowing them to answer hypothetical questions that included the phrase, "in this community or similar communities."

[3] Citing *Ingram v. McCuiston*, 261 N.C. 392, 134 S.E. 2d 705 (1964), plaintiff contends the court erred in allowing two of defendants' expert witnesses to answer hypothetical questions that included, as facts assumed to be found by the jury,

the opinion of another physician. Plaintiff's contention has no merit. The witnesses were asked to assume that, "Dr. Lee was of the impression that there was vascular impairment in the left forearm secondary to fracture with swelling . . . . " Upon the plaintiff's readmission to the hospital on 25 August 1971, Dr. Wright consulted with Dr. Lee, a specialist in vascular surgery, who examined the plaintiff and reported back to Dr. Wright with the above quoted opinion. Thus Dr. Lee's opinion was one of the circumstances that confronted Dr. Wright and was properly considered by defendants' witnesses in stating their opinions as to whether the treatment rendered by Dr. Wright conformed to approved medical practices and procedures.

[4] In response to defendants' proper hypothetical questions as to whether the treatment rendered by Drs. Wright and Carter conformed to approved medical practices and procedures, defendants' expert witnesses characterized the treatment by such phrases as "entirely appropriate" and "good medical care." Plaintiff contends the court erred in allowing the witnesses to use these expressions in characterizing Drs. Wright's and Carter's treatment of the plaintiff because the legal test of medical negligence is not whether the treatment is "entirely appropriate" or "good," but whether the treatment is in conformity with approved medical practices and procedures. Plaintiff did not object to the use of these expressions or move to have them stricken from the record. Therefore, this assignment of error is not based upon a proper exception in the record. N. C. Rules of Appellate Procedure, 10(b), 287 N.C. 669, 699 (App. 1975). Nevertheless, considering plaintiff's contention on the merits, we find no prejudicial error in the use of such expressions since when considered in context, the responses were synonymous to "approved medical practices and procedures" and were so understood by the jury.

[5] The depositions of Dr. Wright and Dr. Samuel A. Sue, Jr., a partner of Dr. Wright in the Greensboro Orthopedic Associates, P.A., were offered into evidence at trial by the plaintiff. Portions of these depositions were excluded by the court upon defendants' objections. Assignments of error 2 and 4, based upon numeous exceptions in the record, relate to the portions of the depositions excluded. We find no prejudicial error in the several rulings challenged by these exceptions. The excluded portions of Dr. Wright's deposition related to whether Dr. Wright agreed with statements taken from an unidentified medical

treatise. The excluded questions attempted to elicit from Dr. Wright on adverse examination medical standards in the treatment of compound fractures. Assuming *arguendo* that some of the excluded testimony was proper, we perceive no prejudicial error since there was plenary evidence in the record before the jury establishing the same approved medical practices in the treatment of compound fractures as plaintiff was attempting to establish by the excluded testimony. *Reeves v. Hill,* 272 N.C. 352, 158 S.E. 2d 529 (1968); *State v. Forehand,* 17 N.C. App. 287, 194 S.E. 2d 157 (1973). Moreover practically all of the substance of the excluded testimony of Dr. Sue challenged by these exceptions was testified to by Dr. Sue himself in other portions of his deposition which were not excluded from evidence. In addition the evidence was properly excluded as responses to improper hypothetical questions.

Plaintiff assigns as error several other evidentiary rulings of the court. We have carefully examined each contention and find them to be without merit.

[6] By his sixth assignment of error plaintiff contends the court erred in directing a verdict for the defendant Greensboro Orthopedic Associates, P.A. Since plaintiff alleged no independent wrongful acts on the part of the defendant corporation, its liability could be based only upon the doctrine of respondeat superior. The jury verdict of no liability on the part of the agent doctors also relieved the principal corporation of any liability, and renders moot any question of error by the court in directing a verdict for the defendant corporation.

Finally plaintiff contends the court erred in portions of its instructions to the jury. Some of the exceptions merely raise again questions already discussed. We have carefully examined all exceptions challenging the court's instructions to the jury and find no prejudicial error.

The voluminous record before us depicts a tragic situation which has left the plaintiff with a major permanent physical impairment, but the jury has determined that this tragedy did not result from the actionable negligence of the defendants in a fair trial we find free from prejudicial error.

No error.

Judges MORRIS and ARNOLD concur.

STATE OF NORTH CAROLINA v. DAVID LAMONT VINSON

No. 768SC408

(Filed 3 November 1976)

1. **Constitutional Law § 31— identity of unnamed informant — disclosure not required**

In a prosecution for felonious possession of heroin with intent to sell, the trial court did not err in denying defendant's motion for disclosure of the identity of an unnamed informant who introduced defendant and an SBI agent where the record revealed that defendant was acquainted with the unidentified informant prior to the sale to the SBI agent, the informant was not present when the transfer occurred, and the evidence which was used to convict defendant did not rely on facts provided by the informer; in short, the unnamed individual was not a "participant" in the crime within the meaning of *McLawhorn v. State of N. C.*, 484 F. 2d 1 and *Roviaro v. U. S.*, 353 U.S. 53.

2. **Criminal Law § 126— confusion as to verdict — questioning jurors by judge — no error**

Where there is confusion in the verdict of the jury, it is proper for the court to clarify and ascertain the verdict upon which all jurors agreed by questioning the jurors.

APPEAL by defendant from *Small, Judge.* Judgment entered 30 January 1976 in Superior Court, WAYNE County. Heard in the Court of Appeals 22 September 1976.

Defendant was indicted for the felonious possession of heroin, a Schedule I controlled substance, with the intent to sell and deliver in violation of G.S. 90-95(a)(1). The jury found defendant guilty, and he was sentenced to imprisonment for a term of five years.

At trial, the State's first witness was Frank Branch. He testified that he had been employed as an undercover agent for the State Bureau of Investigation in 1974. On 11 December 1974, he was working in this capacity in Wayne County where the alleged sale involving defendant took place. At approximately 7:00 p.m., Branch drove to Goldsboro where he met an unnamed male at a prearranged destination. The two men then proceeded to the Chestnut Manor Housing Development in Goldsboro where Branch first saw defendant. Branch was sitting in the front seat of the vehicle when defendant entered the car and got into the back seat. The unnamed male introduced defendant and Branch to each other, and they dis-

cussed the purchase of heroin. Defendant informed Branch that he could supply the heroin, whereupon the three proceeded to the Ravenwood Apartments, also in Goldsboro. When they arrived at Ravenwood, both defendant and the unnamed male got out of the car. Defendant entered the apartment complex where he remained for a short time, and the unnamed male went behind the vehicle and out of Branch's sight. In approximately 15 minutes, defendant returned to the car, opened the door, and handed Branch an aluminum foil package, and Branch gave defendant $300 in U. S. currency. After giving Branch the foil package, defendant again got into the rear seat. Throughout the entire transaction, the unnamed male was at such a distance as to be unable to see anything which transpired in the vehicle. After defendant re-entered the car, so did the unnamed male. The three men returned to the Chestnut Manor Housing Development where defendant got out of the car. Branch then proceeded to Kinston where he met S.B.I. Agent William H. Thompson. Branch placed the aluminum foil package in a marked envelope which he gave to Agent Thompson.

The State also offered the evidence of Ralph Cottrell, a former forensic chemist for the S.B.I. who testified that he had analyzed the substance in the foil package sent in by Branch and found it to contain 64.1% heroin. Agent Thompson also testified to corroborate Branch's account of the alleged sale of 11 December 1974.

Other relevant facts are set out in the opinion below.

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

Louis Jordan for defendant appellee.

MORRIS, Judge.

[1] At the close of State's evidence, defendant moved for the disclosure of the identity of the unnamed male who introduced defendant and Agent Branch. After receiving arguments the trial court denied the motion. In his first assignment of error, defendant claims this denial constituted prejudicial error and cites as authority for this position the cases of *Roviaro v. U. S.*, 353 U.S. 53, 1 L.Ed. 2d 639, 77 S.Ct. 623 (1957), and *McLawhorn v. State of North Carolina*, 484 F. 2d 1 (4th Cir. 1973).

In *Roviaro, supra,* the defendant was indicted on two counts of violating the Narcotic Drugs Import & Export Act by (1) having sold heroin to one "John Doe," and (2) transporting heroin knowing it to be unlawfully imported. The indictments arose out of a transaction between defendant and "John Doe" in which defendant rode with Doe to a spot in Chicago, got out of the car, went to a nearby tree, picked up a package containing heroin, and deposited it in the front seat of Doe's car. At trial, Roviaro moved for disclosure of John Doe's identity. The trial judge denied the motion, and the Seventh Circuit Court of Appeals affirmed the conviction. The Supreme Court reversed, holding that the failure of the lower court to order disclosure of John Doe's identity constituted prejudicial error. However, the Court stated:

> "We believe 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." 353 U.S. at 62.

In *McLawhorn v. State of North Carolina, supra,* an unidentified informant arranged a sale of cocaine between defendant and an undercover police officer. The informant remained present at all times throughout the transaction and did in fact join the police officer as one of the purchasers of the drug. Defendant sought unsuccessfully to have the informant's identity revealed at trial. The Fourth Circuit Court of Appeals reversed the conviction after reviewing the case law, including *Roviaro,* stating:

> " . . . It is important to determine those who have been treated by the courts as tipsters as distinguished from those labeled as 'participants'. In determining whether invocation of the privilege of nondisclosure is to be sustained a distinction has frequently been made based on the nature of the informant's activities, that is, whether the informant is an active participant in the offense or is a mere tipster who supplies a lead to law enforcement officers to be pursued in their investigation of crime. Ap-

plying this distinction, *disclosure of the informant's identity is required where the informant is an actual participant, particularly where he helps set up the criminal occurrence.*" 484 F. 2d at 5. (Emphasis supplied.)

In the present case, Agent Branch and the unidentified male drove to the Chestnut Manor area in Goldsboro. There they parked the car, and defendant entered the vehicle and got into the back seat. The informer introduced Branch and defendant who conversed about defendant's selling drugs to Branch. The three proceeded in Branch's car to the Ravenwood Apartments where both defendant and the informant got out of the car. While defendant entered an apartment to get the drugs, the informant stayed 20 to 30 yards behind the rear of the car. Defendant returned to the car, handed Branch the foil package and collected $300 as payment. Throughout the entire sales transaction, the informant was so removed as to be unable to see or hear anything which transpired between defendant and Branch. Only when the sale was completed did defendant return to the car. Thus, while the informant introduced defendant to Branch and was present while arrangements were made for the sale of the heroin, the informant's activity did not include participation in the sale which formed the basis of defendant's indictment.

We find the case of *State v. Cameron*, 283 N.C. 191, 195 S.E. 2d 481 (1973), to be particularly analogous to the present case. There, a policeman and an unnamed individual went to the residence of the defendant where the officer asked defendant if he had any heroin for sale. The defendant answered that he did have some heroin and left the room. Upon defendant's return, the heroin was exchanged for money. During the time the money and drugs were being exchanged, the unnamed individual who accompanied the policeman to defendant's residence was not present in the room. Our Supreme Court held that it was not error for the trial judge to deny defendant's motion for disclosure of the informer's identity. Moore, Judge, writing for the Court said:

"In the present case, defendant made no defense on the merits. The evidence which established the guilt of the defendant was independent and did not rely on any facts provided by the informer. Furthermore, the trial court found as a fact on evidence offered on *voir dire* that, in the opinion of Officer Conant, defendant and the person with the offi-

cer were acquainted. Based on this finding and the further finding that the unknown person was not present at the time of the actual sale of the heroin, the court concluded that the name of this person was not necessary to the defense of defendant's case. We hold that the trial judge properly denied defendant's motion to disclose the identity of the informer." 283 N.C. at 194.

The record reveals that here, as in *Cameron,* defendant was acquainted with the unidentified informant prior to the sale to Agent Branch and that the informant was not present when the transfer occurred. Furthermore, the evidence which was used to convict defendant did not, as in *Cameron,* rely on facts provided by the informer. In short, the unnamed individual was not a "participant" in the crime within the scope of *McLawhorn* and *Roviaro.* Accordingly, we find no error in the trial judge's denial of defendant's motion to discover the informant's identity. This assignment of error is overruled.

Defendant's remaining assignments of error relate to the polling of the jury after they returned their verdict. The record reveals that one juror did not understand the question which the clerk asked her, whereupon the trial judge made inquiries to determine whether she had agreed with the verdict and still assented to it. After questioning by the judge, the juror stated her agreement with the verdict and her continuing assent thereto. Defendant then moved for a mistrial, to set aside the verdict and for a new trial. Defendant excepts to the judge's questions to the juror and to the denial of the post-verdict motions.

[2] " . . . The polling of the jury is for one purpose only, to ascertain whether the verdict as returned is the verdict of each juror and whether he then assents thereto." *Highway Commission v. Privett,* 246 N.C. 501, 507, 99 S.E. 2d 61 (1957). Where there is confusion in the verdict of the jury, it is proper for the court to clarify and ascertain the verdict upon which all jurors agreed. See *State v. Miller,* 268 N.C. 532, 151 S.E. 2d 47 (1966); *State v. McLamb,* 13 N.C. App. 705, 187 S.E. 2d 458 (1972), 3 Strong, N. C. Index 2d, Criminal Law, § 126, p. 40. We hold that the trial judge did not commit prejudicial error in its questions to the juror and by denying defendant's motions.

No error.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. JOHN WILSON, JR.

No. 7621SC366

(Filed 3 November 1976)

1. **Robbery § 4; Criminal Law § 7— no coercion to commit crime — sufficiency of evidence of armed robbery**

The State's evidence did not show as a matter of law that defendant was coerced by a codefendant into participating in an armed robbery and was sufficient to support a jury finding that he was a principal in the crime where it tended to show: the codefendant knew the victim was carrying a large sum of money on his person and had been unsuccessful in attempts to coerce the victim to hand the money over to him; the codefendant came into the victim's house, pointed a shotgun at the victim, and again demanded the money; defendant then walked into the room, whereupon the codefendant instructed defendant to "take everything"; defendant then pushed the victim onto a bed and forcibly took the victim's wallet and bankbook; defendant also took a radio before leaving the room; and the codefendant kept the shotgun pointed at the victim throughout the entire episode.

2. **Criminal Law § 98— defendant's waiver of right to be present at trial**

One accused of a noncapital felony or a misdemeanor may waive his right to be present during his trial, and defendant's voluntary and unexplained absence from court after his trial begins constitutes a waiver of his right to be present.

3. **Criminal Law § 98— defendant's absence from trial — waiver of right to be present — absence of prejudice**

Defendant's absence at the beginning of the second day of his trial for robbery constituted a voluntary waiver of his right to be present throughout his trial where defendant offered no explanation or justification for his absence; furthermore, defendant was not prejudiced by the court's continuation of the charge during defendant's brief absence from the courtroom when a deputy sheriff requested that he go out and wash his face so that he could stay awake during the remainder of the charge.

4. **Robbery § 5— armed robbery — failure to submit common law robbery**

The trial court in an armed robbery case did not err in failing to submit an issue of common law robbery where the evidence tended to show that an armed robbery was committed by defendant and a codefendant acting in concert and there was no evidence of common law robbery.

5. **Criminal Law §§ 145, 154— consolidated trial of defendants — two records on appeal — taxing of costs against attorneys**

Where attorneys representing two defendants in an appeal from a consolidated trial filed two records on appeal, the attorneys will be taxed with the costs of printing the unnecessary record. App. R. 11(d).

State v. Wilson

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 23 January 1976 in Superior Court, FORSYTH County. Heard in the Court of Appeals 15 September 1976.

Defendant was indicted for robbery with a firearm. The jury returned a verdict of guilty and the defendant was sentenced to imprisonment for a term of five years.

At trial, the State's prosecuting witness was Ralph J. Porter (hereinafter called Porter), the 68-year-old victim of the alleged robbery. Porter testified, inter alia, that he had known defendant and codefendant Roscoe Davis (hereinafter called Davis) for approximately four years. On 10 October 1975, Porter asked one Joe Jones to carry him and Davis to purchase a car at Modern Chevrolet Company in Winston-Salem. At this time, Porter was carrying $2,000 in cash in his hip pocket. As they looked at the automobiles, Davis followed Porter closely, causing the latter to feel uneasy. After selecting a car for purchase, Porter went to his bank, again accompanied by Davis, to withdraw an additional $500 with which to pay for the automobile so that Davis would not know that Porter was carrying the $2,000 on his person. After Porter bought the car, he and Davis stopped by a friend's house where Porter bought a shotgun. Thereafter, as they walked back home, Davis demanded of Porter, "Give me that money, man," which Porter refused to do. Davis then urged Porter to transfer title of the car to him but again Porter refused. Soon thereafter, Davis asked to carry the shotgun and was permitted by Porter to do so. As they continued walking, Davis hit Porter on both shoulders with the gun in a threatening manner. Porter went into Jones' house to pick up $500 which Jones had been holding for him, and, as Porter and Davis left Jones' house, Porter noticed defendant sitting on the porch of a nearby house. Porter then went home alone.

In approximately 15 minutes, Davis came into Porter's house carrying the shotgun and said, "Give me that money, man. I ain't fooling around. Give me that money." Davis began to advance toward Porter, aiming the shotgun at him. At this point, defendant came into the room. Davis commanded defendant to "Take everything; get everything," whereupon defendant pushed Porter on the bed, jerked Porter's hand out of his pants ripping the pocket, and took Porter's bankbook and wallet. Defendant then grabbed a portable radio and left the room. Throughout the episode, Davis had been pointing the shotgun

at Porter but followed defendant when defendant left the room. As Davis and defendant left Porter's house, they snatched a television from the wall with sufficient force that the plug was broken off in the wall socket.

Porter's testimony was corroborated by a friend, Mrs. Cline, and by police officers to whom he had given a similar account of the robbery. Other relevant facts are set out in the opinion below.

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

Michael R. Greeson, Jr., for defendant appellant.

MORRIS, Judge.

Defendant assigns as error the denial of motions for nonsuit contending that there was insufficient evidence for the case to go to the jury.

[1] In considering a motion for judgment of nonsuit, the question before the court is whether there is reasonable basis upon which the jury might find that the offense charged has been committed and that the defendant is the perpetrator or one of the perpetrators of it. *State v. Price,* 280 N.C. 154, 184 S.E. 2d 866 (1971). "[T]he evidence must be considered in the light most favorable to the State, and the State must be given the benefit of every reasonable intendment thereon and every reasonable inference to be drawn therefrom." *State v. Murphy,* 280 N.C. 1, 7, 184 S.E. 2d 845 (1971); 2 Strong, N. C. Index 2d, Criminal Law, § 104, pp. 104-05. The evidence, taken in the light most favorable to the State, tends to show that on 10 October 1975, Porter was carrying a large sum of money on his person, that codefendant Davis knew that Porter had this money; that Davis had been unsuccessful in previous attempts to coerce Porter to hand the money over to him; that Davis came into Porter's house, pointed a shotgun at him and again demanded the money; that defendant then walked into the room, whereupon Davis instructed him to "Take everything; get everything"; that pursuant to these instructions, defendant pushed Porter back onto the bed, forcibly removed Porter's hand with which he protected the contents of his pocket, and took Porter's wallet and bankbook; that defendant also took a radio before leaving the room; that Davis kept the shotgun pointed at Porter throughout this entire episode; and that one

or both of the codefendants snatched Porter's television set from the wall with such force that the plug broke in the electrical socket.

Defendant argues that this evidence is not sufficient to show that he was a principal in the crime but shows instead that he was an unwilling participant who was coerced to act by Davis. We disagree. "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." (Emphasis supplied.) *State v. Swaney*, 277 N.C. 602, 613, 178 S.E. 2d 399 (1971). [Quoting from *State v. Aycoth*, 272 N.C. 48, 157 S.E. 2d 655 (1967)]. While it is possible that defendant was forced to participate in the robbery of Porter, the State is entitled to the inference on a motion for nonsuit that defendant was acting as a principal in the crime. *State v. Murphy, supra.* We believe that this evidence was sufficient to take the case to the jury. Therefore, this assignment of error is overruled.

Defendant's second assignment of error relates to defendant's absence from the courtroom at two stages of the trial. The record reveals that the first day of the trial ended while one defendant was testifying. The court recessed until 9:30 a.m. the next day. At the opening of the next day's session, neither defendant was present. At 9:40 a.m., the court had both defendants called and then began to continue the trial in the absence of the defendants. However, after the court had informed the jury that the defendants had a right not to be present, the codefendant came into the courtroom and the trial proceeded in the absence of defendant. The second absence occurred while the judge charged the jury. The record shows that the defendant was asleep during the charge and that he was told by a deputy sheriff to go out and wash his face. Defendant left for a period of about three minutes before returning. Defendant now contends that the trial court erred in allowing the State to go forward with the case and continuing the charge to the jury in the absence of the defendant. We disagree.

[2, 3] In North Carolina, a criminal defendant charged with a capital offense cannot waive his right to be present at every stage of his trial. *State v. Pope*, 257 N.C. 326, 126 S.E. 2d 126 (1962). However, one accused of a noncapital felony or a misdemeanor may waive his right to be present during his trial, *State v. Cherry*, 154 N.C. 624, 70 S.E. 294 (1911), and in

these cases, defendant's voluntary and unexplained absence from court after his trial begins constitutes a waiver of his right to be present. *State v. Mulwee,* 27 N.C. App. 366, 219 S.E. 2d 304 (1975); *State v. Harris,* 27 N.C. App. 15, 217 S.E. 2d 729 (1975); *State v. Stockton,* 13 N.C. App. 287, 185 S.E. 2d 459 (1971). In *State v. Stockton, supra,* the defendant was being tried for a noncapital felony. After the first day of the trial, defendant failed to attend, and his counsel objected to the continuation of the trial in his absence. Noting that defense counsel did not offer any explanation for his client's absence, this Court stated that "After the trial had commenced, the burden was on the defendant to explain his absence." 13 N.C. App. at 291. In the present case, defendant has offered no explanation or justification for his absence at the beginning of the second day of his trial. Accordingly, we agree with the trial court's determination that defendant's absence constituted a voluntary waiver of his right to be present throughout his trial. As for defendant's exception to his brief absence during the charge, we note that defendant was asked to go outside to wash his face so that he would stay awake for the remainder of the charge. Defendant has shown no prejudice which has resulted from his temporary absence, and we find none. This assignment of error is overruled.

[4] As his final assignment of error, defendant contends that the trial court erred in refusing to submit the issue of common law robbery to the jury. Of course, common law robbery is a lesser included offense of armed robbery. *State v. Bailey,* 278 N.C. 80, 178 S.E. 2d 809 (1971). However, the necessity for instructing the jury as to a lesser included offense arises only when there is evidence to support such a verdict. *State v. Griffin,* 280 N.C. 142, 185 S.E. 2d 149 (1971); *State v. Swaney, supra.* We have examined the record and hold that the evidence in this case tends to show that the armed robbery was committed by the defendant and Davis acting in concert and that there was no evidence of common law robbery. For that reason, the trial judge was not required to instruct the jury as to the lesser included offense.

[5] We note that although both defendants appealed, there were two records on appeal. This is in violation of Rule 11(d), North Carolina Rules of Appellate Procedure, and counsel will

be taxed with the costs of printing the unnecessary record on appeal.

No error.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. JUNIUS CARROLL BOYD

No. 763SC432

(Filed 3 November 1976)

1. **Criminal Law § 75— statements prior to Miranda warnings — no improper custodial interrogation**

The trial court in a second-degree murder and assault prosecution did not err in finding that statements made by defendant to a police officer directing the officer to the scene of the crime where the victims lay and statements made after the officer discovered the victims were not made as the result of an in-custody interrogation, but were voluntary, and no Miranda warning was necessary; moreover, the officer's failure to advise defendant of his rights after placing him in custody was not prejudicial to defendant where there was no evidence of any question, answers or interrogation going on after that point in time until defendant was informed of his rights.

2. **Constitutional Law § 37; Criminal Law § 75— self-incrimination and right to counsel — waiver of rights**

A person accused of a crime, capital or otherwise, may orally or in writing voluntarily waive his constitutional privilege against self-incrimination and his right to legal counsel, and by virtue of G.S. 7A-457(c) this applies to indigents as well. Evidence was sufficient to support the trial judge's finding in this case that defendant's oral waiver was given freely, voluntarily, effectively and understandingly.

3. **Assault and Battery § 14; Homicide § 21— second degree murder and assault — sufficiency of evidence**

Evidence in a second degree murder and assault prosecution was sufficient to be submitted to the jury where it tended to show that defendant called the police, directed police to the scene of the killing, made certain incriminating statements at the scene and later gave police a statement; the assault victim identified defendant as the attacker; and blood in the clothing worn by defendant at his arrest matched the blood of the homicide victim.

APPEAL by defendant from *Rouse, Judge.* Judgment entered 29 January 1976 in Superior Court, PITT County. Heard in the Court of Appeals 11 October 1976.

By separate indictments, proper in form, defendant was charged with (1) first-degree murder of Norvella Wilson and (2) assault of James Green with a deadly weapon with intent to kill inflicting serious injury. At the trial the solicitor elected not to proceed on the charge of first-degree murder but to try the defendant for second-degree murder.

The State offered evidence tending to show that shortly after 1:00 a.m. on 7 September 1975 George Merritt, a Greenville policeman, was summoned to the R. B. Lounge, where he saw defendant. Defendant said that he wanted to show Merritt where some people had been beaten up, and he directed Merritt to a house at 407 Cadillac Street. When Merritt walked into the house, he found Norvella Wilson and James Green lying on the floor in a pool of blood. Defendant began walking rapidly away from the house, and Merritt stopped him and put him in the patrol car. Shortly thereafter, the officer took the defendant to the hospital and later to the police station. At the police station defendant's clothes were removed, and they were found to be heavily stained with blood which was analyzed by a chemist and found to be of the same blood group as Mrs. Wilson's blood. Defendant was advised of his constitutional rights at the hospital and again later at the police station. While at the station, he made a statement in which he said that at about 11:30 that night he went to the house at 407 Cadillac Street and found Green and Mrs. Wilson arguing. Green angrily accused defendant of engaging in a sexual relationship with Mrs. Wilson, and he struck at defendant. Green and defendant fought for a long time, and defendant hit Green with a shoe, while Green hit defendant with a table and other objects. During the fight defendant accidentally struck Mrs. Wilson with a shoe. At some time while he was at 407 Cadillac Street, defendant had intercourse with Mrs. Wilson in Green's presence. This enraged Green, and he assaulted Mrs. Wilson with a stick and a shoe.

James Green testified for the State that the defendant came to 407 Cadillac Street on 7 September 1975 and attacked Green with a stick and knocked him out. Green's skull, jaw and chin were broken, and he lost all his teeth. The State's evidence tended to show that Mrs. Wilson died before 11:00 a.m. on September 7. An autopsy showed that she had suffered lacerations and bruises of the face, shoulder, abdomen, thighs, lower legs, and pelvic area, and two of her ribs were broken. In the

opinion of the medical examiner, her death was caused by "blunt force trauma to head and pelvis."

Before admitting testimony concerning the statements made by defendant to Officer Merritt and the statement he made at the police station, the court held voir dire hearings to determine the admissibility of this testimony. The State offered evidence on voir dire tending to show that when Merritt went to the R. B. Lounge, defendant came out to his car, told Merritt that he wanted to show him where some people were hurt, got into Merritt's car, and directed Merritt to 407 Cadillac Street. Merritt did not question defendant at all. At the hospital, defendant was advised of his rights and was asked whether he understood them. After answering affirmatively, he was then asked whether he desired an attorney and he answered: "That is my mama." He was not questioned any further at that time. Later at the police station, he was again advised of his rights and said that he understood them, desired to make a statement, and did not want an attorney. He then made his statement. The court held that defendant's statements to Merritt and his statements at the police station were admissible.

Defendant testified that on September 7 he went to 407 Cadillac Street and found Green and Mrs. Wilson there arguing. He asked Mrs. Wilson if he could lie down on the bed, because he suffers from epilepsy and could tell that he was about to have a seizure. Mrs. Wilson said that he could lie down but then she approached him and made sexual advances to him. When Green saw what was happening, he began arguing with defendant and Mrs. Wilson, and he struck defendant with some object. Defendant and Green fought for some time, and then defendant left. During the fight each of them struck Mrs. Wilson accidentally, but when defendant left she did not seem to be seriously injured.

The jury found defendant guilty of second-degree murder and assault with a deadly weapon inflicting serious injury, and a prison sentence was imposed.

Attorney General Edmisten, by Associate Attorney Nonnie F. Midgette, for the State.

Richard Powell, for the defendant appellant.

MARTIN, Judge.

[1] In his first assignment of error, the defendant objects to the trial judge's finding that certain statements made by the defendant were not made as the result of an in-custody interrogation and that under the circumstances the statements were voluntary and no *Miranda* warning was necessary.

The facts relevant to this assignment of error are that Officer Merritt, in response to a call, went to the R. B. Lounge to meet a person named "Pee Wee" who was to show him where a rescue was needed. At that time, the defendant, Pee Wee, came out and voluntarily made certain statements to the Officer. Based on these statements, the officer went to a residence where he found the two alleged victims. The defendant rode with the officer to this residence and during this period of time he made certain statements. Further, he made a statement after the officer discovered the alleged victims. At this time, the defendant was placed in the officer's car. The defendant was not informed of his rights until later at the hospital and again shortly thereafter at the jail.

Defendant contends that these statements were elicited before he had been informed of his rights as guaranteed by *Miranda* and that the statements should have been excluded. More specifically, he argues that Officer Merritt should have read him his rights as soon as he was placed in the patrol car. It is important to note, however, that *Miranda* is concerned only with in-custody interrogation. See *State v. Lawson,* 285 N.C. 320, 204 S.E. 2d 843 (1974). In the *Lawson* case, the North Carolina Supreme Court went on to say that *"Miranda* warnings and waiver of counsel are required when and only when a person is being subjected to 'custodial interrogation'; that is, 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' " (Citations omitted.) *State v. Lawson, supra* at 323, 204 S.E. 2d at 845.

In the instant case, the defendant was neither in custody nor had he been arrested when he made the statements to Officer Merritt. In addition, there is no evidence whatsoever that he was probed or questioned when he made the statements. The facts indicate that he was merely voluntarily and freely providing information to the police about an emergency situation and he was not a suspect. Since he was not deprived of his

freedom of action in any significant way, he was not, at that point in time, entitled to the *Miranda* warnings. Although it is arguable that the defendant was in custody after being placed in the patrol car, there is no evidence of any questions, answers, or interrogation going on after that point in time until he was informed of his rights. The officer's failure to advise the defendant of his rights after placing him in the car was, therefore, not prejudicial.

The defendant further contends that the trial judge erred when he ruled that the defendant's statements made at the hospital and later at the police station "were made voluntarily, knowingly and understandingly." The record discloses that when advised of his rights while at the hospital, defendant said he understood. He made no further statements at that time other than a statement implying that his mother was his lawyer. Later, at the police station, he was again advised of his rights and he again said he understood and that he wanted to talk. The record supports the trial judge's findings and these statements were properly admitted into evidence.

The defendant's first assignment of error is therefore overruled.

In his second assignment of error, the defendant contends that the trial court committed prejudical error by admitting the defendant's statements in view of the fact that there was no waiver signed by the defendant. The defendant bases this exception on the fact that there was no waiver written or signed by the defendant.

[2] We have long recognized that a person accused of a crime, capital or otherwise, could orally or in writing voluntarily waive his constitutional privilege against self-incrimination and his right to legal counsel, and by virtue of G.S. 7A-457(c) this applies to indigents as well. See *State v. Chance,* 279 N.C. 643, 660, 185 S.E. 2d 227, 238 (1971).

In the instant case, the trial judge conducted a voir dire hearing in the absence of the jury and found that an oral waiver was freely, voluntarily, effectively, and understandingly given. There was ample competent evidence to sustain the trial judge's finding.

The remainder of defendant's arguments under the second assignment of error have been reviewed and are without merit. The second assignment of error is therefore overruled.

[3] In a third assignment of error, the defendant contends and argues on this appeal that the trial judge committed prejudicial error by failing to grant defendant's motions for nonsuit when made at the close of the State's evidence and then when renewed at the close of all the evidence. We disagree.

It is well settled that upon a motion for nonsuit

> " . . . the trial judge is required to take the evidence for the State as true, to give to the State the benefit of every reasonable inference to be drawn therefrom and to resolve in the favor of the State all conflicts, if any, therein." (Citations omitted.) *State v. Edwards,* 286 N.C. 140, 145, 209 S.E. 2d 789, 792 (1974).

The State's evidence, in the instant case, tended to show that the defendant called the police, directed the police to the scene of the tragic killing, made certain incriminating statements at the scene, later gave the police a statement; that one of the victims identified the defendant as the attacker; and that blood-stained clothing taken from the defendant tended to incriminate him. This evidence, along with other evidence, taken as true in a light most favorable to the State, is sufficient to survive the defendant's motions for judgment as of nonsuit.

The defendant's third assignment of error is therefore overruled.

The defendant had a fair and impartial trial free of prejudicial error.

No error.

Chief Judge BROCK and Judge VAUGHN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 20 OCTOBER 1976

COX v. COX No. 7618DC322	Guilford (75CVD155)	Reversed and Remanded
IN RE HORNADAY No. 7626DC430	Mecklenburg (71J887)	Affirmed
STATE v. CHISHOLM No. 7626SC358	Mecklenburg (75CR53631)	No Error
STATE v. JACKSON No. 7629SC297	Henderson (69CR3597)	No Error
STATE v. JENNINGS No. 7621SC373	Forsyth (74CR30792)	Affirmed
STATE v. McDOWELL No. 7620SC360	Union (75CR8074)	No Error
STATE v. MILLER No. 764SC455	Onslow (75CR18229)	No Error
STATE v. PARKER No. 7614SC443	Durham (74CR20831)	No Error
STATE v. WILKINS No. 7615SC416	Alamance (75CR10449)	No Error

FILED 3 NOVEMBER 1976

HICKS v. HICKS No. 7626DC410	Mecklenburg (72CVD7510)	Affirmed
IN RE DANCY No. 7619DC494	Cabarrus (76J15) (76J16)	Affirmed
IN RE REDD No. 7610DC431	Wake (75J203)	Affirmed
STATE v. ENOCH No. 7615SC398	Alamance (75CRS16810)	No Error
STATE v. ESTES No. 7612SC450	Cumberland (74CR21915)	No Error
STATE v. HARDY No. 768SC480	Wayne (75CR12189) (75CR12499)	No Error
STATE v. JONES No. 769SC375	Warren (75CR2719)	No Error
STATE v. REEVES No. 7626SC470	Mecklenburg (74CR73272)	No Error
STATE v. WILLIAMS No. 7614SC380	Durham (75CR25261)	No Error
STREETER v. STREETER No. 763DC440	Pitt (75CVD795)	Affirmed
WARD v. LAIL No. 7627DC378	Lincoln (75CVD302)	Affirmed

STATE OF NORTH CAROLINA v. LAWRENCE FREEMAN

No. 7622SC313

(Filed 3 November 1976)

1. **Criminal Law § 92— two defendants tried for same crime — motion for separate trials properly denied**

In a trial of defendant and another for the same armed robbery, the trial court did not abuse its discretion in denying defendant's motion for separate trials where there was no showing that defendant was denied a fair trial.

2. **Constitutional Law § 31; Criminal Law § 95— confession of codefendant — exclusion of part implicating defendant — admission of confession proper**

In a trial of defendant and his companion for the same armed robbery, the trial court did not err in refusing to suppress the entire confession of defendant's companion, since the confession was modified to delete all parts which referred to or implicated defendant, and the rule of *Bruton v. U.S.*, 391 U.S. 123, was thereby complied with.

3. **Constitutional Law § 30— probable cause — arrest warrant properly issued — photographs taken of defendant — no constitutional rights violated**

Probable cause existed for the issuance of an arrest warrant for defendant on the basis of a confession by a codefendant which implicated defendant, and the taking of photographs of defendant after his arrest did not violate defendant's constitutional rights.

4. **Constitutional Law § 30; Criminal Law § 66— in-court identification — no illegal arrest — identification properly allowed**

Defendant's contention that an in-court identification of defendant by the victim of an armed robbery should have been excluded as the fruit of an illegal arrest is without merit, since the confession of a codefendant which implicated defendant in the crime was sufficient to constitute probable cause for issuance of the arrest warrant.

5. **Criminal Law § 102— district attorney's comment — instruction to disregard — no prejudice**

Defendant who did not take the stand was not prejudiced by the district attorney's comment that, if defendant wanted ". . . to testify to his record, he can testify himself," since the trial court sustained defendant's objection and instructed the jury to disregard the comment.

APPEAL by defendant from *Wood, Judge.* Judgment entered 17 January 1974 in Superior Court, IREDELL County. Heard in the Court of Appeals 26 August 1976.

State v. Freeman

Lawrence Freeman and Lynn Carter Nichols, Jr. were indicted and tried together for armed robbery. The State offered evidence tending to show that on the night of 6 December 1973 R. W. Maddrey was employed at Eddie's Grocery in Mooresville. At 11:30 that night defendants came into the store and brought some groceries to the counter. As Maddrey was ringing up the groceries on the cash register, Freeman produced a shotgun and demanded the money in the cash register. Maddrey allowed them to take the money, and they then left the store.

Before Maddrey was allowed to identify Freeman and Nichols as the robbers, a *voir dire* hearing was held to determine the admissibility of his identification testimony. During this hearing the State offered evidence tending to show that about an hour after the robbery Maddrey observed a lineup of six people, including Nichols but not Freeman, and he identified Nichols as one of the robbers. On the morning of 7 December 1973, after being advised of his constitutional rights, Nichols confessed that he and Freeman had robbed Eddie's Grocery. On the basis of this confession, police officers obtained a warrant for Freeman's arrest, and he was arrested the next day and photographed. On December 10 Maddrey was shown a group of six photographs, and he correctly identified Nichols and Freeman as the robbers. The court held Maddrey's identification testimony admissible.

During the course of the joint trial, the State attempted to introduce a confession by Nichols which implicated Freeman. The court, over defendant Freeman's objection, permitted Nichols' statement to be entered into evidence in a modified form which supposedly deleted any reference to defendant Freeman.

Defendants offered no evidence. The jury found Freeman guilty and a prison sentence was imposed. The verdict and judgment as to Nichols do not appear in the record. Freeman appealed.

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

McElwee, Hall & McElwee, by E. Bedford Cannon, for defendant.

MARTIN, Judge.

In defendant's first assignment of error, he contends that the failure of the trial judge to grant his motion for separate trials or in the alternative to suppress the use of co-defendant Nichols' statement, constituted reversible error.

[1] In regards to defendant's first argument concerning separate trials, we do not feel that the trial judge committed reversible error by refusing to grant the defendant's motion for separate trials. The question as to whether there should be a joint or separate trial when defendants are jointly indicted is within the sound discretion of the trial court. This discretion, absent a showing that the movant was denied a fair trial, cannot be disturbed on appeal. See *State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492 (1968). There is no evidence that the trial judge abused this discretion in the present case and his refusal to grant a motion for a separate trial was therefore proper.

[2] As an alternative argument in his first assignment of error, defendant contends that the trial judge erred by refusing to suppress from the evidence the entire confession by co-defendant Nichols. The applicable federal law on this point is *Bruton v. United States,* 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968). In its application of the *Bruton* decision, the North Carolina Supreme Court has stated:

> " . . . in joint trials of defendants it is necessary to exclude extrajudicial confessions unless all portions which implicate defendants other than the declarant can be deleted without prejudice either to the State or the declarant." *State v. Fox, supra* at 291, 163 S.E. 2d at 502.

In the instant case, the record reveals that the trial judge properly admitted the confession only after modifying it as required by the *Fox* decision. The actual confession, as given by Nichols, reads as follows:

> "Me and Lawrence I don't know his last name, he is Bill's half brother, were riding around in Lawrence's car, a '66 or '67 Pontiac gray station wagon. We went to Eddie's Grocery. Lawrence had a shotgun. We parked beside the store. We both went inside and demanded the money. We picked up Bill Alexander at Mooresville Drug. We went toward Coddle Creek and had a flat tire. Me and Bill went through the woods. Lawrence stayed with the car. We went

to James Reid's house to get him to take us to Bill's house. We took the shotgun and rifle and asked him to keep them for us. Shortly after we left the police got behind us. I threw the money out of the car. Then the police stopped us."

At trial, the record reveals that the solicitor and the defendant's attorney rephrased Nichols' statement and it was admitted into evidence before the jury as follows:

"Me and two other guys were riding around in a car. We went to Eddie's Grocery; we had a shotgun; we parked beside the store—I and one of the other guys went in the store and demanded the money; then we went toward Coddle Creek and had a flat tire. Then I and one of the men went through the woods; the other guy remained with his car. I and the other man went to James Reid's house to get him to take us home; we took the shotgun and a rifle and asked Reid to keep them for us. Shortly after the police got behind us and I threw the money out of the car; then the police stopped us."

In reviewing the above portions of the trial record, it is apparent to this Court that the trial judge admitted Nichols' statement only after modifying it in accordance with the *Fox* decision. He admitted the extrajudicial confession only after deleting all parts that referred to or implicated the defendant. It is manifest that the statement admitted into evidence did not tend to incriminate the defendant Freeman. The statement merely indicated that Nichols had an accomplice and it in no way indicated the identity of that accomplice. Defendant's right to confrontation was therefore not infringed and the trial judge did not err in admitting the modified confession.

Defendant's first assignment of error is therefore overruled.

Defendant's second assignment of error is without merit and is overruled.

[3] By his third assignment of error defendant contends the court erred in failing to make findings of fact and conclusions of law concerning the constitutionality of defendant Freeman's arrest. He contends that his arrest was illegal because it was based solely on Nichols' confession, and Nichols' confession was not sufficient to furnish probable cause for an arrest. He fur-

ther argues that the photo identification of himself was tainted because the photos were obtained as a result of his unconstitutional arrest. Defendant cites *State v. Accor* and *State v. Moore*, 277 N.C. 65, 175 S.E. 2d 583 (1970).

Accor is distinguishable. In that case photographs by which defendants were identified were held inadmissible on the ground that they were taken in violation of defendants' Fourth and Fourteenth Amendment rights. The defendants were picked up and brought to the police station without a warrant and without probable cause. The evidence was silent as to the circumstances under which defendants were picked up and there was no evidence that either defendant voluntarily accompanied the officers. The defendants were photographed prior to the issuance of warrants for their arrest, and at the time the photographs were taken there was no evidence to support a finding of probable cause of defendants' guilt. There was no evidence that one defendant consented to the taking of his photograph, and the evidence was insufficient to show that the other defendant voluntarily and understandingly consented to the taking of his photograph.

In the instant case a warrant was issued for Freeman's arrest prior to the taking of any photographs. In addition, probable cause for the issuance of the warrant existed. The basis upon which the warrant was issued was the statement of the defendant Nichols, indicating Freeman's participation. These facts amount to sufficient probable cause and defendant's constitutional rights were not violated.

Defendant's third assignment of error is therefore overruled.

Defendant's fourth assignment of error is without merit and is overruled.

[4] By his fifth assignment of error defendant contends that the court should have excluded Maddrey's in-court identification of him as one of the robbers, because the identification was the fruit of an illegal arrest. Defendant contends that his arrest was illegal because there was no probable cause to believe that he had taken part in the robbery and that Nichols' confession could not furnish probable cause for defendant's arrest because there was no evidence that he was a reliable informant, and because he had previously denied that he had been involved in the robbery.

It is clear that:

"The Fourth Amendment requirement that no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the persons or things to be seized, applies to arrest warrants as well as to search warrants. The judicial officer issuing such warrant must be supplied with sufficient information to support an independent judgment that there is probable cause for issuing the arrest warrant." (Citation omitted.) *State v. Harvey,* 281 N.C. 1, 6, 187 S.E. 2d 706, 710 (1972).

We hold that the information furnished by Nichols to Officer Barger upon whose complaint the arrest warrant was issued, was sufficient information to authorize Officer Barger to make the complaint and to authorize the magistrate to issue the warrant. This assignment of error is overruled.

[5] Defendant contends the district attorney's comment concerning the ability of the defendant Freeman to testify in his own behalf constituted prejudicial error.

In cross-examining one of the State's witnesses, counsel for Nichols asked him if he knew that Nichols had no criminal record. The district attorney objected and stated, "If he wants to testify to his record, he can testify himself." The court sustained the objection and instructed the jury to disregard the district attorney's comment. We think the court's instruction was adequate. This assignment of error is overruled.

We have carefully considered defendant's remaining assignments of error and have found them to be without merit. The defendant had a fair trial free of prejudicial error.

No error.

Judges BRITT and HEDRICK concur.

FRANKLIN A. STURDIVANT v. BETTY LOU V. STURDIVANT

No. 7623DC500

(Filed 3 November 1976)

1. **Appeal and Error § 24— question not presented by appeal**

Plaintiff's appeal did not present the question of the sufficiency of the evidence to support an award of child custody to defendant where plaintiff did not appeal from the order originally awarding custody to defendant and the only new relief provided by the order from which plaintiff appealed was a grant to plaintiff of temporary custody of the child for three weeks after which the child would be returned to defendant. App. R. 10.

2. **Appeal and Error § 42— correspondence not made part of proceedings — no consideration on appeal**

In an appeal from an order entered in a child custody action, the appellate court will not consider correspondence between defendant's attorney and the physician and administrator of the hospital providing treatment for the child where the correspondence was not made a part of the court proceedings in the action.

3. **Appeal and Error § 16; Divorce and Alimony § 22— violation of child support order — contempt jurisdiction**

While an appeal from a child custody order removes the cause from the trial court to the appellate court, and pending the appeal the trial court is without jurisdiction to punish for contempt for a violation of the order, one who wilfully violates the order does so at his peril since, if the order is upheld by the appellate court, the violation may be inquired into when the cause is remanded to the trial court.

APPEAL by plaintiff from *Davis, Judge.* Judgment entered 30 March 1976 in District Court, ALLEGHANY County. Heard in the Court of Appeals 20 October 1976.

Plaintiff instituted this action against defendant, his wife, on 19 February 1974 asking that he be awarded custody of the five children born to the parties, the youngest child being a two-year-old girl. Defendant filed answer alleging cruel and barbarous treatment of her by plaintiff, resulting in her having to leave the home. She asked for a divorce from bed and board, for custody of the children and for support of herself and the children.

On 19 July 1974 judgment was entered granting each of the parties a divorce from bed and board and, by consent, awarding plaintiff custody of the children with certain specified visitation privileges provided for defendant.

In February 1975 defendant filed an affidavit stating that plaintiff had consistently refused to allow her to exercise her visitation privileges. Plaintiff was ordered to show cause why he should not be held in contempt and, pending the hearing, plaintiff was ordered to allow the children to visit with defendant on four specific dates at the office of the Department of Social Services.

Following these visits a hearing was held at which the social worker testified that the four older children were very hostile toward defendant and attempted to prevent the youngest child from going to defendant although she tried to do so several times and, when left alone with defendant, ran into defendant's arms.

In an order dated 25 April 1975 the court concluded that it would be in the best interest of the youngest child to be permitted to visit with defendant in order to reestablish the parent-child relationship, and that defendant was a fit person to be accorded temporary custody. The court ordered plaintiff to turn the youngest child over to defendant for a month, at the end of which time defendant was to appear with the child before the court in chambers. Plaintiff gave notice of appeal, the temporary custody order was not carried out and plaintiff subsequently withdrew his appeal.

Defendant then moved again for custody of, or visitation privileges with, the youngest child. Following a hearing at which was presented evidence of defendant's employment, living situation and provisions for the care of the child, the court found it to be in the best interest of the child to be permitted to visit with her mother in order to establish a parent-child relationship. The court again granted temporary custody to defendant for a month and the order was carried out.

Thereafter another order was entered allowing defendant to retain custody of the child, subject to visitation by plaintiff, pending an examination of the home conditions of defendant by the Department of Social Services. Plaintiff maintained his home in or near Sparta while defendant maintained her home and was working in Winston-Salem.

In February 1976 the Department of Social Services filed a very favorable report concerning defendant's homelife and relationship with the child. Based primarily on the information in this report, the court entered an order dated 24 February

1976 finding and concluding that it was in the child's best interest to remain under the care, custody and control of defendant, subject to certain visitation privileges granted plaintiff. Three weeks later plaintiff filed a motion for a new hearing alleging that the social services report contained false information.

A hearing was scheduled for 30 March 1976 but on 26 March 1976 plaintiff moved for a continuance on the ground that the child was ill and scheduled for surgery on 19 April 1976. Plaintiff requested custody of the child during her hospitalization and convalescence on the ground that it would be hazardous to remove her from plaintiff's town, where she was then visiting with plaintiff and near where the operation was to be performed, to defendant's home in Winston-Salem.

The hearing was held on 30 March 1976 and plaintiff presented a doctor who was treating the child and recommended surgery; he testified that the surgery was not of an emergency nature but should be performed at some time; that in his opinion it would benefit the child to convalesce with her older sister in plaintiff's home but that the child could be safely moved by car if so ordered. Defendant presented the social services case worker who testified substantially as set forth in his report.

The court entered an order dated 15 April 1976 finding that plaintiff had obtained possession of the child from defendant by failing to return her to defendant after exercising his visitation privilege, that defendant's suitability to have custody of the child had been determined at the previous hearing at which time the court awarded defendant continued custody of the child subject to plaintiff's visitation rights, that plaintiff alleged the child's illness for the first time in his motion for continuance, that the proposed surgery was not of an emergency nature and the child could be moved by car if necessary, and that the child should be returned to defendant immediately until after the scheduled surgery at which time the child would remain with plaintiff for approximately three weeks. The court ordered "that the order announced in open court on February 24, 1976, and filed March 30, 1976, shall remain in full force and effect" subject to the recuperation modification.

Plaintiff appeals from the 15 April 1976 order.

Arnold L. Young and Hayes, Hayes and Shepard, by Paul C. Shepard, for plaintiff appellant.

W. Warren Sparrow for defendant appellee.

BRITT, Judge.

In the first assignment of error argued in his brief, plaintiff contends the trial court erred in its finding of fact to the effect that defendant disputed the seriousness of the child's condition, for the reason that said finding was not supported by competent evidence. While this assignment might have merit from a technical standpoint, we are unable to perceive how plaintiff was prejudiced by the challenged finding since it had no bearing upon the relief granted.

[1] In the second assignment of error argued in his brief plaintiff contends the court erred in entering the 15 April 1976 order for the reason that there were insufficient findings of fact supported by competent evidence to justify an award of custody of the child to defendant. We find no merit in this assignment.

The record discloses that defendant was awarded custody of the child by the order dated 24 February 1976 (filed 30 March 1976), that no exception was noted to any finding of fact or conclusion of law in said order, and that no exception was made to, or appeal taken from, the entry of said order. The only new relief granted by the 15 April 1976 order, the one from which plaintiff appealed, was the modification of the 30 March 1976 order to provide that plaintiff would have the care and custody of the child from 9 April 1976 until 1 May 1976, after which he would return the child to defendant. We hold that plaintiff has not properly presented the question which he attempts to raise by the second assignment argued in his brief, therefore, it is overruled. Rule 10, N. C. Rules of Appellate Procedure, 287 N.C. 698 (1975).

[2] In the third assignment of error argued in his brief plaintiff seeks to raise questions regarding certain purported correspondence between defendant's attorney and the physician and administrator of the hospital providing treatment and care for the child. Clearly said correspondence was not made a part of any of the court proceedings in this cause, therefore, we decline to afford it any consideration.

A review of this cause leaves the impression that while defendant has sought the processes of the court to provide her with relief, plaintiff has attempted to frustrate rulings of the court that were not pleasing to him. It appears that Judge Davis has heard all phases of the case from its inception and has acted with patience and understanding to all persons concerned. It further appears that in two instances plaintiff has frustrated orders of the trial court by giving notice of appeal to this court, the first of which was not perfected.

[3] We consider it appropriate to point out that while an appeal from an order providing for the custody of a minor child removes the cause from the trial court to the appellate court, and pending the appeal the trial court is without jurisdiction to punish for contempt, taking an appeal does not authorize a violation of the custody order. "One who wilfully violates an order does so at his peril." If the order is upheld by the appellate court, the violation may be inquired into when the cause is remanded to the trial court. *Beall v. Beall,* 290 N.C. 669, 228 S.E. 2d 407 (1976); *Joyner v. Joyner,* 256 N.C. 588, 124 S.E. 2d 724 (1962); *Collins v. Collins,* 18 N.C. App. 45, 196 S.E. 2d 282 (1973).

The order appealed from is affirmed and this cause is remanded to the district court for further proceedings not inconsistent with this opinion.

Affirmed.

Judges VAUGHN and MARTIN concur.

W. B. WILLIAMS, D/B/A WILLIAMS FARM SUPPLY v. PELL D. LILES, JR. AND WIFE, MILDRED LILES, INDIVIDUALLY AND TRADING AS DIXIE IRON WORKS

No. 7610DC395

(Filed 3 November 1976)

1. Rules of Civil Procedure § 41— nonjury trial — motion for involuntary dismissal — weighing of evidence

In ruling on a motion for involuntary dismissal made pursuant to Rule 41(b), the trial judge may weigh the evidence, find facts against plaintiff and grant defendant's motion to dismiss even though

plaintiff may have introduced evidence sufficient to make out a *prima facie* case and to withstand a motion for a directed verdict in a jury case.

2. **Trial § 58— nonjury trial — findings of fact — appellate review**

Where the trial court, as the trier of the facts, has found specific facts, such findings are conclusive upon appeal if supported by competent evidence even though there may be evidence which would sustain findings to the contrary.

3. **Accounts § 1— goods sold to business — liability of femme defendant**

Trial court's findings to the effect that *femme* defendant was not personally liable to plaintiff for goods sold on account to a business operated by the male defendant were supported by competent evidence and thus were binding on appeal, although the evidence was conflicting as to the extent of the *femme* defendant's involvement in the male defendant's business.

APPEAL from judgment of *Green, Judge.* Judgment entered 23 December 1975 in District Court, WAKE County. Heard in the Court of Appeals 22 September 1976.

This is an action to recover on an account for goods sold by W. B. Williams, trading as Williams Farm Supply, to Dixie Iron Works. Plaintiff alleged "[t]hat the defendants, jointly and severally, are indebted to the plaintiff in the amount of THREE THOUSAND THREE HUNDRED ELEVEN DOLLARS AND SEVEN CENTS ($3,311.07) as a result of a contract entered into by the plaintiff and defendants for the delivery of merchandise and for payment of the same, and the plaintiff has performed its contract with defendants but defendants refuse to pay the plaintiff said amount. . . ." The femme defendant averred by answer and defense that she had "at no time entered into a contract, either express or implied, with the plaintiff" and that she ". . . is not, nor has she ever been, trading as Dixie Iron Works." She prayed that the action be dismissed as to her and that plaintiff recover nothing against her.

The case was tried in Wake County District Court before Green, Judge, sitting without a jury. Plaintiff testified in his own behalf and stated, inter alia, that he operated a general store named Williams Esso and Farm Supply located near the town of Garner, North Carolina. Mr. Williams dealt with both defendants in a business capacity for approximately 15 years during which time the defendants had bought items from his store on both a cash and a credit basis. There was no written agreement between Williams and either defendant for such pur-

chases. When defendants' account balance became substantial, Williams often called defendants and on several occasions went to defendants' house where he received a check from the femme defendant on the account. Employees of Dixie Iron Works would, from time to time, come to Williams' store, purchase merchandise, and sign the tickets therefor. Femme defendant had never signed such tickets but often paid on the account based on these tickets. Mrs. Liles once told Williams "I know we are slow" in paying on the account and "Mr. Williams, I'll see that you never lose this." Williams also introduced into evidence a certified copy of a deed to the property on which Dixie Iron Works is located which showed that title to the property was in the name of Mrs. Liles.

Raymond Medlin was also called by plaintiff. Mr. Medlin testified, inter alia, that he had been employed by Williams for 23 years. During that time, he received payments on the Dixie Iron Works account by checks drawn in the name of the business and of Mrs. Liles. In all instances, the checks were signed by Mrs. Liles. Medlin further testified that he had never received a cash payment from Mrs. Liles, nor did he have any evidence other than the checks to show that Mrs. Liles was a partner in the business.

At the close of the plaintiff's evidence, femme defendant moved for a dismissal of the action as to her. This motion was denied, and she introduced evidence. Mrs. Liles testified in her own behalf, stating that she had been employed for the past ten years as a legal secretary, and Dixie Iron Works was totally owned and operated as a sole proprietorship by her husband. She further testified that she had never been an employee or partner in the business and that she had never received any salary, bonus or other monetary reward for services rendered. She never requested credit from Williams and never charged items on the business' account with plaintiff. Although she made payments from time to time to various creditors of the business, this was done only when requested by her husband. She denied that she had promised to plaintiff to be personally responsible for the business debts.

Defendant Pell Liles, Jr., testified in substance that he had been in business for 15 years, operating under the name of Dixie Iron Works. Mrs. Liles was not and never had been a partner in his business. He had never told plaintiff that Mrs. Liles was a partner or that she would be responsible for the

debts of Dixie Iron Works. Mr. Liles admitted that the property on which his business was located and some of the company trucks were owned by Mrs. Liles.

At the close of all the evidence, Mrs. Liles moved for an involuntary dismissal of the action as to her. The motion was granted, and judgment was entered, the pertinent portions of which are as follows:

> "This cause coming on to be heard before the Honorable George R. Greene, District Court Judge without a jury, at the October 23, 1975 term of Wake County District Court and the Court after hearing all of the testimony of all of the witnesses for the plaintiff and the defendants makes the following findings of fact:
>
> 1. That the defendant Mildred C. Liles was not individually responsible for the debt sued on by the plaintiff in that she did not request that a charge account be opened at the plaintiff's store and she at no time acknowledged responsibility individually for the debt sued on and at no time did she charge any item of purchase at the plaintiff's store.
>
> 2. That defendant Mildred C. Liles made payments from time to time on the account of Dixie Iron Works to plaintiff as an accommodation to her husband, Pell D. Liles, Jr., owner and operator of Dixie Iron Works.
>
> 3. That the defendant Mildred C. Liles was not connected or involved in any way with the business of Dixie Iron Works except for the fact that she is the wife of Pell D. Liles, Jr., sole owner and operator of Dixie Iron Works and as such assisted him from time to time by signing certain business checks and making payments on business accounts solely as an accommodation to her husband, Pell D. Liles, Jr.
>
> 4. That defendant Mildred C. Liles is now and has for a period of ten (10) years next preceding this hearing been fully and gainfully employed as a legal secretary in the City of Raleigh, North Carolina, and therefore any assistance given to the business of Dixie Iron Works was in the form of an accommodation or a gift to her husband, Pell D. Liles, Jr.

5. Plaintiff did not present any evidence to show that defendant Mildred C. Liles knowingly received any benefit from the items purchased from plaintiff's store.

6. That the defendant, Pell D. Liles, Jr., testified that he was the owner and operator of Dixie Iron Works; that his wife, Mildred C. Liles was not a part of his business known as Dixie Iron Works; that his wife, Mildred C. Liles, had been gainfully employed on a full-time basis as a legal secretary in the City of Raleigh for ten (10) years prior to this action; that he, individually, arranged for a charge account at Williams' Farm Supply, a farm supply store owned and operated by the plaintiff, W. B. Williams and that he and employees of his had over a period of years charged various items of purchase at that store and that he, Pell D. Liles, Jr., was indebted to the plaintiff in the amount of Three Thousand Three Hundred Eleven and 07/100ths Dollars ($3,311.07).

* * *

Based upon the above findings of facts the Court makes the following conclusions of law:

1. That the plaintiff has failed to offer sufficient evidence upon which to base a claim for relief against the defendant Mildred C. Liles.

* * *

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the claim of the plaintiff against the defendant, Mildred C. Liles, be dismissed involuntarily pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure and that the plaintiff have and recover nothing of this defendant. . . ."

Kirk, Ewell & Tantum, by George N. Hamrick, for plaintiff appellant.

Reynolds & Howard, by E. Cader Howard, for defendant appellee.

MORRIS, Judge.

Plaintiff raises two assignments of error, both of which relate to the trial judge's findings and conclusions that femme defendant was not indebted to plaintiff on the account of Dixie

Iron Works. Plaintiff argues both assignments together in his brief and we shall likewise treat them as one. Plaintiff contends that the trial court erred as a matter of law in its determination that Mrs. Liles was not liable to the plaintiff. We disagree.

[1-3] In ruling on a motion for involuntary dismissal made pursuant to Rule 41(b), the trial judge may weigh the evidence, find facts against plaintiff and grant defendant's motion to dismiss. This is true even though plaintiff may have introduced evidence sufficient to make out a *prima facie* case and to withstand a motion for a directed verdict in a jury case. *Helms v. Rea,* 282 N.C. 610, 194 S.E. 2d 1 (1973); *Fearing v. Westcott,* 18 N.C. App. 422, 197 S.E. 2d 38 (1973). Where the trial court, as the trier of the facts, has found specific facts, such findings are conclusive upon appeal if supported by competent evidence, even though there may be evidence which would sustain findings to the contrary. *Construction Co. v. Hajoca Corp.,* 28 N.C. App. 684, 222 S.E. 2d 709 (1976); *Bryant v. Kelly,* 10 N.C. App. 208, 178 S.E. 2d 113 (1970), rev'd on other grounds, 279 N.C. 123, 181 S.E. 2d 438 (1971). In the present case, the trial judge found specific facts against plaintiff and made conclusions of law thereon. Therefore, the question before us is whether the facts are based on competent evidence. While the evidence is certainly conflicting on the extent of femme defendant's involvement in her husband's business, the findings of the trial court were based on competent evidence. Accordingly, plaintiff's assignments of error are overruled.

Affirmed.

Judges HEDRICK and ARNOLD concur.

INTERSTATE EQUIPMENT COMPANY v. C. CHRISTOPHER SMITH, RECEIVER FOR BOLLINGER CONSTRUCTION COMPANY, GREAT AMERICAN INSURANCE COMPANY, AND NELLO L. TEER COMPANY (INC.)

No. 7622SC157

(Filed 3 November 1976)

1. **Principal and Surety § 10— contractor's bond — intended beneficiaries — action against surety**

The intended beneficiaries of a contractor's or subcontractor's bond may maintain actions in their own names against the surety on such bond.

2. **Principal and Surety § 10— private contractor's bond**

In a private contractor's bond the parties are free to agree at arm's length on the extent of the coverage desired.

3. **Principal and Surety § 10— highway construction bond — meaning of "materials" — equipment rental**

In a surety bond conditioned upon the contractor paying those furnishing "materials" in the construction of a highway, "materials" consist of articles necessary and indispensable to performance of the contract which the parties must reasonably contemplate will be incorporated into the work and which lose their identity in the finished product; therefore, such a bond does not cover amounts due for the rental of equipment.

4. **Principal and Surety § 10— private construction bond — consideration with contract — intent of parties**

While a construction contractor's payment bond should be read in conjunction with the construction contract, the provisions of the bond should not be extended beyond the reasonable intent of the parties gathered from the language and purpose of the bond.

5. **Principal and Surety § 10— terms of bond in conflict with construction contract**

Where the provisions of a bond conflict with those of a contract, the terms of the bond control over those of the contract in determining the surety's liability.

6. **Principal and Surety § 10— highway construction bond — conflict between bond and contract — bond for "labor and materials" — rental of equipment**

Where a highway construction contract required the subcontractor to "pay all indebtedness" arising out of its operations and to provide a "satisfactory Payment bond," and the bond provided by the subcontractor covered only "payment to all persons supplying labor and material," the language of the bond conflicted with that of the contract and the terms of the bond controlled the liability of the bond surety; therefore, the surety was liable only for amounts due for labor and materials and not for amounts due for the rental of equipment.

7. **Principal and Surety § 10— highway construction bond — contract provision — no intent to include equipment as "labor and materials"**

Provision of a highway construction contract requiring a subcontractor to furnish "all supervision, labor and materials, including equipment and incidentals" did not show an intent by the parties to include equipment within the category of labor and materials in the subcontractor's bond covering "payment to all persons supplying labor and material."

8. **Principal and Surety § 10— payment bond — meaning of "labor and materials"**

As used in a payment bond, "labor and materials" mean such labor and materials as are necessary to construct the work in accordance with the contract.

9. **Principal and Surety § 10— payment bond for "labor and materials" — equipment repairs**

Whether labor and parts used in repairing equipment come within a payment bond for "labor and materials" depends on whether the repairs are major or incidental; major repairs add materially to the value of the equipment and render it available for other work while incidental repairs consist of labor and parts which are needed to keep the equipment operational during the construction period, which are not of a permanent nature, and which do not appreciably add to the value of the equipment.

10. **Principal and Surety § 10— payment bond for "labor and materials" — repairs to leased equipment — tire adjustment charge**

The cost of repairs made on leased equipment after the equipment was returned to the lessor and a tire adjustment charge were not incidental repairs and did not come within the coverage of a payment bond for "labor and materials."

APPEAL by plaintiff from *Collier, Judge.* Judgment entered 6 February 1976 in Superior Court, IREDELL County. Heard in the Court of Appeals 27 May 1976.

Plaintiff originally instituted this action against Bollinger Construction Company, Nello L. Teer Company, and Carolina Power and Light Company. After institution of this action, Bollinger Construction Company was placed in receivership in Robeson County and C. Christopher Smith was appointed receiver. The receiver was made a party in lieu of Bollinger.

Summary judgment has been entered against the receiver of Bollinger in favor of plaintiff, but plaintiff has recovered nothing under its judgment against the receiver. Plaintiff has entered voluntary dismissals of its action against Nello L. Teer Company and of its action against Carolina Power and Light Company. Therefore, the only parties to this appeal are plain-

tiff and Great American Insurance Company. Great American was the surety on Bollinger's payment bond.

The controversy between the parties arose fo'lowing the construction of a public highway project in the State of Virginia. Adams Construction Company, Roanoke, Virginia, was prime contractor on the project. Nello L. Teer, Durham, North Carolina (Teer), was a subcontractor of Adams Construction Company on the project. Bollinger Construction Company, Lumberton, North Carolina (Bollinger), was a subcontractor of Teer for a part of the grading work on the project. Plaintiff, Interstate Equipment Company, Statesville, North Carolina (Interstate), leased grading equipment to Bollinger, which was used by Bollinger on the Virginia project. Interstate contends that Bollinger is indebted to it for the leased equipment, repairs thereto, and service charges in the total sum of $39,670.83.

Teer required Bollinger to furnish a payment bond in connection with the contract between Teer and Bollinger. Great American Insurance Company (Great American), the remaining defendant, became the surety on Bollinger's payment bond. The payment bond executed by Great American contains the following language:

> "NOW, therefore, the condition of the foregoing obligation is such that if the Principal shall well and truly perform and promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and in all duly authorized modifications of said contract that may hereafter be made, then this obligation shall be void, otherwise it shall remain in force."

Plaintiff seeks recovery from Great American under the terms of the foregoing bond for $39,670.83—plaintiff's total claim against Bollinger. Both plaintiff and Great American moved for summary judgment. The trial judge denied plaintiff's motion and granted summary judgment in favor of Great American. Plaintiff appealed.

Raymer, Lewis, Eisele & Patterson, by Douglas G. Eisele, for the plaintiff.

Haywood, Denny & Miller, by John C. Martin, for Great American Insurance Company.

BROCK, Chief Judge.

[1] It has long been established that a person for whose benefit a promise is made to another, though not a party to the agreement or privy to the consideration, may maintain an action upon the promise, and one who has assumed or contracted for the payment of another's debt may be sued directly by the creditor. 2 Strong, N. C. Index, Contracts, § 14. The same principle applies to the intended beneficiaries of a contractor's or subcontractor's bond, and such a beneficiary may maintain an action in his own name against the surety on such bond. *Glass Co. v. Fidelity Co.*, 193 N.C. 769, 138 S.E. 143 (1927). The problem in the present case is whether the plaintiff, Interstate, is a beneficiary under the bond upon which the defendant, Great American, is the surety.

[2] Both parties, as well as this Court, view the contractor's bond given by Bollinger to Teer as one not required by statute, but rather as a private bond agreement. In a private contractor's bond the parties are free to agree at arm's length on the extent of coverage desired.

[3] The bond executed by Bollinger and Great American as surety was a payment bond for the protection of those supplying labor and material. Plaintiff claims that this bond should cover the rental of equipment. In private contractor's bonds neither equipment nor rental of equipment is considered "materials." 17 Am. Jur. 2d, Contractor's Bonds, § 7, p. 196. "Materials" within a surety bond, conditioned upon the contractor paying those furnishing materials in the construction of a roadway, consist of articles necessary and indispensable to performance of the contract, which the parties must reasonably contemplate will be incorporated into the work and which lose their identity in the finished product. *Hardware Co. v. Indemnity Co.*, 205 N.C. 185, 170 S.E. 643 (1933). Equipment, such as the Wabco scrapers in this case, is neither used up nor incorporated into the work but is rather a component of the contractor's plant.

Under the above-stated general principle, plaintiff's claims against the surety for amounts due on the equipment leases ($27,447.29) are invalid. Plaintiff argues, however, that if the contractor's bond is read in conjunction with the construction contract, the equipment leases would come within the coverage of the bond. We disagree.

The pertinent provisions of the contract relied on by the plaintiff are:

> "You [Bollinger] will fiance your operations in every detail and promptly, or upon demand, pay all indebtedness arising out of your operations hereunder."
>
> * * *
>
> "You are to furnish us satisfactory Payment bond being in the full amount of this subcontract."
>
> * * *
>
> "You will furnish all supervision, labor and materials, including equipment and incidentals, to do properly the items of work listed below at the designated unit prices and in accordance with the contract, plans, specifications, special provisions and directions of our representative who is in charge of the project."

[4, 5] While it is certainly a correct rule of construction that the payment bond be read in conjunction with the construction contract, the provisions of a contractor's bond should not be extended beyond the reasonable intent of the parties gathered from the language and purpose of the bond. *Lumber Co. v. Lawson,* 195 N.C. 840, 143 S.E. 847, 67 A.L.R. 984 (1928). Furthermore, where the provisions of the bond conflict with those of the contract, the terms of the bond are controlling over those of the contract in determining the surety's liability. 17 Am. Jur. 2d, Contractor's Bonds, § 4, p. 194.

[6] In the case at bar the contract called for Bollinger to provide Teer with a "satisfactory Payment bond." Bollinger and Great American as surety executed a bond conditioned simply on "payment to all persons supplying labor and material in the prosecution of the work provided in said contract." While the contract also required Bollinger to "pay all indebtedness" arising out of his operations, there is no wording in the condition of the bond that in any way extends coverage to include "all indebtedness." The language of the bond conflicts with that of the contract; therefore, the terms of the bond must control. Those terms encompass only labor and materials, and not equipment.

[7] Plaintiff argues that the provision requiring Bollinger to furnish "all supervision, labor and materials, including equipment and incidentals" shows the intent of the parties to include

equipment within the category of labor and materials. By reading the contract as a whole and thereby placing the provision in its proper context, it is evident that the provision is not intended to bring equipment within the category of materials. The provision comes at a point in the contract describing the items of work to be performed by Bollinger. The language of the provision is but a preface to the specific job description. It merely defines Bollinger's construction responsibilities. Furthermore, the contract itself makes the traditional distinction between equipment and materials. In the paragraph immediately after the provision for a satisfactory payment bond, the contract says:

> "You [Bollinger] shall *immediately procure and prepare your materials and manufactured products to be incorporated in the completed work and advise us of your source of supply and delivery schedule of said materials.* You shall have available the necessary workmen and equipment so as to be ready to begin work immediately following our direction to do so." (Emphasis added.)

The contract called for Bollinger to pay all indebtedness and provide a satisfactory payment bond. Bollinger and Great American as surety provided a payment bond simply covering labor and materials. Teer accepted this bond as satisfactory. These parties were dealing at arm's length and were free to agree on the extent of the bond's coverage. They could have easily included rental of equipment, and had they done so, the surety would have been liable. The parties did not affirmatively include equipment rental within the bond coverage, nor can their contract be properly construed to include such coverage. Summary judgment denying plaintiff's claims for amounts due on rental of equipment was proper.

[8-10] Besides its claims for lease payments, plaintiff also claims the cost of repairs made on the leased equipment ($1,304.08), a tire adjustment charge ($6,000.00) also claimed as a repair, and service charges ($4,419.46) on the overdue lease and repair accounts. As to the two items classed as repairs, the question is whether they are "labor and materials" within the coverage of the payment bond. The term "labor and materials," as used in a payment bond, means such labor and materials as are necessary to construct the work in accordance with the contract. 17 Am. Jur. 2d, Contractor's Bonds, § 7, p. 196. Whether the labor and parts used in repairing equip-

ment are within the bond depends on whether the repairs are major or incidental. Major repairs add materially to the value of the equipment and render it available for other work. The replacement of tires falls into this category. 67 A.L.R. 1241. Thus, the tire adjustment charge claimed by the p'aintiff as a repair does not fall within the labor and materials covered by the bond.

Non-major repairs are those which are incidental to the carrying on of the work. They consist of labor and parts which are needed to keep the equipment operational during the construction period, which are not of a permanent nature, and which do not appreciably add to the value of the equipment. 67 A.L.R. 1242. The only materials before Judge Collier concerning repairs, other than the tire adjustment considered above, show that the repair charges claimed by plaintiff were for work done after the equipment had been returned to plaintiff. The repairs in question were not needed to keep the equipment operational during the construction work. The defendant as surety is not liable on the bond because the repairs claimed were not necessary for the construction and therefore not within the covered category of "labor and materials."

Since Great American is not liable as surety on the lease payments or repair charges, it follows that Great American is not liable for the service charges attached to Bollinger's failure to pay those claimed amounts.

The judgment of the Superior Court of Iredell County denying plaintiff summary judgment and granting defendant summary judgment is

Affirmed.

Judges BRITT and MORRIS concur.

MILDRED S. JOHNSON, ADMINISTRATRIX OF THE ESTATE OF PHILIP RANDALL JOHNSON, DECEASED v. LYNWOOD EDWARD YATES, JR., AND LYNWOOD EDWARD YATES, SR.

No. 764SC478

(Filed 3 November 1976)

1. **Automobiles § 46— wrongful death — automobile accident — investigating officer's opinion as to speed — admission prejudicial error**

In a wrongful death action where plaintiff alleged that her intestate was killed while riding in a vehicle driven by defendant at a speed greater than that posted, the trial court committed prejudicial error in allowing the State Trooper who arrived at the scene after the accident for the purpose of investigating it to testify that the speed of defendant's vehicle immediately before the accident was from 70 to 80 mph, since the rule in this State is that one who did not see a vehicle in motion will not be permitted to give an opinion as to its speed.

2. **Automobiles §§ 73, 91— wrongful death — willful and wanton negligence of defendant — contributory negligence of plaintiff no bar — requirement that issue be submitted to jury**

Where the death of a plaintiff's intestate is the result of willful and wanton conduct on the part of the defendant, the intestate's contributory negligence will not bar recovery; and where the plaintiff alleges and offers evidence tending to show that willful and wanton conduct on the part of the defendant proximately caused the intestate's death, it is error for the trial court to refuse to submit plaintiff's tendered issue as to the willful and wanton negligence of the defendant.

3. **Automobiles §§ 51, 91— evidence of excessive speed — issue of willful and wanton negligence properly submitted to jury**

In a wrongful death action where plaintiff alleged that her intestate's death was proximately caused by defendant's willful and wanton negligence, plaintiff was entitled to have the issue submitted to the jury, even if the court had properly excluded opinion evidence as to the speed of defendant's vehicle, where plaintiff's evidence tended to show that defendant driver, after drinking a quantity of intoxicants sufficient to cause his blood content of alcohol to be .17, operated the pickup truck in which intestate was riding as a passenger over a narrow rural paved road, in the nighttime, at a speed so great that when said driver lost control of the vehicle it slid on the paved portion of the road 260 feet, then slid on the ground adjoining the road 137 feet, and then struck a tree with a 12 inch trunk with such force that the tree was uprooted and mashed into and around the vehicle.

APPEAL by defendants from *Lanier, Judge.* Judgment entered 15 January 1976 in Superior Court, JONES County. Heard in the Court of Appeals 19 October 1976.

In this action plaintiff seeks to recover for the wrongful death of her intestate. In her complaint she alleges that intestate was killed while riding as a passenger in a pickup truck owned by defendant Yates, Sr., and driven by defendant Yates, Jr., in a careless and wreckless manner, in willful and wanton disregard of the rights and safety of others, in violation of the posted speed limit and without keeping said vehicle under proper control.

In their answer defendants deny negligence, allege that the accident was unavoidable and that plaintiff's intestate was contributorily negligent in that he failed to admonish defendant driver with respect to the manner in which the vehicle was being operated, accepted a ride with defendant driver knowing that he had been drinking intoxicants and could be under the influence of alcohol, and encouraged defendant driver to drink alcoholic beverages on the night of the accident.

Prior to and during the trial the parties stipulated that plaintiff's intestate died as a result of the accident, that blood alcohol tests administered after the accident showed the blood of intestate to be negative for alcohol and the blood content of defendant driver to be .17, and that defendant driver pleaded guilty to charges of death by vehicle and driving under the influence of intoxicants stemming from the accident.

At trial State Highway Trooper Gregory testified that he had been a trooper for twelve years and investigates approximately 150 accidents per year; that he arrived at the scene of the accident in question soon after it occurred and observed a pickup truck overturned on the side of road; that the truck had left skidmarks 397 feet long, consisting of 260 feet on the paved portion of the road and 137 feet on the ground adjacent to the road, indicating that the truck slid in a sideways manner; that a tree with a 12-inch trunk had been uprooted and was mashed in and around the smashed vehicle; that in his opinion, based on the physical evidence observed at the scene, the truck was traveling 70 to 80 m.p.h. when it left the road; that the road was narrow and the posted speed limit was 55 m.p.h.; that the occupants of the vehicle had been taken to the hospital when he arrived at the scene and plaintiff's intestate was pronounced dead upon arrival at the hospital; that defendant driver survived the accident and he talked with said defendant at the hospital; at that time it was readily apparent that defendant driver had been drinking because his speech was unclear and

there was an odor of alcohol about his person; that defendant driver stated that he had taken a couple of drinks earlier that night and had simply run off the road, started sliding and turned over.

Plaintiff presented other evidence which is not pertinent to the questions raised on this appeal. Defendant driver testified and presented other evidence, none of which is pertinent to the questions raised on this appeal.

Issues were submitted to and answered by the jury as follows:

"(1) Was the death of Plaintiff's intestate caused by willful or wanton conduct on the part of the Defendants as alleged in the Complaint?

Answer: Yes

(2) Was Plaintiff's intestate killed by the negligence of Defendants as alleged in the Complaint?

Answer: Yes

(3) If so, did Plaintiff's intestate, contribute by his own negligence to his death, as alleged in the Answer?

Answer: _____

(4) What amount, if any, is the plaintiff entitled to recover for the wrongful death of Philip Randall Johnson?

Answer: $25,000.00."

From judgment entered on the verdict, defendants appealed, assigning errors.

Brock and Foy, by Donald P. Brock, for plaintiff appellee.

Jeffress, Hodges, Morris & Rochelle, P.A., by Thomas H. Morris, for defendant appellants.

BRITT, Judge.

[1] Defendants assign as error the admission of testimony by Trooper Gregory that in his opinion the speed of the vehicle in question immediately before the accident was "from 70 to 80" m.p.h., this opinion being based on physical evidence found at the scene following the accident. The assignment is sustained.

The rule applicable in the present case is well stated in 1 Stansbury, N. C. Evidence § 131 (Brandis Rev. 1973) thusly: "The opinion of a witness, whether lay or expert, will not be received when he did not observe the critical events, but bases his testimony on the appearances at the scene which he later observed and can adequately describe to the jury."

The leading case in this area of the law and the one most factually in point with the instant case is *Tyndall v. Hines Co.*, 226 N.C. 620, 39 S.E. 2d 828 (1946). In that personal injury case, a State highway patrolman was allowed to give his opinion as to the speed of defendant's car based on the tire marks and conditions observed by him at the scene of the accident. The Supreme Court in granting a new trial for the defendant stated that:

> ". . . [O]ne who did not see a vehicle in motion will not be permitted to give an opinion as to its speed. The 'opinion' must be a fact observed. The witness must speak of facts within his knowledge. He cannot, under the guise of an opinion, give his deductive conclusion from what he saw and knew. . . ."

For other cases adhering to the stated principle see *Shaw v. Sylvester,* 253 N.C. 176, 116 S.E. 2d 351 (1960); *Carruthers v. R.R.,* 232 N.C. 183, 59 S.E. 2d 782 (1950); *Webb v. Hutchins,* 228 N.C. 1, 44 S.E. 2d 350 (1947); *State v. Roberson,* 240 N.C. 745, 83 S.E. 2d 798 (1954).

Plaintiff now concedes that the trial court erred in admitting the testimony but argues that the error was harmless and not sufficiently prejudicial to require a new trial. A careful review of controlling authorities impels us to reject plaintiff's argument.

In *Tyndall v. Hines Co., supra,* pp. 623-24, the Supreme Court said:

> "On this record the admission of this evidence, in our opinion, was prejudicial to the defendants. The witness was a State employee whose duty it was to make a disinterested and impartial investigation of the accident. In so doing he was a representative of the State. His testimony should, and no doubt did, carry great weight with the jury.
>
> "His testimony was material to the issue being tried. Excessive and unlawful speed is paramounted in the com-

plaint, in the testimony, and in the charge of the court as one of the primary acts of negligence relied on by plaintiff. The manner of operation of the truck, due to its speed, was reckless and unlawful; the excessive speed caused the driver to lose control. . . . This was the theory of the trial. So then any evidence tending to prove an unlawful rate of speed had a direct bearing on the cause of action plaintiff was seeking to establish.

"Furthermore, in its charge to the jury, the court made special reference to the testimony of this witness, to his official position and to the statement that the car was traveling from 50 to 60 m.p.h."

We are unable to distinguish *Tyndall* from the case at bar, therefore, we hold that the error complained of was sufficiently prejudicial to entitle defendants to a new trial.

Defendants assign as error the submission to the jury the issue with respect to willful and wanton negligence. We find no merit in this assignment.

[2] Where the death of a plaintiff's intestate is the result of willful and wanton conduct on the part of the defendant, the intestate's contributory negligence will not bar recovery. And where the plaintiff alleges and offers evidence tending to show that willful and wanton conduct on the part of the defendant proximately caused the intestate's death, it is error for the trial court to refuse to submit plaintiff's tendered issue as to the willful and wanton negligence of the defendant. *Pearce v. Barham,* 271 N.C. 285, 156 S.E. 2d 290 (1967); *Brewer v. Harris,* 279 N.C. 288, 182 S.E. 2d 345 (1971), aff'g 10 N.C. App. 515, 179 S.E. 2d 160 (1971).

[3] We hold that the allegations in the complaint and the evidence presented at the trial in the case at bar required the trial judge to submit plaintiff's tendered issue as to the willful and wanton negligence of defendants. Since a new trial is being ordered for the reasons set forth above, the question then arises would plaintiff be entitled to have the issue submitted in the absence of opinion testimony as to the speed of the vehicle. We answer that question in the affirmative.

While evidence of willful and wanton conduct in the instant case is not as strong as that presented in *Pearce* and *Brewer,* we think it was sufficient to warrant a submission of

the issue even without the opinion testimony as to speed. Plaintiff's evidence tended to show that defendant driver, after drinking a quantity of intoxicants sufficient to cause his blood content of alcohol to be .17, operated the pickup truck in which intestate was riding as a passenger over a narrow rural paved road, in the nighttime, at a speed so great that when said driver lost control of the vehicle it slid on the paved portion of the road 260 feet, then slid on the ground adjoining the road 137 feet, and then struck a tree with a 12-inch trunk with such force that the tree was uprooted and mashed into and around the vehicle. Opinion testimony by the investigating trooper was not necessary for the jury to draw its own conclusion that the vehicle was being driven greatly in excess of the posted speed limit of 55 m.p.h.

We find it unnecessary to discuss the other assignments of error brought forward and argued in defendants' brief.

For the reasons stated above, defendants are awarded a

New trial.

Judges VAUGHN and MARTIN concur.

VIVIAN R. TRAYWICK v. RALPH C. TRAYWICK

No. 7620DC367

(Filed 3 November 1976)

1. **Appeal and Error § 16— authority of trial court pending appeal**

When an order arising from a domestic case is appealed, the cause is taken out of the jurisdiction of the trial court and put into the jurisdiction of the appellate court, and, pending the appeal, the trial judge is *functus officio* and without authority to act in the matter.

2. **Appeal and Error § 16; Divorce and Alimony § 18— divorce action — new trial ordered — case certified to trial court — jurisdiction to determine motion for contempt**

After an appellate court reversed judgment on the merits in an action for alimony without divorce, ordered a new trial and certified the case back to the district court, the district court then had jurisdiction to entertain a motion in the cause that defendant be adjudged in contempt for failure to comply with an alimony *pendente lite* order entered prior to the first trial.

APPEAL by plaintiff from order of *Crutchfield, Judge.* Order entered 3 March 1976 in District Court, UNION County. Heard in the Court of Appeals 15 September 1976.

On 20 February 1974, plaintiff instituted this action against her husband seeking alimony without divorce, alimony pendente lite, and attorneys fees. On 6 March 1974, defendant filed an answer in which he contested plaintiff's right to relief. Following notice and a hearing on plaintiff's motion, Crutchfield, Judge, signed an order on 15 March 1974 which ordered, inter alia, that defendant "pay for the plaintiff alimony *pendente lite* in the amount of $100.00 per month, such payments to be made in the office of the Clerk of the Superior Court of Union County, on the 20th day of each month, beginning on March 20, 1974, and continuing on the 20th day of each month thereafter, which sums shall be paid by the Clerk to the plaintiff." Neither party appealed from this order.

The action came to trial in Union County District Court in March, 1975, at which time the jury answered all issues in favor of plaintiff. On 14 March 1975, Webb, Judge, entered judgment awarding permanent alimony for plaintiff, and defendant appealed. The Court of Appeals reversed the judgment, *Traywick v. Traywick,* 28 N.C. App. 291, 221 S.E. 2d 85 (1976), and ordered a new trial. On 19 January 1976, the Court of Appeals entered its judgment which stated in pertinent part:

> "This cause came on to be argued upon the transcript of the record from the Union District Court. Upon consideration whereof, this Court is of the opinion that there is error in the record and proceedings of said trial tribunal.
>
> It is therefore considered and adjudged by the Court here that the opinion of the Court as delivered by the Honorable David M. Britt, Judge, be certified to said trial tribunal, to the intent that a new trial is awarded.
>
> * * *
>
> Certified to the District Court this 19th day of January, 1976."

On 29 January 1976, plaintiff filed a motion in the cause in which she alleged that defendant had violated the 15 March 1974 order for alimony pendente lite and that these monthly payments were $1,100 in arrears. After notice, Webb, Judge, entered an order on 10 February 1976 which, inter alia, directed

defendant to appear on 3 March 1976 and show cause why he should not be held in contempt for violation of the order. On 3 March, the matter was heard, but Crutchfield, Judge, entered an "Order Refusing to Hear Motion to Hold Defendant in Contempt," which stated:

> "AND IT APPEARING TO THE COURT AND THE COURT FINDS AS A FACT:
>
> * * *
>
> 6. That at the hearing on March 3, 1976, the plaintiff tendered to the Court evidence that the defendant had failed to comply with the provisions of the March 15, 1974 Order for alimony *pendente lite*, including, but not limited to, his failure to make any payments of alimony *pendente lite* in the amount of $100.00 for the period between March 20, 1975 and February 20, 1976, but the Court refused to allow the plaintiff to present said evidence.
>
> AND IT BEING THE OPINION OF THE COURT AND COURT CONCLUDES AS A MATTER OF LAW:
>
> That the decision and opinion of the Court of Appeals in ordering a new trial and setting aside the Judgment entered on the verdict, which opinion has been certified to the Union County District Court, leaves the Union County District Court *functus officio* and without authority or jurisdiction to hear the MOTION IN THE CAUSE or to adjudge the defendant in contempt for his failure to make payments of alimony *pendente lite* or to otherwise comply with the terms of the March 15, 1974 Order or alimony *pendente lite.*"

Plaintiff appeals from this order of 3 March 1976.

Clark & Griffin, by Richard S. Clark, for plaintiff appellant.

William H. Abernathy for defendant appellee.

MORRIS, Judge.

[2] The sole question for consideration on this appeal is whether the district court had jurisdiction to entertain a motion in the cause and to adjudge defendant guilty of contempt for failure to comply with the alimony pendente lite order, after the judgment on the merits had been reversed on other grounds,

a new trial was ordered and the case was certified back to the trial court by this Court. The plaintiff contends that once the case was returned by the Court of Appeals to the district court, the district court had jurisdiction to inquire into defendant's violation of the alimony pendente lite order. We are constrained to agree.

[1] It is the general rule in North Carolina that when an order arising from a domestic case is appealed, the cause is taken out of the jurisdiction of the trial court and put into the jurisdiction of the appellate court. Pending the appeal, the trial judge is *functus officio* and is without authority to act in the matter. *Joyner v. Joyner,* 256 N.C. 588, 124 S.E. 2d 724 (1962) ; *Lawson v. Lawson,* 244 N.C. 689, 94 S.E. 2d 826 (1956) ; *Lawrence v. Lawrence,* 226 N.C. 221, 37 S.E. 2d 496 (1946). This is not to say, however, that the trial court may never reexamine an order in the cause after appellate review has been conducted.

> "The general rule is that an appeal or writ of error, when duly perfected, divests the trial court of jurisdiction of the cause and transfers such jurisdiction to the appellate court *where it remains until the appellate proceeding terminates and the trial court regains jurisdiction.*" 4 Am. Jur. 2d, Appeal and Error, § 352, pp. 830-31. (Emphasis supplied.)

The rule that the trial court regains jurisdiction over the cause after the completion of appellate review was implicitly recognized by our Supreme Court in the case of *Joyner v. Joyner, supra.* There, the trial court awarded alimony pendente lite to the plaintiff wife, and the husband appealed. While his appeal was pending, the wife sought to hold the husband in contempt for failure to pay according to the alimony order. The trial court judge held that he was *functus officio* and without authority to make any further orders while the case was on appeal. In affirming the lower court's order, the Supreme Court said:

> "Judge Bundy was correct in holding that the superior court was divested of jurisdiction by the appeal. . . . The appeal stays contempt proceedings until the validity of the judgment is determined. *But taking an appeal does not authorize a violation of the order. One who wilfully violates an order does so at his peril. If the order is upheld by the appellate court, the violation may be inquired into when*

> *the case is remanded to the superior court.*" 256 N.C. at 591. (Emphasis supplied.)

Similarly, in *Upton v. Upton,* 14 N.C. App. 107, 187 S.E. 2d 387 (1972), this Court reviewed an order holding a defendant husband in contempt for violation of a child support order which was pending appeal at the time. We said (at p. 109) that "An appeal removes a cause from the trial court which is thereafter without power to proceed further *until the cause is returned by mandate of the appellate court.*" (Emphasis supplied.)

[2] When this Court certified the case back to the Union County District Court on 19 January 1976, that trial court regained the jurisdiction over the case.

> "When the Supreme Court has decided the case and the decision has been certified to the superior court, its jurisdiction over the case is at an end. The 'legal link or string' which brought the case up for review is broken, and the case goes 'back home' to the superior court, to be there proceeded with in accordance with the decision of the appellate court." 1 McIntosh, N. C. Practice and Procedure, § 65, p. 40 (2d ed. 1956).

The trial court's jurisdiction was not limited in this case to holding the new trial.

> "The jurisdiction of the lower court reattaches on remand and it may take such action as law and justice may require under the circumstances as long as it is not inconsistent with the mandate and judgment of the appellate court." 5B C.J.S., Appeal and Error, § 1965, p. 574.

Accordingly, we hold that the district court had jurisdiction to hear plaintiff's motion regarding the alimony pendente lite order. The order is

Reversed.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. MICHAEL ALLEN HARMON

No. 7627SC447

(Filed 3 November 1976)

1. **Criminal Law § 70— tape recordings — requirements for admissibility**

Before a tape recorded conversation may be admitted into evidence, the following requirements must be met: (1) a showing that the recording device was capable of taking testimony; (2) a showing that the operator of the device was competent; (3) establishment of the authenticity and correctness of the recording; (4) a showing that changes, additions or deletions have not been made; (5) a showing of the manner of the preservation of the recording; (6) identification of the speakers; and (7) a showing that the testimony elicited was voluntarily made without any kind of inducement.

2. **Criminal Law § 70— tape recordings — insufficient foundation laid for admission**

On a *voir dire* hearing to determine the admissibility of a statement made to police officers by defendant, the trial court did not err in excluding tape recordings of telephone conversations between defendant and the interrogating officers which were made by defendant and which he kept in his possession from the time they were made until trial, since defendant's testimony identifying the recorded telephone voices was totally inadequate, defendant's evidence was insufficient to establish the authenticity and correctness of the recordings, and defendant's testimony did not supply a sufficient explanation of the manner in which the recordings were preserved from the time they were made until trial.

3. **Criminal Law § 76— confession — admissibility question for judge — credibility question for jury**

Admissibility of a confession is a matter for determination by the judge unassisted by the jury, while credibility and weight are for determination by the jury unassisted by the judge.

APPEAL by defendant from *Walker, Judge.* Judgment entered 15 January 1976 in Superior Court, LINCOLN County. Heard in the Court of Appeals 12 October 1976.

Defendant was indicted for felonious receiving of stolen property, convicted by a jury, and sentenced to 2 to 4 years, with 6 months active and the remainder suspended. Before trial, defendant moved to suppress certain evidence concerning his confession and a *voir dire* hearing was allowed. The hearing began with defendant testifying in his own behalf. He testified that he and his wife were taken into custody around 4:30 p.m. on 7 August 1975; that they were taken to jail and questioned separately until around 11:00 p.m. by Officers Burgin and

Allen; that he did not understand his rights; that Burgin promised to get him a lawyer if he would cooperate; that he was frightened and made a statement exactly as the officers wanted; that he was released on bond and thereafter had several telephone conversations with the officers "discussing the possibility of incriminating other persons"; and that he tape recorded some of these telephone calls. He asked to play the tapes to corroborate his testimony but the judge refused. State then presented Burgin and Allen who testified that they found a stolen tractor at defendant's home and took him into custody in Caldwell County for questioning; that they advised defendant of his rights; that he questioned his rights and they explained them in minute detail; that defendant would not talk; that they returned defendant to Lincoln County and again advised him of his rights and questioned him; that they never threatened defendant or promised him anything; that defendant became cooperative and gave them a tape recorded statement. At the close of the hearing defendant renewed his request to play his recordings of telephone calls to the officers. The judge again denied the request. The judge then found the confession to be voluntary and allowed defendant's statement into evidence.

Attorney General Edmisten, by Associate Attorney Richard L. Griffin, for the State.

Robert H. West, for defendant.

MARTIN, Judge.

In his first assignment of error, the defendant contends and argues that during the evidentiary hearing on his motion to suppress his confession as involuntary, the trial judge erred in denying defendant's request to play a tape recording of alleged telephone conversations between defendant and the interrogating officers. Although the alleged conversations took place after the confession, defendant proffered the recordings as his proof that the confession was obtained by threat, force, coercion, and promises of assistance.

It is manifest that in order to admit a tape recording of telephone conversations, certain evidentiary requirements must be fulfilled. See *State v. Lynch*, 279 N.C. 1, 181 S.E. 2d 561 (1971); *Everette v. Lumber Co.*, 250 N.C. 688, 110 S.E. 2d 288 (1959); 1 Stansbury, N. C. Evidence, § 96, (Brandis Rev. 1973).

[1] In regards to the introduction of tape recorded conversations into evidence, there are several definite requirements that must be fulfilled. In order to lay a proper foundation for the admission of tape recorded evidence, the cases are in general agreement and the courts are in strict adherence to certain rules and requirements. These rules have been set forth as follows:

> "(1) a showing that the recording device was capable of taking testimony; (2) a showing that the operator of the device was competent; (3) establishment of the authenticity and correctness of the recording; (4) a showing that changes, additions, or deletions have not been made; (5) a showing of the manner of the preservation of the recording; (6) identification of the speakers; and (7) a showing that the testimony elicited was voluntarily made without any kind of inducement." 58 A.L.R. 3d 598, § 2[b]; 29 Am. Jur. 2d, *Evidence* § 436 (1967). See also *State v. Lynch, supra.*

In the present case, the defendant himself testified on *voir dire* in an attempt to lay a foundation for the admission of the recorded conversations. The record of the pertinent parts of his testimony is as follows:

> " . . . I had several telephone conversations with Mr. Burgin and Mr. Allen. . . . I started taping some of these conversations. . . . I have the tapes in my pocket—the original tapes. There have not been any additions, changes or deletions made on these tapes."
>
> * * *
>
> "I recorded these conversations on the cassette tape player in front of you. It is capable of accurate reproduction and I do know how to operate it."
>
> * * *
>
> "I put the date on one of the tapes so I could remember it."

[2] This testimony reveals that the defendant failed to meet several of the seven requirements cited above. In regards to requirement number (6), the defendant's testimony identifying the recorded telephone voices was totally inadequate. See *Everette v. Lumber Co., supra;* 29 Am. Jur. 2d, *Evidence* § 381 (1967). Although the defendant testified that he had several telephone conversations with Mr. Burgin and Mr. Allen, the

record is completely silent as to when the calls were made, who initiated the calls, and, most importantly, how the defendant identified the voices as those of Mr. Burgin and Mr. Allen.

In addition, there are several foundation requirements that were partially, but not adequately, fulfilled by the defendant's testimony. For example, although the defendant testified that the recorder was capable of accurate reproduction, this evidence alone is not sufficient to establish the authenticity and correctness of the recording as required by requirement number (3). In addition, while defendant stated that he put the date on the tapes so he could remember it, this testimony falls far short of requirement number (5) calling for an explanation of the manner in which the recording was preserved since it was made.

It is apparent that the defendant failed in several ways to satisfy the foundation requirements for the admission of recorded evidence. Consequently, it was not error for the trial judge to exclude the tape recorded telephone conversations from the *voir dire* hearing.

The defendant's first assignment of error is therefore overruled.

In the second assignment of error, the defendant argues and contends that the trial judge committed error by restricting his inquiry of the defendant's confession to its voluntariness and by not addressing his inquiry to the truth or falsity of the confession. We feel that this argument is without merit.

[3] It is apparent that the courts of this State have concluded that it is the function of the trial judge to decide the voluntariness of a confession while the truth or falsity of the confession is a matter in the province of the jury. The North Carolina Supreme Court seems to be in accord with what is referred to as the "Wigmore or 'Orthodox' Rule" referred to in Appendix A of the separate opinion of Mr. Justice Black in *Jackson v. Denno,* 378 U.S. 368, 411, 12 L.Ed. 2d 908, 936, 84 S.Ct. 1774, 1799, 1 A.L.R. 3d 1205, 1234 (1964). In that opinion it was stated that the "Judge hears all the evidence and then rules on voluntariness for purpose of admissibility of confession; jury considers voluntariness as affecting weight or credibility of confession." In accord with this rule, the North Carolina Supreme Court concluded that "[a]dmissibility is for determination by

the judge unassisted by the jury. Credibility and weight are for determination by the jury unassisted by the judge." (Citation omitted.) *State v. Barber*, 268 N.C. 509, 511, 151 S.E. 2d 51, 53 (1966).

Based upon the aforementioned court decisions, the trial judge in the instant case was correct in declining to personally address the issue of truth or falsity of the confession.

The defendant's second assignment of error is therefore without merit.

The defendant had a fair and impartial trial free of prejudicial error.

No error.

Chief Judge BROCK and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. NICHOLO HARVEY

No. 762SC333

(Filed 3 November 1976)

1. **Criminal Law § 66— illegal lineup — in-court identification — independent origin**

The evidence on *voir dire* supported the trial court's determination that a robbery victim's in-court identification of defendant was of independent origin and not tainted by his identification of defendant at an illegal lineup where it showed that the witness saw defendant at close range for ten minutes in a well-lighted area; therefore, the in-court identification was properly admitted in evidence.

2. **Criminal Law § 66— cross-examination about illegal lineup — harmless error**

A lineup at which defendant was identified by a robbery victim was improperly conducted where officers failed to advise defendant of his right to have counsel present at the lineup, and the trial court erred in permitting the district attorney to cross-examine defendant about his lineup identification by the robbery victim; however, such error was harmless beyond a reasonable doubt where there was overwhelming competent evidence of defendant's guilt of the robbery.

APPEAL by defendant from *Webb, Judge*. Judgment entered 29 January 1976 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 31 August 1976.

Defendant was indicted and tried for armed robbery. The State offered evidence tending to show that on 25 February 1975 William M. Hodges was the operator of the Travel Land Motel in Washington. At about 1:00 a.m. on that date the door bell rang and he unlocked the door and let in a man who wanted a room. While the man was in the process of registering, Hodges went to the door to see what was causing a dog to bark and as he opened the door he faced the defendant who was standing there with a shotgun. The defendant forced him to return to the office counter and, at the point of a gun, made him open the cash drawer from which defendant took over $223.00.

Defendant testified that he did not rob the Travel Land Motel and that on the night of the alleged robbery he was nowhere near the motel; that he could remember his whereabouts at the time of the robbery because he had recently been released from the Navy and had only arrived in Washington on the 23rd of February; that on the night of February 24, he went to the home of Margie Wright at 7:00 p.m. and that he stayed there until the following day. The defendant also said that the Travel Land Motel " . . . is not too far from where Margie Wright lives." The defendant's mother testified that "other than the sentence he is serving" her son had never previously been convicted of any crime. She did not know where her son was on the night of the robbery because there were a lot of times that she did not know where he was.

From a verdict of guilty of armed robbery and a prison sentence imposed thereon, the defendant appealed.

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

Carter, Archie & Grimes, by Samuel G. Grimes, for defendant.

MARTIN, Judge.

Defendant contends the court erred in allowing the in-court identification of the defendant by Mr. Hodges.

[1] Before Hodges' identification testimony was admitted in evidence, a *voir dire* hearing was held to determine its admissibility. *State v. Accor* and *State v. Moore*, 277 N.C. 65, 175 S.E. 2d 583 (1970). On *voir dire* the State offered evidence tending to show that Hodges observed defendant for about ten minutes

during the robbery, and that the motel was brightly lighted. On 26 February 1975, after defendant had been arrested, Hodges observed him in a lineup and identified him as one of the robbers. After his arrest and prior to the lineup defendant was given the *Miranda* warning, but he was not specifically told that he had a right to have counsel at the lineup. The court held that evidence of the lineup would not be admitted, but Hodges' in-court identification testimony would be admitted. It found that Hodges' " . . . in-court identification of the defendant is of independent origin and is not tainted by any out-of-court observation of the defendant or by any other thing."

Where such findings are supported by competent evidence, they are conclusive on appellate courts. In a ruling on this point, the North Carolina Supreme Court has stated:

> "When the admissibility of in-court identification testimony is challenged on the ground it is tainted by out-of-court identification(s) made under constitutionally impermissible circumstances, the trial judge must make findings as to the background facts to determine whether the proffered testimony meets the tests of admissibility. When the facts so found are supported by competent evidence, they are conclusive on appellate courts." (Citations omitted.) *State v. Tuggle,* 284 N.C. 515, 520, 201 S.E. 2d 884, 887 (1974).

In the present case, there was ample competent evidence to support the court's finding that Hodges' identification was independent of anything which occurred at the lineup. The evidence before the trial judge showed that the witness saw the defendant at close range for a period of ten minutes in a well-lighted area and he had ample opportunity to observe the defendant.

The trial court's finding that the witness's identification was independent of anything which occurred at the lineup being supported by competent evidence, the in-court identification testimony was competent and admissible. Defendant's first assignment of error is therefore overruled.

Defendant next contends the trial court erred by allowing the State to cross-examine the defendant about his lineup identification by Hodges.

[2] The trial record reveals that the defendant's lineup was improperly conducted because of the failure of the law enforce-

ment officers to specifically advise the defendant of his right to have counsel present at the lineup. Moreover, there is no evidence that the defendant had knowledge of or had waived his right to have counsel present at the lineup. See *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174 (1971). In ruling on this point, the trial judge in the instant case stated that he would disallow any evidence as to the identification lineup itself but he found that the in-court identification was of independent origin and not tainted. It was therefore improper for the district attorney to cross-examine the defendant about his lineup identification by Hodges, direct evidence about the lineup by Hodges having been excluded by the court.

Even though the trial judge erred in allowing the State to cross-examine the defendant about the lineup identification, it is evident that some errors are harmless and not every erroneous ruling on the admissibility of evidence will result in the obtaining of a new trial. See *Harrington v. California,* 395 U.S. 250, 23 L.Ed. 2d 284, 89 S.Ct. 1726 (1969); *Chapman v. California,* 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967); *Board of Education v. Lamm,* 276 N.C. 487, 173 S.E. 2d 281 (1970); 1 Stansbury, N. C. Evidence, § 9, (Brandis Rev. 1973).

The test for harmless error is whether the evidence which was admitted would, if excluded, have changed the result of the trial. See 1 Stansbury, N. C. Evidence, *supra.* On this same point, the North Carolina Supreme Court has stated that the " . . . test of harmless error is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." (Citation omitted.) *State v. Thacker,* 281 N.C. 447, 455, 189 S.E. 2d 145, 150 (1972).

In the case at bar, we do not think that the admission on cross-examination of the defendant's testimony concerning the lineup identification contributed to his conviction and we believe that its admission was harmless beyond a reasonable doubt. See *State v. Thacker, supra.* Even if the questions addressed to the defendant concerning the lineup had been excluded, there was still overwhelming evidence from which a jury could find that the defendant was guilty as charged. This assignment of error is therefore overruled.

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

Defendant had a fair trial free of prejudicial error.

No error.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. RICHARD L. CORPENING

No. 7624SC349

(Filed 3 November 1976)

1. **Larceny § 4— larceny after breaking and entering of property worth more than $200 — charge not duplicitous**

The second count in a bill of indictment which charged defendant with felonious larceny after a felonious breaking and entering of specified personal property having a value of more than $200 was not duplicitous since it charged only one offense, felonious larceny.

2. **Larceny §§ 4, 8— not guilty of breaking and entering — guilty of larceny of property worth more than $200 — instructions proper**

In a prosecution of defendant for (1) felonious breaking and entering and (2) felonious larceny after such breaking and entering of specified personal property having a value of more than $200 where the jury found defendant not guilty of breaking and entering, it could, under the evidence, still find defendant guilty of felonious larceny on the second count if it found the stolen property had a value of more than $200, and the trial court properly instructed in this regard.

APPEAL by defendant from *Friday, Judge.* Judgment entered 18 September 1975 in Superior Court, WATAUGA County. Heard in the Court of Appeals 2 September 1976.

Defendant was charged by bill of indictment, proper in form, with (1) felonious breaking and entering and (2) felonious larceny after such breaking and entering of specified personal property having a value of more than $200.00. He pled not guilty to both charges.

The State presented evidence to show that on the night of 4 March 1975 dormitory room 348 in East Hall on the campus of Appalachian State University was broken into while the students who occupied that room were absent on quarter break, and that a camera and camera equipment having a fair market value from $300.00 to $380.00 and meal books valued from

$160.00 to $170.00 were taken therefrom without the owner's permission. Edward Blount, an indicted accomplice, testified that he, Michael Scott, and defendant at about 1:30 a.m. on 4 March 1975 went to Room 347 in East Hall, where Blount and Scott roomed; that he stood watch while Scott and defendant broke into Room 348; that all three helped pack the above described property plus other items into dufflebags, which they then carried from the dormitory and loaded into a car owned by defendant's girl friend; and that they then took the stolen articles to defendant's residence.

Defendant testified that on the night of 4 March 1975, at Blount's request, he helped Blount and Scott move some items packed in dufflebags from Blount's room in the dormitory to defendant's residence; that he understood these items belonged to Blount; that he did this because Blount planned to move in with him after the quarter break; and that he did not break into and never entered room 348 and did not know the items were stolen.

The jury found defendant not guilty of breaking or entering but found him guilty of felonious larceny. From judgment imposing a prison sentence of not less than three, nor more than five years, defendant appealed.

Attorney General Edmisten by Special Deputy Attorney General John M. Silverstein for the State.

West, Groome & Baumberger by Ted G. West for defendant appellant.

PARKER, Judge.

[1] The second count in the bill of indictment was not, as defendant contends, duplicitous. It charged only one offense, felonious larceny. In *State v. Benfield,* 278 N.C. 199, 179 S.E. 2d 388 (1971), Bobbitt, C.J., speaking for our Supreme Court, said (at p. 209):

> "To convict of felony-larceny, the indictment must allege and the State must prove beyond a reasonable doubt, as an essential element of the crime, that the value of the property exceeded two hundred dollars, or that the larceny was from the person, or that the larceny was from a building in violation of G.S. 14-51, 14-53, 14-54 or 14-57, or that

the property involved was an explosive or incendiary device or substance.

When the available evidence indicates that the value of the property exceeds two hundred dollars *and also* that the larceny is either (1) from the person, or (2) from a building in violation of G.S. 14-51, 14-53, 14-54 or 14-57 or (3) that the property involved is an explosive or incendiary device or substance, the solicitors would do well to incorporate both allegations in the bill of indictment so that if the proof as to one should fail the prosecution can proceed on the other." (Emphasis added.)

The Solicitor, in drafting the second count in the bill of indictment in the case now before us, has properly followed the recommendation made in *State v. Benfield, supra.*

[2] By its verdict on the first count, the jury found defendant not guilty of breaking and entering. Under the evidence it could nevertheless find defendant guilty of felonious larceny on the second count if it found the stolen property had a value of more than $200.00. The court properly instructed in this regard when it instructed the jury that if it did not find that the property was taken as result of a felonious breaking or entering, it could not "return a verdict of guilty as to felonious larceny unless you find from the evidence and beyond a reasonable doubt that the property stolen was worth more than two hundred dollars."

Defendant has excepted to the above quoted portion of the charge. He contends that the effect of the charge was to instruct the jury that if it should find that the property was not taken as a result of a felonious breaking or entering, then the jury could find defendant guilty of felonious larceny upon a simple finding that the property was worth more than two hundred dollars. If the quoted portion of the charge is considered by itself, it is, quite obviously, incomplete. The quoted portion of the charge, however, must be considered contextually with the remainder of the charge. When so considered, and when the charge is considered as a whole, we do not believe that the jury could have been misled into finding defendant guilty of felonious larceny upon a finding only that the property had value of more than two hundred dollars. The court, earlier in the charge, had correctly instructed the jury concerning the elements of the crime of larceny, and it is simply inconceivable

that the jury could have found defendant guilty of felonious larceny without having found him guilty of all elements of the crime of larceny. Accordingly, defendant's assignment of error directed to the charge of the court is overruled.

The only remaining assignment of error which defendant has brought forward in his brief is directed to the denial of his motion to set aside the verdict as being against the greater weight of the evidence, or in the alternative, for a new trial. Defendant's motion was addressed to the sound discretion of the trial judge. In the absence of a showing of abuse of discretion, his ruling on the motion is not reviewable on appeal. *State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974). Although there was sharp conflict between the evidence for the State and the evidence for the defendant, there was ample evidence to support the verdict. No abuse of the trial judge's discretion has been shown.

In defendant's trial and in the judgment appealed from we find,

No error.

Judges BRITT and CLARK concur.

STATE OF NORTH CAROLINA v. WALTER CHEEK

No. 7619SC388

(Filed 3 November 1976)

1. **Criminal Law § 148— prayer for judgment continued — no appeal lies**

Where the trial court continued prayer for judgment on an assault with a deadly weapon charge for five years upon the condition that defendant not attempt to escape from prison or break any state or federal law, such conditions did not amount to punishment which would render the judgment entered on the guilty verdict as to the assault charge appealable; therefore, defendant's assignment of error with respect to the admission of certain evidence relevant to the assault charge was not properly before the court on appeal.

2. **Homicide § 21— exchange of gunfire — subsequent death — possibility of intervening person — sufficiency of evidence**

Evidence was sufficient for the jury in an assault and homicide prosecution where it tended to show that defendant threatened to kill

both his assault victim, whom he had previously assaulted, and his homicide victim; immediately thereafter the homicide victim pulled a gun and an exchange of gunfire ensued; defendant fired first, the bullet striking beneath the assault victim's foot; a total of eight shots were fired; the homicide victim was found thereafter suffering from severe gunshot wounds; and both parties stipulated that death was a result of gunshot wounds. The possibility that defendant's shots were not the ones which caused the victim's death but that another person intervened between the time the victim was first shot and the time of death was a matter for determination by the jury and was irrelevent to the issue before the court on a motion to dismiss as in nonsuit.

APPEAL by defendant from *Albright, Judge.* Judgment entered 30 January 1976. Heard in the Court of Appeals 16 September 1976.

Defendant was charged by two indictments in proper form with the second-degree murder of Parks Patterson and the assault of Betty Jordan with a deadly weapon and with the intent to kill. The jury returned verdicts of guilty of voluntary manslaughter and assault with a deadly weapon. Defendant was sentenced on the manslaughter charge to imprisonment for a term of 20 years, and prayer for judgment was continued on the assault with a deadly weapon charge for five years upon the condition that defendant not attempt to escape from prison or break any state or federal law.

The State's first witness was Betty Jordan, who testified, in substance, that she had lived with the defendant in Liberty, North Carolina, for approximately six years but ceased cohabitation with him in May 1975. On 7 June 1975, she spent most of the day with Parks Patterson, whom she had known for some time. She saw defendant three times that day, and on one occasion "Walter Cheek and I argued which is not unusual." At approximately 10:30 p.m., she and Patterson arrived at a friend's house only to discover the door locked and entry impossible. They crossed Murphy Street to the house of Viola Swarringer where defendant was sitting on the porch. Defendant jumped up and shouted that he was going to kill both Jordan and Patterson. Then, "Walter Cheek started shooting." The first bullet hit just under Jordan's right foot, and she began to crawl away around the Swarringer house where she remained until the gunfire had stopped. Patterson had a gun which he fired four times, but defendant "shot first. The first shot was fired just as I was turning to go around the house.

The first and second shots that I heard were right after the other. There were eight shots in succession, one right after the other."

Ronald Morgan of the Liberty Police Department testified that he received a call at approximately 11:03 p.m. concerning the shooting incident. He arrived at the scene within two or three minutes but did not see Patterson at that time. He subsequently found Patterson lying wounded in a ditch on Carter Street some 1,000 yards from the scene of the shooting. He observed that Patterson was wounded in the right hip and the right side slightly in front of the arm and that "there was a trail of blood leading from the body to about 100 yards behind the Swarringer residence."

The State and defendant stipulated that Patterson died on 7 June 1975 as the direct and proximate result of gunshot wounds, that Patterson's blood alcohol content was equivalent to a .39 on a breathalyzer machine, and that if a medical examiner were called, he would testify that Patterson "would have been expected to have been in a stuporous condition with marked loss of coordination, judgment and reception."

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

Bell & Ogburn, P.A., by Deane F. Bell and William H. Heafner, for defendant appellant.

MORRIS, Judge.

[1] Defendant assigns as error the court's allowing into evidence, over defendant's objections, testimony with respect to prior assaults on prosecuting witness Betty Jordan by defendant. This testimony, of course, is relative to the assault charge as to which defendant was found guilty and the court continued prayer for judgment. In *State v. Bryant,* 23 N.C. App. 373, 374, 208 S.E. 2d 723 (1974), Judge Britt, speaking for the Court, said: "It is well established that a 'prayer for judgment continued' is not a final judgment, therefore, it is not appealable." However, the rule is different where conditions are imposed upon the continuation of the entry of judgment.

> "When the prayer for judgment is continued there is no judgment—only a motion or prayer by the prosecuting officer for judgment. And when the court enters an order

continuing the prayer for judgment and at the same time imposes conditions amounting to punishment (fine or imprisonment) the order is in the nature of a final judgment, from which the defendant may appeal. Punishment having been once inflicted, the court has exhausted its power and cannot thereafter impose additional punishment." *State v. Griffin,* 246 N.C. 680, 683, 100 S.E. 2d 49 (1957).

We cannot say that the conditions imposed here amounted to punishment. Certainly no fine or term of imprisonment was imposed. Defendant was required to refrain from attempting to escape and to refrain from breaking any state or federal law. These are requirements to obey the law, an obligation which he already had as a citizen. Therefore, it appears that the judgment entered on the guilty verdict as to the assault charge is not appealable, and the question raised by defendant is not before us. However, if it were, we would, upon the clear law in this State, find no error in the court's rulings.

[2] Defendant's only valid assignment of error is to the failure of the trial court to grant his motion to dismiss at the close of State's evidence. In ruling upon such a motion in a criminal prosecution, the trial court is required to consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Caron,* 288 N.C. 467, 219 S.E. 2d 68 (1975); *State v. Widemon,* 26 N.C. App. 245, 215 S.E. 2d 826 (1975); 2 Strong, N. C. Index 2d, Criminal Law, § 104, pp. 648-49 and cases cited therein. The evidence, taken in the light most favorable to the State, tends to show that defendant threatened to kill both Jordan, whom he had previously assaulted, and Patterson; that immediately thereafter Patterson also pulled a gun and an exchange of gunfire ensued; that defendant fired first, the bullet striking beneath Jordan's right foot; that a total of eight shots were fired; and that Patterson was found thereafter suffering from severe gunshot wounds. Both parties stipulated that death was a result of gunshot wounds. Defendant argues that his motion should have been granted because there was no direct evidence that defendant's shots were those which caused Patterson's death and because there was an absence of blood within 100 yards of the scene of the shooting. Defendant suggests that another person intervened between the time Patterson was first shot and the time of death. However, the possibility of such an intervening factor is a matter for the determination of the

jury and is irrelevant to the issue before the court on a motion to dismiss as in nonsuit. "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. Caron, supra,* at 469. The evidence was sufficient to overcome defendant's motion.

No error.

Judges HEDRICK and ARNOLD concur.

SANDRA BISHOP, ADMINISTRATRIX OF THE ESTATE OF KEITH LAMONT BISHOP, DECEASED v. ROANOKE CHOWAN HOSPITAL, INC.; BESSIE SMALL, AND EUNICE BOYETTE, ADMINISTRATRIX OF THE ESTATE OF DR. DANIEL T. BOYETTE, DECEASED

No. 766SC424

(Filed 3 November 1976)

Appeal and Error § 59— ruling on motion for judgment n.o.v. — competent and incompetent evidence considered

Since all relevant evidence admitted by the trial court, whether competent or not, must be accorded its full probative force in determining the correctness of its ruling upon a motion for judgment n.o.v., the trial court erred in granting defendants' motion for judgment n.o.v. in a wrongful death action based on defendants' contention that the testimony of a pathologist was the only evidence of causation and that testimony was incompetent and inadmissible because of the incompetency of a hypothetical question asked of the pathologist.

APPEAL by plaintiff from *Cowper, Judge.* Judgment entered 12 December 1975, in Superior Court, HERTFORD County. Heard in Court of Appeals 23 September 1976.

Plaintiff, by this action, seeks to recover damages for the alleged wrongful death of Keith Lamont Bishop, her infant son. At the close of plaintiff's evidence, defendants moved for directed verdict. The motion was denied, whereupon defendants presented evidence and, at the close of all the evidence, renewed the motion for directed verdict. The motion was again denied. The jury returned a verdict for plaintiff, and defend-

ants moved for judgment notwithstanding the verdict. This motion was allowed, and plaintiff appealed.

John H. Harmon and Moore and Moore, by Milton H. Moore, for plaintiff appellant.

Smith, Anderson, Blount & Mitchell, by Samuel G. Thompson, for defendant appellees.

MORRIS, Judge.

At trial, prior to the introduction of any evidence, plaintiff elected to take a voluntary dismissal, with prejudice, as to the defendant Eunice Boyette, Administratrix of the Estate of Dr. Daniel T. Boyette, deceased.

Plaintiff's intestate, an 8-month-old baby, was a patient in defendant hospital, and defendant Bessie Small was employed by the hospital as a nurse's aide. During the time deceased was hospitalized, he occupied a small bed with rails on all sides to prevent him from falling. Plaintiff alleged that defendant Small lowered the rails on one side of the bed, left the baby unattended, and he fell to the floor suffering head injuries which subsequently caused his death five days after the fall. The fall occurred on 11 September 1973, and the infant was discharged from the hospital on 12 September 1973. On 15 September 1973, the infant, who was then at the home of his mother, became violently ill and was returned to the hospital where he died the next day.

The evidence for plaintiff included testimony of the pathologist who performed an autopsy upon the baby's body and testified that death was the result of a subdural hematoma bilateral. In response to a hypothetical question, he was allowed to answer, over objection, that the fall from the crib could have caused the subdural hematomas which resulted in death. Included in the hypothetical question were facts which were not then in evidence. The missing facts were later supplied by witnesses, but the pathologist was not recalled to testify further.

Defendants contend that the court properly allowed their motion for judgment notwithstanding the verdict, because the testimony of the pathologist was the only evidence of causation, and that testimony was incompetent and inadmissible because of the incompetency of the hypothetical question.

However our Supreme Court, speaking through Justice Lake, has said:

> "All relevant evidence admitted by the trial court, whether competent or not, must be accorded its full probative force in determining the correctness of its ruling upon a motion for judgment as of nonsuit, *Ballard v. Ballard*, 230 N.C. 629, 55 S.E. 2d 316." *Dixon v. Edwards*, 265 N.C. 470, 476, 144 S.E. 2d 408 (1965).

See also *Jenkins v. Starrett Corp.*, 13 N.C. App. 437, 186 S.E. 2d 198 (1972). A motion for directed verdict presents substantially the same question as that under the old motion for judgment as of nonsuit. *Jenkins v. Starrett Corp., supra*, and "[t]he standard for granting judgment notwithstanding the verdict is precisely the same as the standard for directing a verdict." 9 Wright and Miller, Federal Practice and Procedure: Civil § 2537, p. 599.

Applying the rule to the evidence here, the result is that the evidence was sufficient to take the case to the jury and support a verdict for plaintiff. We cannot say that had plaintiff not relied on the admission of the testimony of the pathologist, she would not have successfully gotten evidence of causation before the jury. Nor do we, on this appeal, find it necessary to determine the competency of the testimony of the pathologist. Suffice it to say, the court should have denied defendants' motion for judgment notwithstanding the verdict. The matter must be remanded for judgment reinstating the verdict of the jury.

Remanded.

Judges HEDRICK and ARNOLD concur.

JOHN D. BELL, ERNEST WADDELL AND GUYNELL WADDELL v. LARRY WALTER MOORE AND SHIRLEY POOLE MOORE

No. 7622SC418

(Filed 3 November 1976)

1. **Rules of Civil Procedure § 60— relieving party from costs**

G.S. 1A-1, Rule 60(b)(6) would allow the court to relieve plaintiff from the costs imposed in the final judgment for any reason "justifying relief from the operation of the judgment."

2. **Rules of Civil Procedure § 62— motion for relief from judgment — stay of judgment**

G.S. 1A-1, Rule 62(b) allows the court in its discretion to stay the execution of a judgment pending the disposition of a motion for relief from a judgment made pursuant to Rule 60(b)(6).

3. **Appeal and Error § 6— stay of judgment — order not immediately appealable**

Where the court has granted a stay pending a decision on a Rule 60(b) motion, there is no appealable order until the stay is dissolved or the motion is ruled on.

4. **Appeal and Error § 6— appeal from interlocutory order**

An appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from the final judgment.

5. **Appeal and Error § 6— stay of collection of deposition costs — no right of immediate appeal**

Where the court dismissed an action for insufficiency of service of process and plaintiff expressed an intention to reinstitute the action, the trial court's discretionary order staying the collection of costs of depositions taken by defendants until the termination of the subsequent action did not affect a substantial right of defendants and was not immediately appealable by them.

APPEAL by defendants from *Collier, Judge*. Order entered 21 February 1976, in Superior Court, IREDELL County. Heard in the Court of Appeals 23 September 1976.

In this personal injury action, summons was returned showing service on the defendants on 29 April 1975 by leaving copies of the summons with the stepmother of one defendant at her home. Neither defendant lived there. Defendants answered in due time, and included several motions to dismiss in their responsive pleading including one on the ground of insufficiency of process. On 17 July 1975 defendants took four

depositions at a cost in excess of $400.00. On 15 January 1976 defendants filed notice of hearing on their several motions. An affidavit taken on 2 June 1975 was presented which showed that neither defendant lived with Mrs. Louise Moore, the woman upon whom service had been made.

On 5 February 1976 the trial court granted the motion to dismiss for lack of jurisdiction due to insufficiency of service of process and taxed costs to plaintiffs. Upon motion by plaintiffs, the court issued a "supplemental order" on 23 February 1976. Based upon plaintiffs' intention to reinstitute their claim, the court deferred the collection of the cost of the depositions until the termination of the subsequent action.

From this order defendants appeal.

Homesley, Jones, Gaines & Dixon by Wallace W. Dixon for plaintiff appellees.

Richard M. Pearman, Jr., for defendant appellants.

CLARK, Judge.

Defendants assign as error the issuance of the supplemental order which stayed collection of costs. Among other grounds, they assert lack of notice and hearing under G.S. 1A-1, Rule 6(d) and Rule 7(b)(1).

[1] G.S. 1A-1, Rule 60(b)(6) would allow the court to relieve plaintiff from the costs imposed in the final judgment for any reason "justifying relief from the operation of the judgment." Although not denominated as such, we view plaintiffs' motion as one under Rule 60(b)(6) to relieve them of the costs of the depositions taken by defendants if plaintiffs prevail in the action to be reinstituted.

[2] G.S. 1A-1, Rule 62(b) allows the court in its discretion to stay the execution of a judgment pending the disposition of a motion for relief from a judgment made pursuant to Rule 60(b)(6). W. Shuford, N. C. Civil Practice and Procedure, § 62-4 (1975). In his order Judge Collier found that it would work a substantial hardship on the plaintiffs to require immediate payment of the cost of the depositions since the suit was to be reinstituted and the depositions would be relevant to the subsequent action.

[3] Not every order of the superior court is immediately appealable. G.S. 1-277. *State v. Childs,* 265 N.C. 575, 144 S.E. 2d 653 (1965). Appellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals and to present the whole case upon appeal from a final judgment. *Harrell v. Harrell,* 253 N.C. 758, 117 S.E. 2d 728 (1961). The order staying collection of costs was an interlocutory order. Final judgment on costs would be entered at the termination of the second suit or, if plaintiffs failed to re-file, upon the expiration of the statute of limitations. Where the court has granted a stay pending a decision on a Rule 60(b) motion, there is no appealable order until the stay is dissolved or the motion ruled on. 7 J. Moore, Federal Practice, Para. 62.04 (2d Ed. Supp. 1975), citing *Paxman v. Wilkerson,* 73-1611 (4th Cir., Aug. 2, 1974).

[4, 5] An appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from the final judgment. *Gardner v. Price,* 239 N.C. 651, 80 S.E. 2d 478 (1954); *Steele v. Hauling Co.,* 260 N.C. 486, 133 S.E. 2d 197 (1963). We find no such right or injury to justify an immediate appeal from a discretionary order staying collection of deposition costs where the moving party has clearly expressed an intention to institute an action in which the same depositions will be material and where the non-moving party incurred those costs three months after filing responsive motions and over one month after taking an affidavit which revealed insufficiency of service of process and then waited an additional six months for a hearing upon a motion to dismiss for insufficient service.

The appeal is

Dismissed.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. ARTHUR LEE BEST

No. 7615SC453

(Filed 3 November 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 shooting by accident or misadventure where defendant presented evidence that he did not intend to shoot the victim but that the gun accidentally discharged when the victim grabbed his hand.

APPEAL by defendant from *Graham, Judge.* Judgment entered 11 February 1976 in Superior Court, ORANGE County. Heard in the Court of Appeals 13 October 1976.

Defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious bodily injury and was convicted of assault with a deadly weapon inflicting serious bodily injury in violation of G.S. 14-32(b).

The State's evidence tended to show that on the night of 26 October 1975, defendant was attempting to sleep in the apartment of Mary Monk and was interrupted by phone calls for Miss Monk. When friends had called her on prior occasions she and defendant had argued and he had threatened to kill her several times. They had been sleeping together occasionally for about three years. At approximately 10:00 o'clock p.m. defendant answered the phone and heard a male voice ask for Miss Monk. While she was talking on the phone, the defendant removed a .22 caliber pistol from under the mattress and pointed it towards her left ear. She then threw the phone down, defendant fired, and she threw up her right hand and hit the gun. Defendant called the Rescue Squad. The bullet lodged below her right ear but caused only some loss of hearing. Defendant told her to say that it was an accident and when questioned by the doctors and police after the shooting she would only say "I shot, I shot, I shot." She called the police a week after the shooting and stated that defendant had shot her.

Defendant's testimony tended to show that he had purchased the weapon for Miss Monk's safety about three years earlier; that she had a history of nervous disorders, including a breakdown in 1963 and had once told him that if he ever left her upset he would "find her stretched out on the floor"

when he returned. He testified that on the night of the shooting he had decided to return to his home in Goldsboro because the ringing of the phone kept him from sleeping; that he dressed and removed the gun from under the mattress for her safety; that as he walked past her she asked him to stay and grabbed his hand causing the gun to discharge. He did not remember with which hand she grabbed the gun.

Defendant was questioned by two police officers on the night of the shooting. They testified for the State at the trial, and the version of events related by defendant to them on the night of the shooting was very substantially the same as his version at trial. From judgment imposing imprisonment, defendant appeals.

Attorney General Edmisten by Associate Attorney Claudette Hardaway for the State.

Haywood, Denny & Miller by James H. Johnson III for defendant appellant.

CLARK, Judge.

Defendant assigns as error the failure of the trial court to charge the jury on the law of shooting by accident or misadventure. Defendant did not request such an instruction.

The trial judge has a duty to "declare and explain the law arising on the evidence given in the case." G.S. 1-180. 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). In a case where the evidence offered by one party tends to show accident, it is not enough for the trial judge to charge that the State must prove intent beyond a reasonable doubt. The judge must also clearly explain that accident is the antithesis of intent. This was not done here. Two recent opinions by this Court have made clear this duty with respect to the law of accident in appropriate cases, and we see no reason to elaborate on their wisdom. *State v. Wright*, 28 N.C. App. 481, 221 S.E. 2d 745 (1976); *State v. Moore*, 26 N.C. App. 193, 215 S.E. 2d 171 (1975).

We order a

New trial.

Judges MORRIS and ARNOLD concur.

DAVIS R. MADIGAN v. AUBREY V. JENKINS AND FANNIE F. JENKINS

No. 7610DC460

(Filed 3 November 1976)

Rules of Civil Procedure § 8— recovery based on items not listed in complaint — no error

In an action for damages where plaintiff alleged that he bought a house from defendants, defendants warranted the workmanship of the house, defendants agreed to perform certain work on the property including but not limited to specific items listed by plaintiff, and plaintiff discovered within one year numerous defects in the workmanship and construction of the house including but not limited to certain items listed by plaintiff, the trial court did not err in basing part of the amount of plaintiff's recovery on items not specifically set forth in the complaint, since G.S. 1A-1, Rule 8(a)(1) requires only that a complaint give the court and parties notice of the matters intended to be proved and does not require that detailed facts be pleaded.

APPEAL by defendants from *Murray, Judge.* Judgment entered 26 February 1976 in District Court, WAKE County. Heard in the Court of Appeals 13 October 1976.

In his complaint plaintiff alleged that he purchased a house and lot from defendants; that they warranted the workmanship of the house and further agreed to perform certain painting and repair work on the house; that they failed to perform the work and certain defects in workmanship were discovered. Plaintiff asked for judgment in the sum of $6,000.

Defendants answered but subsequently the answer was stricken because of defendants' failure to answer plaintiff's interrogatories.

Judgment by default was entered and a nonjury trial was held to determine the amount of damages. Following the trial the court made findings of fact and conclusions of law and adjudged that plaintiff recover $3,629.30 plus interest and costs. Defendants appealed.

Smith, Anderson, Blount & Mitchell, by C. Ernest Simons, Jr., and Joseph E. Kilpatrick, for plaintiff appellee.

Basil L. Sherrill for defendant appellants.

BRITT, Judge.

By their first assignment of error defendants contend the court erred in admitting certain photographs into evidence. The photographs are not included as a part of the record on appeal, therefore, we cannot consider this assignment and it is overruled.

By their two remaining assignments of error, defendants contend the court erred (1) in granting judgment based upon evidence at variance with the complaint, and (2) in striking substantial portions of the narrative of the evidence from the record on appeal since the stricken evidence would have shown a variance between the complaint and proof.

The record reveals that defendants entered no exception to any finding of fact. Evidently, the trial judge in settling the record on appeal and striking a substantial portion of the evidence therefrom had in mind the long prevailing rule that in the absence of proper exceptions to the findings of fact, an appeal presents for review only the question whether the findings support the conclusions of law and the entry of the judgment. See 1 Strong, N. C. Index 2d, Appeal and Error § 26 (1967). While it appears that the stated rule might have been modified by *Whitaker v. Earnhardt,* 289 N.C. 260, 221 S.E. 2d 316 (1976), we find it unnecessary to consider the impact of *Whitaker* on the quoted rule or the application of *Whitaker* to the instant case. Defendants' challenge to the judgment is based solely on the ground that the evidence supporting the judgment is at variance with allegations of the complaint, therefore, we are able to consider the question raised without the stricken evidence.

In his complaint plaintiff alleged that prior to the transfer of the property to him defendants agreed to perform and complete certain work on and about the property "including, but not limited to the following: (some eight items are then set out in detail)." Further on in the complaint plaintiff alleged that within one year following the date plaintiff purchased the property he discovered numerous defects in the workmanship and construction of the house, "including but not limited to the following: (several items are then set out in detail)."

In its findings of fact the trial court determined that prior to the sale of the subject property defendants agreed to com-

plete several of the items specifically listed in the complaint and also certain other items not specifically listed therein. In its findings the court further determined that within one year after the sale plaintiff discovered certain defects in the workmanship and construction of the house; the court set forth several of the items specifically alleged in the complaint and also several items not specifically listed therein.

We perceive no error in the court's basing part of the amount of plaintiff's recovery on items not specifically set forth in the complaint. General rules with respect to pleading are now set forth in G.S. 1A-1, Rule 8. Rule 8(a)(1) provides that a pleading which sets forth a claim for relief shall contain "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved . . . . "

Our Supreme Court has held that by repealing G.S. 1-122 and enacting Rule 8(a)(1) the General Assembly intended to relax somewhat the strict requirements of detailed fact pleading and to adopt the concept of "notice pleading." *Sutton v. Duke,* 277 N.C. 94, 176 S.E. 2d 161 (1970). Under the "notice theory" of pleading contemplated by Rule 8(a)(1) detailed fact pleading is no longer required. *Sutton v. Duke, supra; Cassels v. Motor Co.,* 10 N.C. App. 51, 178 S.E. 2d 12 (1970).

We find no merit in the assignments of error and they are overruled.

For the reasons stated, the judgment appealed from is

Affirmed.

Judges PARKER and CLARK concur.

STATE OF NORTH CAROLINA v. KENNETH EUGENE ROSS

No. 769SC458

(Filed 3 November 1976)

1. **Assault and Battery § 5— gun — deadly weapon per se**

A gun is a deadly weapon *per se*, and whether or not the gun is loaded is immaterial.

2. **Infants § 10— committed youthful offender — no fixed term of imprisonment**

Judgment of the trial court providing that defendant be imprisoned for the term of one year "in the custody of the Secretary of Corrections as a committed youthful offender under Article 3A, Chapter 148 of the North Carolina General Statutes" did not amount to a sentence to a fixed term when defendant was a "committed youthful offender"; rather, since the judgment indicated that it was being entered pursuant to Article 3A, Chapter 148 of the General Statutes, the options of conditional release and unconditional discharge by the parole commission were adequately provided for.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 1 March 1976 in Superior Court, VANCE County. Heard in the Court of Appeals 14 October 1976.

Defendant was charged in separate warrants with assaults with a deadly weapon, a shotgun, on Joseph Hale and Michael Coghill. In district court he pled not guilty, was found guilty in both cases and from judgments imposing prison sentences, he appealed to superior court.

At his trial in superior court, where defendant again pled not guilty, the State presented evidence tending to show: On the night of 26 November 1975 Hale and Coghill were operators of an ambulance which responded to a call from the home of defendant's parents. On arriving there they found defendant's mother sitting at the kitchen table with a severe cut to her right inner elbow. While Hale and Coghill were bandaging the mother's arm, defendant and his father, who were also in the kitchen, were fighting. Defendant obtained a shotgun, pointed it at his father and at Hale and Coghill and made threats directed at Hale. After bandaging the mother's arm, Hale and Coghill removed Mrs. Ross to the ambulance and carried her to the hospital.

Defendant presented no evidence. The jury found him not guilty of assaulting Coghill but guilty of assault with a deadly

weapon on Hale. From judgment imposing prison sentence of one year as a committed youthful offender, defendant appealed.

Attorney General Edmisten, by Associate Attorney Jerry B. Fruitt, for the State.

Zollicoffer & Zollicoffer, by John H. Zollicoffer, Jr., for defendant appellant.

BRITT, Judge.

While defendant argues eleven assignments of error we find only two that we think warrant discussion.

[1] First, he assigns as error the trial court's jury instruction that a shotgun is a deadly weapon. We find no merit in the assignment.

Defendant argues that no evidence was presented tending to show that the shotgun which he allegedly pointed at Hale was loaded and that a gun is not a deadly weapon *per se* unless it is loaded. This argument is not persuasive. Over a period of many years, the appellate courts of this State have held that a gun or pistol is a deadly weapon *per se* and defendant does not cite, and our research has not revealed, any case which supports defendant's argument.

In *State v. Atkinson,* 141 N.C. 734, 53 S.E. 228 (1906), the defendant was tried on an indictment charging him with assault with a deadly weapon, a pistol. The trial court charged the jury that if the State had satisfied them beyond a reasonable doubt that the defendant pointed a pistol at the prosecuting witness, whether the pistol was loaded or not, it would be an assault and to find the defendant guilty. The Supreme Court found no error in the instruction.

In *State v. Smith,* 187 N.C. 469, 121 S.E. 737 (1924), in an opinion by Justice (later Chief Justice) Stacy, the court stated that a pistol or a gun is a deadly weapon and did not limit the statement to a loaded gun or pistol.

In *State v. Powell,* 238 N.C. 527, 531, 78 S.E. 2d 248, 251 (1953), opinion by Justice (later Chief Justice) Parker, the court declared without qualification that "[a] pistol is a deadly weapon *per se.*"

In *State v. Reives*, 29 N.C. App. 11, 222 S.E. 2d 727, *cert. denied*, 289 N.C. 728 (1976), this court declared without qualification that a pistol is a deadly weapon *per se*.

We hold that the trial court did not err in giving the challenged instructions.

[2] Defendant assigns as error the judgment entered by the trial court. He contends that the court erred in sentencing him to a fixed term when he was a "committed youthful offender." We find no merit in this assignment.

The judgment provides that defendant be imprisoned for the term of one year "in the custody of the Secretary of Corrections as a committed youthful offender under Article 3A Chapter 148 of the North Carolina General Statutes." While the judgment does not utilize the word "maximum" or the words "not more than," we think it is clear that one year is the longest period of time that defendant can be incarcerated pursuant to the judgment. By indicating that it is being entered pursuant to Article 3A, Chapter 148 of the General Statutes, the options of conditional release and unconditional discharge by the parole commission are adequately provided for.

Although we do not discuss them here, we have carefully considered the other assignments of error brought forward and argued in defendant's brief and find that they too are without merit. We conclude that he received a fair trial, free from prejudical error, and that a valid judgment was imposed.

No error.

Judges PARKER and CLARK concur.

STATE OF NORTH CAROLINA v. TERRY LYNN BRYANT

No. 7610SC506

(Filed 3 November 1976)

Criminal Law § 34— evidence of defendant's possible involvement in other crimes

In this prosecution for felonious possession of marijuana, the trial court erred in the admission of an SBI agent's testimony that he investigated "the possibility" that defendant, a guard at Central

Prison, was taking marijuana into the prison since the testimony pertained to a mere suspicion of other crimes and impeached defendant's credibility when defendant had not even testified.

APPEAL by defendant from *Godwin, Judge.* Judgment entered 10 March 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 21 October 1976.

Defendant was tried for felonious possession of marijuana. SBI Agent Ray Brown testified for the State that he received a telephone call from Warden Garrison at Central Prison and then began an investigation into "the possibility" that defendant, a guard at Central Prison, was taking marijuana into the prison. Defendant, thereafter, testified in his own behalf that he received the marijuana unsolicited, and that at the time of his arrest he intended to turn over the drugs to the authorities.

From a verdict of guilty defendant appealed to this Court.

Attorney General Edmisten, by Associate Attorney Jerry B. Fruitt, for the State.

Kirk, Ewell & Tantum, by John E. Tantum, for defendant appellant.

ARNOLD, Judge.

Before defendant testified in his own behalf the State offered testimony concerning defendant's possible involvement in transporting marijuana into Central Prison. Error is assigned to the admission of this evidence, and the assignment has merit.

The State concedes that evidence of other crimes is inadmissible on the issue of guilt if its only relevancy is to show the character of the accused, or his disposition to commit an offense in the nature of the one with which he is charged. However, the State reviews the recognized exceptions to this rule as set forth in *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364 (1954), and argues that under certain of these exceptions the testimony was admissible.

If a defendant may not be cross-examined for purposes of impeachment as to whether he has been *indicted* for other crimes, *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174 (1971), then, *a fortiori,* direct evidence by the State concerning "the possibility that . . . [defendant] was bringing marijuana into the walls of Central Prison" is inadmissible. This evidence does not

pertain to convictions of other crimes, as discussed in *State v. McClain, supra,* and it carries even less weight than formal accusations of other crimes, as discussed in *Williams.* Such evidence pertains only to mere suspicion, and it impeached defendant's credibility when defendant had not even testified. This evidence had no probative value except to highly prejudice defendant.

New trial.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. I. L. CHADWICK AND WIFE, EMMA CHADWICK, AND H. I. CHADWICK AND WIFE, LUREE CHADWICK

No. 7613SC435

(Filed 3 November 1976)

1. **State § 2; Waters and Watercourses § 7— title to submerged lands and tidelands — failure of defendants to carry burden**

In an action by the State for removal of a cloud on its title to submerged lands and tidelands lying within the description of a tract of land claimed by defendants, the trial court properly directed verdict in favor of the State where defendants stipulated at trial that they were unable to prove an unbroken chain of title connecting their deed to a deed or grant from the State and where defendants offered no evidence of adverse possession to support their pleadings. G.S. 146-79.

2. **State § 2; Waters and Watercourses § 7— lands claimed by State — defendants' burden of proof to show title — constitutionality of statute**

Defendants' contention that the application of the statute creating a presumption of title in the State, G.S. 146-79, results in a taking of their property without compensation and that the statute is therefore unconstitutional is without merit.

APPEAL by defendants from *Hobgood, Judge.* Judgment entered 25 February 1976 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 11 October 1976.

This is an action by the State of North Carolina for the removal of a cloud on its title to submerged lands and tidelands lying within the description of a tract of land claimed by defendants. Defendants denied plaintiff's title and alleged that defendants owned the land in fee simple. Among other things, they

alleged adverse possession for the requisite period. Defendants had registered a claim under G.S. 113-205. At the close of the case for the plaintiff, defendants declined to offer any evidence. The court directed a verdict in favor of the plaintiff.

Judgment was entered declaring that plaintiff owns the lands, if any, below the mean high water line within the described tract that defendants had claimed to own in fee simple.

Attorney General Edmisten, by Special Deputy Attorney General William A. Raney, Jr., and Associate Attorney Daniel C. Oakley, for the State.

Frink, Foy & Gainey, by Henry G. Foy, for defendant appellants.

VAUGHN, Judge.

[1] G.S. 146-79, in pertinent part, is as follows:

> "In all controversies and suits for any land to which the State or any State agency or its assigns shall be a party, the title to such lands shall be taken and deemed to be in the State or the State agency or its assigns until the other party shall show that he has a good and valid title to such lands in himself."

At trial defendants stipulated that they were unable to prove an unbroken chain of title connecting their deed to a deed or grant from the State. They offered no evidence of adverse possession to support their pleadings. It was, therefore, proper to direct the verdict in favor of the State. *State v. Brooks*, 279 N.C. 45, 181 S.E. 2d 553.

[2] Defendants primarily contend that G.S. 146-79 is unconstitutional. They urge that application of the statute results in a taking of their property without compensation. We do not agree. The statute does not authorize a "taking" of property. The presumption of title in the State lasts only until the rival claimant establishes valid title in himself.

We have carefully considered the other arguments advanced by defendants and conclude that they do not persuade us that the judgment should be disturbed.

The judgment is affirmed.

Affirmed.

Chief Judge BROCK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. THOMAS WOODSON

No. 7617SC446

(Filed 3 November 1976)

1. **Assault and Battery § 15— failure to instruct on defense of home**

The trial court in a felonious assault case erred in failing to instruct on defendant's right to defend himself in his home where the evidence showed defendant was standing on the porch of his home when he shot the victim and defendant presented evidence tending to show that he shot in self-defense.

2. **Assault and Battery § 15— instructions — final mandate — not guilty by reason of self-defense**

The trial judge in a felonious assault case erred in failing to include not guilty by reason of self-defense as a possible verdict in his final mandate to the jury.

APPEAL by defendant from *Wood, Judge.* Judgment entered 17 December 1975 in Superior Court, CASWELL County. Heard in the Court of Appeals 12 October 1976.

Defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury. Judgment was entered imposing a prison sentence of twenty years.

Attorney General Edmisten, by Associate Attorney Elisha H. Bunting, Jr., and Assistant Attorney General Ralf F. Haskell, for the State.

Alston & Hart, by Vernon Hart, for defendant appellant.

VAUGHN, Judge.

It is not necessary to state the facts except to say that there was ample evidence to sustain the verdict of the jury. There must be a new trial, nevertheless, because of errors in the charge. Defendant admitted shooting the victim. Defendant was standing on the porch of his home when he fired the shot. Defendant's evidence was calculated to show that he shot in self-defense.

[1] Defendant contends that the judge failed to declare and explain the law arising upon the evidence as it related to defendant's right to defend himself in his home. The exception is well taken and requires a new trial. *State v. Poplin*, 238 N.C. 728, 78 S.E. 2d 777.

[2] Defendant also assigns error to the charge in that the court did not include a specific instruction on self-defense in his final mandate to the jury. As a result of the decision of the Supreme Court in *State v. Dooley,* 285 N.C. 158, 203 S.E. 2d 815, such an instruction must be given in the final mandate.

In *Dooley* the judge explained the law as it related to self-defense and explained what must be shown in order to excuse defendant's conduct on that ground. The Supreme Court, nevertheless, granted a new trial because of "[t]he failure of the trial judge to include not guilty by reason of self-defense as a possible verdict *in his final mandate* . . . ." (Emphasis added.) *State v. Dooley, supra.* The final mandate in the case at bar is almost identical to the one that required reversal in *State v. Girley,* 27 N.C. App. 388, 219 S.E. 2d 301, *cert. den.,* 289 N.C. 141, 220 S.E. 2d 799. In compliance with the decision of the Supreme Court in *Dooley,* this Court was required to also order a new trial in *State v. Hunt,* 28 N.C. App. 486, 221 S.E. 2d 720. In that case, as here, the Court failed to include not guilty by reason of self-defense in his final mandate.

The questions raised by defendant's other assignments of error may not recur at the next trial and will not be considered on this appeal.

There must be a new trial for the reasons stated.

New trial.

Chief Judge BROCK and Judge MARTIN concur.

LEONARD K. THOMPSON v. WAKE COUNTY BOARD OF EDUCATION

No. 7610SC290

(Filed 17 November 1976)

1. Schools § 13— dismissal of career teacher — school board's participation in initial and final decisions — due process

Participation by the county board of education in both the initial decision to suspend a career teacher and the final decision as to dismissal of the teacher does not constitute a denial of the teacher's right to due process. G.S. 115-142.

2. Schools § 13— teacher dismissal — participation by school board attorney — exchanges involving board members — due process

A career teacher was not denied due process in a dismissal hearing before a county board of education by the participation in the hearing of the board's attorney rather than an attorney for the superintendent as permitted by G.S. 115-142(j)(3), or by exchanges at the hearing which involved members of the board.

3. Schools § 13— teacher dismissal — review in superior court

A dismissed school teacher is not entitled to a trial *de novo* in the superior court on the question of the truth or validity of the charges against him, and the action of the board of education will stand in the superior court unless the court finds one of the errors of law enumerated in former G.S. 143-315 (now G.S. 150A-51).

4. Administrative Law § 4; Schools § 13— teacher dismissal proceeding — exemption from rules of evidence

School boards acting pursuant to G.S. Ch. 115 were specifically excepted by former G.S. 143-317(1) from the general rule that the rules of evidence must be followed in administrative proceedings.

5. Schools § 13— teacher dismissal proceeding — superior court review — consideration of evidence inadmissible in other proceedings

Since school boards acting in teacher dismissal cases were not strictly bound by the rules of evidence, a reviewing superior court, in determining whether a board's determination was supported by competent, material and substantial evidence as required by former G.S. 143-315(5), could not exclude testimony from its consideration merely because it violated a rule of evidence.

6. Schools § 13— teacher insubordination — acts contrary to accepted behavior standards

Local school boards need not counsel teachers in advance against all possible types of misconduct before those teachers can be found guilty of insubordination, and repeated acts of teacher misconduct which are obviously contrary to accepted standards of behavior in the teaching profession and the community in general constitute insubordinate conduct.

7. Schools § 13— teacher dismissal — insubordination — use of profanity — slapping, kicking, etc. of students — sanctioning card games in study hall — acts before teacher admonished

A career teacher's use of "damn" and "hell" at various times in his classroom activities, his slapping, kicking, hair-pulling and "frogging" of students, and his sanctioning of card games in study hall did not constitute insubordination where there was no evidence that such acts were continued after the teacher was admonished or counselled to act differently. G.S. 115-142(e)(1)c.

8. Schools § 13— teacher dismissal — immorality — obscene characterization of female student

A career teacher's characterization of a female student as a whore did not constitute immorality within the purview of G.S. 115-142(e)(1)b.

9. Schools § 13— teacher dismissal — allowing students to fight — neglect of duty

The evidence supported a board of education's finding that a teacher on one occasion permitted two of his students to settle a dispute by fighting with each other, and such finding supported the board's dismissal of the teacher for neglect of duty relating to the encouragement of order and discipline. G.S. 115-142(e)(1)d.

10. Schools § 13— teacher dismissal — conduct insufficient to show lack of mental capacity

Conduct of a school teacher in using profanity in classroom activities, slapping, kicking, and pulling the hair of students, sanctioning card games in study hall, allowing students to settle a dispute by fighting, and entering the girls' bathroom and seizing a student therein did not indicate a lack of mental capacity within the purview of G.S. 115-142(e)(1)e.

Judge CLARK dissenting.

APPEAL by respondent from order of *Alvis, Special Judge.* Order entered out of session 8 December 1974 in Superior Court, WAKE County. Heard in the Court of Appeals 25 August 1976.

During the 1973-74 school year, Leonard K. Thompson (hereinafter called "petitioner") was employed by the Wake County Board of Education (hereinafter called "the board") as a public school teacher in the Apex Elementary School. At that time, petitioner had attained status as a career teacher as defined by G.S. 115-142. On 11 March 1974, the board by unanimous resolution suspended petitioner without pay and without a hearing on the grounds of (1) immorality, (2) insubordination, (3) neglect of duty, and (4) physical or mental incapacity.

Pursuant to G.S. 115-142(h)(3), petitioner requested an investigation of the charges against him by a panel of the Professional Review Committee. The board submitted to the panel a list of "Grounds and Specifications" in justification of its suspension of petitioner. The specific charges were as follows:

"Leonard K. Thompson Grounds: IV

Charge: Physical or Mental Incapacity

Specification 1:

In that Leonard K. Thompson has engaged in such conduct, as set forth in the preceding charges and specifications, that if said conduct be not willful, the said Leonard K.

Thompson's physical or mental condition must be such as to render him incapable of control of himself and others about him, including students, and therefore in a condition of mental or physical incapacity (or both).

Leonard K. Thompson Grounds: I

Charge: Immorality

Specification 1:

In that Leonard K. Thompson

(a) on or about February 21, 1974, communicated to Lorna J. Mann, a female child under the age of 16 years, indecent, insulting and obscene language, calling her a whore and making an obscene gesture to her; and

(b) on February 21, 1974, and on other occasions with respect to Lorna J. Mann and other female persons vocally used a term amounting to a charge of incontinent conduct, to wit: he called them 'little whores.'

Specification 2:

In that Leonard K. Thompson habitually during the 1973-74 school year has used in the presence of students at Apex Elementary School vulgar and obscene language not generally accepted in the community in which he was teaching and considered by the community to constitute immoral conduct.

Specification 3:

In that Leonard K. Thompson on various occasions has fondled and otherwise assaulted Johnnette Smith and other female and male children during duty hours at Apex Elementary School.

Leonard K. Thompson Grounds: II

Charge: Insubordination

Specification 1:

In that Leonard K. Thompson during the 1973-74 school year failed to comply with instructions from the central

office of the Wake County Schools and from his principal with respect to:

(a) Refraining from assaulting children in the school;

(b) Refraining from use of profane, obscene, and vulgar language in the presence of the students;

(c) Attacking without cause students at Apex Elementary School.

Specification 2:

In that Leonard K. Thompson failed to maintain discipline in his classes and classroom in accordance with instructions from his superiors.

Leonard K. Thompson Grounds: III

Charge: Neglect of Duty

Specification 1:

In that Leonard K. Thompson failed to encourage good order and discipline in the Apex Elementary School, as required by NCGS 115-146, in 1973-1974.

Specification 2:

In that Leonard K. Thompson failed to discharge his duty during the 1973-74 school year at the Apex Elementary School insofar as encouragement of temperance and morality is concerned, against the form of the statute (NCGS 115-146)."

The panel met on 6 May 1974 and 16 May 1974 to investigate the matter and issued a report on 28 May 1974. In its report, the panel made findings of fact that the grounds for petitioner's dismissal were unsubstantiated by the evidence. The report also recommended, *inter alia,* that petitioner be reinstated with tenure, that petitioner be paid for the period of his suspension, that he be transferred to a new school, and that he be counseled to refrain from certain activities which had resulted in the charges against him.

Upon receipt of the report of the panel, the Superintendent of the Wake County Schools submitted to the board his written recommendation for dismissal of petitioner. The board, pursuant to G.S. 115-142(i) (6), notified petitioner of the Super-

intendent's recommendation and scheduled a hearing for 15 July 1974, in the event petitioner wished to be heard on the matter. Petitioner requested the hearing pursuant to G.S. 115-142(i)(6). It began as scheduled and continued through five sessions, ending on 21 August 1974. Twenty witnesses were called and extensive testimony was taken. On 27 August 1974, the board issued a "Resolution" containing findings of fact and conclusions of law. The resolution concluded by ordering "that Leonard K. Thompson be and he is hereby dismissed as a teacher in the Wake County Public Schools on the grounds of immorality, insubordination, neglect of duty, and mental incapacity."

Pursuant to G.S. 115-142(n), petitioner appealed from this order of the board to the Wake County Superior Court. Upon reviewing the evidence, Alvis, Special Judge, entered an order on 8 December 1975, which reversed the resolution of the board and ordered that petitioner be reinstated as a career teacher in the Wake County Schools. It further ordered the board to pay petitioner all sums he would have received as compensation if he had not been discharged and had continued in employment as a teacher. The board appeals from the order of the Superior Court.

Other relevant facts are set out in the opinion below.

Chambers, Stein, Ferguson and Becton, by Charles L. Becton, for petitioner appellee.

Boyce, Mitchell, Burns and Smith, by Eugene Boyce, for respondent appellant.

MORRIS, Judge.

In the order of 8 December 1975, the Superior Court found as a "factual conclusion of law" that "the Wake County Board of Education, which was biased against Thompson, investigated, prosecuted and judged a cause against him, all in violation of due process as required by the current decisions interpreting constitutional guarantees." Thus the court appears to impugn both the impartiality of the board's decision as well as the statutory procedures by which the decision was reached. We do not agree that petitioner's constitutional rights were violated and shall discuss separately each aspect of the finding and our grounds for disagreement.

The more fundamental aspect of the finding of unconstitutionality involves the procedures set forth in G.S. 115-142. G.S. 115-142 represents a legislative attempt to provide the public school teachers of this State a greater amount of job security than had previously existed. *Taylor v. Crisp*, 21 N.C. App. 359, 205 S.E. 2d 102 (1974), *modified and aff'd.*, 286 N.C. 488, 212 S.E. 2d 381 (1975). The statute creates the status of "career teacher" to which various rights and privileges are attached. Perhaps the most important of these rights is that a career teacher may not be dismissed or demoted except upon specified grounds and in accordance with the statutory procedures provided.

The portions of G.S. 115-142 which are pertinent to this appeal are as follows:

"(e) Grounds for Dismissal or Demotion of a Career Teacher.—

(1) No career teacher shall be dismissed or demoted or employed on a part-time basis except for:

a. Inadequate performance;

b. Immorality;

c. Insubordination;

d. Neglect of duty;

e. Physical or mental incapacity;

f. Habitual or excessive use of alcohol or non-medical use of a controlled substance as defined in Article 5 of Chapter 90 of the General Statutes.

g. Conviction of a felony or a crime involving moral turpitude;

h. Advocating the overthrow of the government of the United States or of the State of North Carolina by force, violence, or other unlawful means;

i. Failure to fulfill the duties and responsibilities imposed upon teachers by the General Statutes of this State.

j. Failure to comply with such reasonable requirements as the board may prescribe;

k. Any cause which constitutes grounds for the revocation of such career teacher's teaching certificate; or

l. A justifiable decrease in the number of positions due to district reorganization or decreased enrollment, provided that subdivision (2) is complied with.

m. Failure to maintain one's certificate in a current status.

* * *

(f) Suspension without Pay.—If a board believes that cause exists for dismissing a probationary or career teacher for any reason specified in G.S. 115-142(e)(1)b through 115-142(e)(1)h and that immediate suspension of the teacher is necessary, the board may by resolution suspend him without pay and without giving notice and a hearing . . . .

* * *

(h) Procedure for Dismissal or Demotion of Career Teacher.—

(1) A career teacher may not be dismissed, demoted or reduced to part-time employment except upon the superintendent's recommendation.

(2) Before recommending to a board the dismissal or demotion of the career teacher, the superintendent shall give written notice to the career teacher by certified mail of his intention to make such recommendation and shall set forth as part of his recommendation the grounds upon which he believes such dismissal is justified. The notice shall include a statement to the effect that if the teacher within 15 days after the date of receipt of the notice requests a review, he shall be entitled to have the proposed recommendations of the superintendent reviewed by a panel of the Committee. . . .

(3) Within the 15-day period after receipt of the notice, the career teacher may file with the superintendent a written request for either (i) a review of the

superintendent's proposed recommendation by a panel of the Professional Review Committee or (ii) a hearing before the board within 10 days. . . .

(4) If a request for review is made, the superintendent, within five days of filing such request for review, shall notify the Superintendent of Public Instruction who, within seven days from the time of receipt of such notice, shall designate a panel of five members of the Committee (at least two of whom shall be lay persons) who shall not be employed in or be residents of the county in which the request for review is made, to review the proposed recommendations of the superintendent for the purpose of determining whether in its opinion the grounds for the recommendation are true and substantiated. . . .

(i) Investigation by Panel of Professional Review Committee; Report; Action of Superintendent; Review by Board.—

(1) The career teacher and superintendent will each have the right to designate not more than 30 of the 121 members of the Professional Review Committee as not acceptable to the teacher or superintendent respectively. No person so designated shall be appointed to the panel. . . .

(2) As soon as possible after the time of its designation, the panel shall elect a chairman and shall conduct such investigation as it may consider necessary for the purpose of determining whether the grounds for the recommendation are true and substantiated. . . .

(3) The career teacher and superintendent involved shall each have the right to meet with the panel accompanied by counsel or other person of his choice and to present any evidence and arguments which he considers pertinent to the considerations of the panel and to cross-examine witnesses.

(4) When the panel has completed its investigation, it shall prepare a written report and send it to the superintendent and teacher. The report shall contain an outline of the scope of its investigation and its finding as to whether or not the grounds for the recom-

mendation of the superintendent are true and substantiated. . . .

(5) Within five days after the superintendent receives the report of the panel, he shall submit his written recommendation for dismissal to the board with a copy to the teacher, or shall drop the charges against the teacher. His recommendation shall state the grounds for the recommendation and shall be accompanied by a copy of the report of the panel of the Committee.

(6) Within seven days after receiving the superintendent's recommendation and before taking any formal action, the board shall notify the teacher by certified mail that it has received the superintendent's recommendation and the report of the panel. . . .

(j) Hearing Procedure.—The following provisions shall be applicable to any hearing conducted pursuant to G.S. 115-142(k) or (l).

* * *

(3) At the hearing the teacher and superintendent shall have the right to be present and to be heard, to be represented by counsel and to present through witnesses any competent testimony relevant to the issue of whether grounds for dismissal or demotion exist or whether the procedures set forth in G.S. 115-142 have been followed.

* * *

(l) Panel Does Not Find That the Grounds for Superintendent's Recommendation Are True and Substantiated.—

(1) If the panel does not find that the grounds for the recommendation of the superintendent are true and substantiated, at the hearing the board shall determine whether the grounds for the recommendation of the superintendent are true and substantiated upon the basis of competent evidence adduced at the hearing by witnesses who shall testify under oath or affirmation to be administered by any board member or the secretary of the board.

(2) The procedure at the hearing shall be such as to permit and secure a full, fair and orderly hearing and

> to permit all relevant competent evidence to be received therein. The report of the panel of the committee shall be deemed to be competent evidence. A full record shall be kept of all evidence taken or offered at such hearing. Both counsel for the system and the career teacher or his counsel shall have the right to cross-examine witnesses.
>
> * * *
>
> (4) At the conclusion of the hearing provided in this section, the board shall render its decision on the evidence submitted at such hearing and not otherwise."

Thus a career teacher may not be dismissed except for the grounds enumerated in subsection (e), and then only upon the recommendation of the superintendent to the board. The teacher must be notified of the superintendent's recommendation and given the opportunity to request a hearing before the board or a panel of the Professional Review Committee. If the board believes that cause exists for dismissal under certain of the grounds listed in subsection (e) (1), the teacher may be suspended without pay and without notice and a hearing. The teacher's recourse is then by means of a hearing before the board or a panel of the Review Committee where the teacher may have counsel, present evidence and cross-examine witnesses. If the teacher requests a hearing before the panel and it finds that the superintendent's charges are not true and substantiated, the superintendent may either drop the charges or may again recommend suspension to the board. Only if the recommendation is renewed by the superintendent at this point does the matter come again before the board, which schedules a hearing. The teacher is notified and given an opportunity to be present, to be heard, to be represented by counsel and to present competent testimony. The final decision is then given by the board solely on the basis of the evidence presented.

[1] Thus, when a teacher is suspended without pay and without notice and a hearing, the board is involved in two steps of the process: (1) in the determination that "cause exists" for immediate dismissal and (2) in the final decision, either where review is immediately requested by the teacher, or where the superintendent renews his recommendation after exoneration by the panel. In either case, both the initial decision to suspend and the final disposition of the case rest with the board. Petitioner contends, and the trial judge found, that participation

of the board in both stages of the suspension procedure constitutes a denial of the teacher's right to due process. We disagree.

Of course, "[a] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison,* 349 U.S. 133, 136, 99 L.Ed. 942, 946, 75 S.Ct. 623, 625 (1955). This rule applies equally to administrative agencies which have adjudicatory functions as well as to the courts. *Gibson v. Berryhill,* 411 U.S. 564, 36 L.Ed. 2d 488, 93 S.Ct. 1689 (1973). However, mere familiarity with the facts of a case gained by an agency in the performance of its statutory duties does not disqualify it as a decisionmaker. In *FTC v. Cement Institute,* 333 U.S. 683, 92 L.Ed. 1010, 68 S.Ct. 793 (1948), the Federal Trade Commission investigated the pricing system of the respondent and reported its findings to the Congress and the President. Certain members of the Commission had expressed the opinion that the pricing system was illegal. When the Commission subsequently instituted formal proceedings, the respondent insisted that the Commissioners disqualify themselves ". . . on the assumption that such an opinion had been formed by the entire membership of the Commission as a result of its prior official investigations." 333 U.S. at 700, 92 L.Ed. at 1034, 65 S.Ct. at 803. In rejecting this contention, the Supreme Court held that the fact that the Commission formed opinions as the result of its prior investigations did not mean that their minds were irrevocably closed on the subject. The Court also stated:

> "[No] decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court." *Id.* at 702-03, 92 L.Ed. at 1035, 68 S.Ct. at 804.

Withrow v. Larkin, 421 U.S. 35, 43 L.Ed. 2d 712, 95 S.Ct. 1456 (1975), involved the medical licensing board of Wisconsin, which was empowered by statute to warn and reprimand a physician, temporarily suspend his license, and begin criminal or suspension proceedings against him. When the board began

investigating the plaintiff-physician, he brought suit to enjoin the board from conducting both an investigation and a subsequent hearing based on the investigation. The Supreme Court reaffirmed its *FTC* rule and held that the procedure by which the licensing board investigated and adjudicated the physician's case did not violate due process.

We find the recent case, *Hortonville Joint School District v. Hortonville Educational Assoc.*, 426 U.S. 482, 49 L.Ed. 2d 1, 96 S.Ct. 2308 (1976), to be particularly analogous to the case at hand. In *Hortonville,* respondent-teachers had taught in petitioner-school district, but the parties were unable to come to terms over a new contract. The teachers subsequently went on strike in direct violation of Wisconsin law. After repeated attempts to get the teachers back to work, the School Board began disciplinary hearings against them and subsequently voted to terminate the employment of those still on strike. The teachers filed suit alleging that the termination hearing was constitutionally inadequate, because the Board was biased as a result of the heated contract dispute. The Supreme Court held that the School District could properly make the decision to terminate the teachers' employment and rejected the teachers' claim of bias, noting that ". . . the Board's prior role as negotiator does not disqualify it to decide that the public interest in maintaining uninterrupted classroom work required that teachers striking in violation of state law be discharged." 426 U.S. at 494, 49 L.Ed. 2d at 10, 96 S.Ct. at 2315. The Court went on to hold that:

> "Respondents have failed to demonstrate that the decision to terminate their employment was infected by the sort of bias that we have held to disqualify other decisionmakers as a matter of federal due process. *A showing that the Board was 'involved' in the events preceding this decision, in light of the important interest in leaving with the Board the power given by the state legislature, is not enough to overcome the presumption of honesty and integrity in policymakers with decisionary power.*" 426 U.S. at 496-97, 49 L.Ed. 2d at 11-12, 96 S.Ct. at 2316. (Emphasis supplied.)

Appellee contends, however, that the board is necessarily biased because it is in effect required to make the same finding twice. We disagree. In authorizing immediate suspension of

a teacher without pay, G.S. 115-142(f) requires only that the board find "that *cause* exists" for suspension under one of the enumerated grounds. Before final disposition of the matter, however, the board must provide the teacher with a full and formal hearing in accordance with traditional due process protections. Clearly, the standard applied by the board in each stage is different. Initially, the board, after investigation, need only find that cause exists to believe the teacher is guilty of misconduct; this is somewhat analogous to the finding of probable cause in a criminal case. The board does not reach the merits of the case until it holds its formal hearing where the teacher has the right to be present, represented by counsel, put on evidence and cross-examine witnesses. Thus, the board is performing two separate functions pursuant to G.S. 115-142. Accordingly, we believe, and so hold, that procedures provided by G.S. 115-142 do not violate the due process guarantees of the United States Constitution.

[2] Petitioner further argues that, even if the procedures followed by the board are not unconstitutional *per se*, there are special facts and circumstances which amount to a due process violation in this case. In its order, the Superior Court agreed and cited the participation of the board's attorney in the hearing and certain exchanges which took place at the hearing as circumstances which resulted in bias toward petitioner. Admittedly, G.S. 115-142(j)(3) entitles the superintendent, and not the board, to be represented by counsel at the hearing. Yet the order does not specify how this participation prejudiced petitioner. In fact the order recites, "Of course, it would be unfair to say that [attorney] Davis worked Thompson's defeat, especially in consideration of a record that shows that in the volume his examination of witnesses on behalf of the Board is exceeded by that of the Board's members' examination of the witnesses." We have studied the entire record and find no evidence to support the contention that participation of the board's attorney resulted in biasing the board or prejudicing petitioner in any manner. As for the exchanges which occurred at the hearing, we recognize that in any hearing the trier of fact may form certain opinions on the facts thus far presented; this is his function. Also, pointed questions are often necessary to reach the truth on a given issue. We have examined these remarks in the context of the full hearing and do not find any evidence of actual bias of any members of the board. Since there was no prejudice to petitioner resulting either from the

procedures provided in G.S. 115-142 or from the events which transpired at the hearing, the order's "factual conclusion of law" relating to a denial of due process is overruled.

[3] Before considering the specific findings of Judge Alvis' order, we must first determine the proper scope of review in the Superior Court of a teacher dismissal proceeding. At the time of petitioner's hearing, the scope of judicial review of administrative decisions was set out in G.S. 143-315, repealed 1973 Session Laws, c. 1331, s. 2 (now G.S. 150A-51) which provides:

> "The court may affirm the decision of the agency or may remand the case for further proceedings or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions; or
>
> (2) In excess of the statutory authority or jurisdiction of the agency; or
>
> (3) Made upon unlawful procedure; or
>
> (4) Affected by other error of law; or
>
> (5) Unsupported by competent, material, and substantial evidence in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious."

Clearly, petitioner was not entitled to a trial *de novo* on the question of the truth or validity of the charges against him. The action of the board will stand in the Superior Court unless it finds that one of the enumerated errors of law occurred. Petitioner contends that subsection (5) conclusively determines that the superior court may reverse if it finds the school board's decision is not supported by competent, material, and substantial evidence in the record as a whole. We believe, however, that G.S. 143-315(5) must be read in conjunction with the rules regarding the admission of evidence at teacher dismissal hearings.

[4] Generally, the rules of evidence must be followed in administrative proceedings. G.S. 143-318, repealed 1973 Session Laws, c. 1331, s. 2 (now G.S. 150A-29). However, school boards

acting pursuant to Chapter 115 of the General Statutes are specifically excepted from this general rule by virtue of G.S. 143-317(1), repealed 1973 Session Laws, c. 1331, s. 2. Instead G.S. 115-142(j)(2) sets out the applicable rules governing teacher dismissal proceedings.

> "The hearing shall be conducted in accordance with such reasonable rules and regulations as the board may adopt consistent with G.S. 115-142, or if no rules have been adopted, in accordance with reasonable rules and regulations adopted by the State Board of Education to govern such hearings."

As the board had no such rules and regulations at the time of petitioner's hearings, we are guided by the rules of the State Board of Education as adopted in its proposed resolution of 6 April 1972 (effective 1 July 1972):

> "(4) *Rules of Evidence.*—At any hearing conducted pursuant to G.S. 115-142(k) or G.S. 115-142(l), boards of education may admit any evidence and may give probative effect to evidence that is of a kind commonly relied on by reasonably prudent men in the conduct of serious affairs. Boards may in their discretion exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence."

Thus, the board, unlike most other administrative agencies, was not strictly bound by the rules of evidence, although certain types of evidence could be excluded in the board's discretion.

[5] We believe the general guidelines for judicial review contained in G.S. 143-315(5) are modified by the evidentiary rules of teacher dismissal proceedings. Although the reviewing superior court must still look for substantial evidence in the record as a whole which is competent and material, it may not exclude testimony from its consideration merely because it would otherwise violate a rule of evidence. We shall now examine the board's resolution and the Superior Court's order in that light.

The board, in its resolution of 27 August 1974, made the following findings of fact:

> "[1] During the 1973-74 school year Charles D. Keck, the principal of the Apex Elementary School, directed Leonard K. Thompson not to administer corporal punishment

to any student without another member of the faculty or staff of the school being present. Mr. Keck also admonished Mr. Thompson not to use the terms 'damn' and 'hell' in instruction of and conversation with his students at school. The principal had a general directive against playing cards at school, and confiscated cards he found being used in card games at school.

[2] On January 24, 1974, Leonard K. Thompson, while on duty at Apex Elementary School, slapped Kathryn Elaine Novick, a female student, in the face after understanding her to say to him: 'Shut up, Mr. Thompson!' During the same episode Mr. Thompson pulled the hair of Tracy Byrd, another female student. No other member of the faculty or staff of Apex Elementary School was present at the time of the slapping or hair-pulling. The assistant principal of Apex Elementary School observed Mr. Thompson immediately after the incident 'hollering and yelling . . . about to have a fit.' Complaints were made and Mr. Thompson apologized to the parents of the two girls, but recited that he would slap the Novick child again if she told him to shut up.

[3] At various times during the 1973-74 school year Mr. Thompson, who weighs about 190 pounds, administered corporal punishment to male and female students by performing what he described as 'frogging,' resulting in one case on October 9, 1973, of (sic) injury and bruises to Robert Joseph Jungers, a male student weighing about 90 pounds. The 'frogging' of Jungers and other students was not accomplished in the presence of any other member of the faculty or staff of Apex Elementary School.

[4] During the 1973-74 school year Mr. Thompson allowed students in study halls over which he had supervision to play checkers, chess, and various card games including blackjack.

[5] On many occasions during the school year 1973-74 Leonard K. Thompson used the words 'damn' and 'hell' as part of his vocabulary in instruction of and conversation with his students at Apex Elementary School. The use of such terms by a teacher under such circumstances is considered by some members, if not the majority, of the Apex community as immoral conduct.

[6] On numerous occasions during the 1973-74 school year Leonard K. Thompson administered corporal punishment to students by kicking them, not in the presence of any other member of the faculty or staff of Apex Elementary School, including February 21, 1974, when he went into the girls' toilet in the school gymnasium, pulled out Lorna Mann, a female student, and kicked her. During a discussion of her conduct with Lorna Mann Mr. Thompson called her a whore. Earlier during the 1973-74 school year Mr. Thompson, in a conference with Morris Brown, had characterized a group of his female students as 'little whores.'

[7] On occasion during the 1973-74 school year Mr. Thompson allowed students under his supervision to settle disputes by fighting among themselves, and on one occasion allowed himself to engage in a slapping exchange with Cindy Yarborough, one of his students."

The Superior Court reviewed the findings as follows:

"Finding of Fact numbered '[1]' is not supported by any competent evidence of record.

Finding of Fact numbered '[2]' has supporting evidence for the first sentence. If the second sentence—'During the same episode Mr. Thompson pulled the hair of Tracy Byrd, another female student.'—is read only to ascertain a result it is supported by evidence, but if it is read to ascertain intent it is not supported by any competent evidence. The fourth sentence, that no faculty or staff member was present, is not supported by competent evidence. The fifth sentence, what the assistant principal observed, is an incorporation of inadmissible hearsay and conclusory evidence which was not responsive to a proper question. The concluding sentence finds evidentiary support in the record.

Finding of Fact numbered '[3]' as it relates to Robert Joseph Jungers is supported by evidence, otherwise the finding is itself conclusory.

Finding of Fact numbered '[4]' is supported by competent evidence. Finding of Fact numbered '[5],' first sentence, exclusive of the conclusory word 'many,' is supported by competent evidence. The second sentence, exclusive of the phrase 'if not the majority,' is not supported by any competent evidence. The excluded phrase 'if not the majority'

could have been found as a legitimate inference arising from a lack of competent evidence on the subject.

Finding of Fact numbered '[6],' first sentence, finds no evidentiary support for the conclusory word 'numerous' and the words 'kicking' and 'kicked' were contested at length on hearing to the end that the acts shown by the evidence warranted complete description rather than characterization. The witness Lorna Mann, a student, did testify that she ran out of a gym class and Thompson pursued her into the girls' bathroom, brought her back and kicked her. She also testified that Thompson called her a 'whore.' Morris Brown testified Thompson in a conversation between the two in Brown's office characterized some students as 'little whores.' Lorna Mann's testimony was clearly competent. Brown's less so.

Finding of Fact numbered '[7],' as it relates to allowing students to settle disputes by fighting is not supported by competent evidence—rather it appears to be the product of an erroneous deduction from some related evidence: an illegitimate inference. As to the incident with Cindy Yarborough, Johnette Smith's testimony is to the effect that she 'didn't know whether they [Thompson and Yarborough] were playing or not.' "

We shall now separately treat each of the findings in the order. Examination of the record reveals that Charles D. Keck, Principal of Apex Elementary School, testified that he met with petitioner at various times throughout the 1973-74 school year concerning petitioner's performance. The record is unclear as to what precisely transpired in these discussions, but Keck testified that he ". . . did counsel with Mr. Thompson about his use of vulgar and obscene language." Keck also stated that he ". . . had not authorized any teacher at Apex School to use those [study] periods for chess games or card games. I disapprove of that kind of thing and I have a drawer full of cards now that I would take." These facts were undisputed in the record. We are unable to find support in the record that petitioner was directed not to administer corporal punishment to any student unless another faculty member was present. However, the remainder of the board's first finding of fact is supported by substantial evidence which is both competent and material.

We agree with the trial judge that the record supports the board's second finding that petitioner slapped one female student and pulled the hair of another on 24 January 1974. The evidence on these incidents was virtually uncontroverted. Petitioner did not deny the incidents and recited that he would slap the Novick girl again in similar circumstances. The order's criticism of the portion of the finding as based on hearsay evidence is erroneous in view of the evidence which is properly admissible at a teacher dismissal hearing (supra). We agree that there is no support in the record for the board's finding that no faculty member was present when the slapping incident took place. This is, however, a minor error in what is otherwise a finding supported by substantial and competent evidence.

We agree with the Superior Court that findings 3 and 4 of the board are supported by the evidence.

We disagree with the order's review of finding of fact 5. At the hearing, Joe Jungers, one of petitioner's students, testified that "I have heard him [petitioner] use profane language in class. I heard him say 'Damn' and 'Hell.' He would use those expressions there sometimes during class when he would get mad at one or two of the kids." He also testified that, upon discovering a fight between two students, petitioner instructed one of them to ". . . beat the hell out of [the other]." Cathy Regan, another student, testified "I have occasionally heard Mr. Thompson use the word 'damn' and the word 'hell' in the classroom." A third student, Johnette Smith, stated that "the onliest words I heard him use was 'damn' and sometimes he would say 'hell,' when he was mad." Lorna Mann, another student stated "I have heard Mr. Thompson use the word 'Damn' in a class. I have heard him use the word 'hell' in a class. . . . I have heard him use the word 'Damn' a couple of occasions in class during class and study hall." On the question of what constitutes immoral or profane conduct in the Apex community, the board heard testimony from Mr. William J. Booth, Chairman of the Apex Advisory Council, a body which serves as a link between the school board and the citizens. In response to questions relating to the use of "hell" and "damn" in the classroom, Booth testified, "To my knowledge of the community, I would say that these type (sic) of language used in the classroom in Apex would be considered immoral. . . . I recognize the word 'damn' as profanity. . . . As to the word 'hell' other than use in religious type courses and referring to the below and above, I

would say this is profanity. I would say that it is the sentiment for a lot of people but to say for all, I cannot. . . . I feel this is the general community concept." Taking this testimony into account, we believe the board's finding No. 5 was supported by the record.

Most of the order's comments regarding finding of fact No. 6 are not pertinent to the true function of the Superior Court in reviewing the board's decision. The order correctly states that there was no evidence of "numerous" kicking incidents although Lorna Mann testified that petitioner kicked her on at least two different occasions. However, the other remarks in the court's order are addressed more to the credibility of the witnesses before the board than to the sufficiency of the testimony to support the finding. This clearly was not the function of the Superior Court. The Superior Court may not weigh the evidence and substitute its evaluation for that of the board. In so doing it exceeds its right of review. *Equipment Co. v. Johnson,* 261 N.C. 269, 134 S.E. 2d 327 (1964). We believe the board's finding No. 6 is supported by the record.

We disagree with the order's review of the board's finding No. 7. Joe Jungers testified "I know Mike Novick and Eddie Barker. I recall an occasion when they had a fight with each other. Mr. Thompson saw the fight. He did not stop it. Mike and Eddie were fighting and Mr. Thompson called to Mike and as he turned around he said 'beat the hell out of Eddie' and Eddie hit and Mike turned around and bashed the mess out of Eddie." Johnette Smith testified similarly that petitioner said, " 'Go ahead and beat the hell out of each other!' He didn't care. It was in a class." Therefore, we believe that the board's finding No. 7 was supported by competent evidence and was not, as Judge Alvis found, "the product of an erroneous deduction from some related evidence: an illegitimate inference."

Consequently we are left with the following facts which are supported in the record: that petitioner used the words "damn" and "hell" at various times in his classroom activities; that he called one of his female students a whore; that such language was considered vulgar and profane by many members of the Apex community; that he allowed students in his study halls to play checkers, chess and blackjack, despite his principal's general policy against card playing in school; that on 24

January 1974, petitioner slapped one student and pulled the hair of another; that this action was taken in anger; that on 9 October 1973, petitioner administered corporal punishment upon a male student by what is referred to in the record as "frogging"; that by engaging in "frogging," petitioner bruised and injured the student; that on 21 February 1974, petitioner pulled a female student out of the girl's bathroom and kicked her; and that petitioner had on one occasion permitted his students to settle a dispute by fighting with each other. With only minor variations, these facts were incorporated into the findings by the board. Therefore, except for the discrepancies which we noted above, it was error for Judge Alvis to rule, as he did, that they were not based on competent evidence.

We shall now examine the board's conclusions of law and the Superior Court's review of them. The resolution contained the following conclusions:

> "[1] That Mr. Thompson's action in using the words 'damn' and 'hell' in instruction of and conversation with his students at Apex Elementary School is disapproved by the Wake County Board of Education but does not constitute beyond a reasonable doubt immoral conduct on his part; that his continued use of these terms after counseling did constitute insubordination.
>
> [2] That Mr. Thompson's action in entering the girls' toilet and seizing Lorna Mann on February 21, 1974, constituted indiscreet but not necessarily immoral conduct.
>
> [3] That Mr. Thompson's characterization of Lorna Mann and other female students under his supervision as whores was an imputation to them of incontinence and lack of chastity and, in the absence of knowledge of such incontinence or lack of chastity, constituted an immoral act, inimical to public welfare and contrary to accepted standards.
>
> [4] That Mr. Thompson's actions in administering corporal punishment without the presence of another member of the faculty or staff, in slapping children, pulling hair, and 'frogging' them as punishment, and kicking students, without authority from his superiors and against their stated policy, constituted insubordination.

[5] That Mr. Thompson's actions in allowing his students to fight with each other and with him constituted neglect of duty insofar as encouragement of discipline and good order in accordance with NCGS 115-146 is concerned.

[6] That Mr. Thompson's allowing cards and other games to be played in his study halls, without permission of his principal and against stated school policy, constituted an act of insubordination.

[7] That the language and actions of Mr. Thompson during the 1973-74 school year demonstrated his lack of capacity to control his speech and conduct, and constitutes mental incapacity."

In reviewing the board's conclusions, Judge Alvis found that

"Conclusion of Law numbered '[1]' is not supported by facts found from competent evidence because there is absolutely no evidence of record, competent or incompetent, that Thompson's conduct was in contravention of any superior's directive to the contrary.

Conclusion of Law numbered '[2]' is in Thompson's legal favor.

Conclusion of Law numbered '[3],' solely as to Lorna Mann, is supported by her testimony alone (which is emphatically denied by Thompson), but the remainder of the conclusion is without support.

Conclusion of Law numbered '[4]' is totally without evidentiary support insofar as it speaks to contravention of 'stated policy,' and insubordination may not result from lack of authority unless action without authority has been prohibited which is not this case.

Conclusion of Law numbered '[5]' is not supported by a finding based on competent evidence. According to the competent evidence, Thompson did say to two students on one occasion that IF they could not settle their dispute otherwise that they should fight—they did not fight; he did not allow a fight.

Conclusion of Law numbered '[6]' is totally lacking in support in evidence. One is not insubordinate unless he

knows, or has reason to know, that his actions are in violation of his superior's directives. He need not guess or speculate as to the attitudes of his superior.

There was no stated school policy. Keck, the principal, did not testify that he had directed Thompson to the contrary.

Conclusion of Law numbered '[7]' is not supported by a finding based on competent evidence. It is a clear product of predisposition overlooking a nonsequitur.

Therefore, not a single Conclusion of Law relied upon by the Board in dismissing Thompson is supported by a finding of fact based on competent evidence, except the finding that he called Lorna Mann a whore which the Board inextricably combined with a finding from Brown's testimony concerning a private conversation he had (denied by Thompson) with Thompson in which the latter referred to some unidentified group of students as little whores. From this combined finding the Board concluded that Thompson acted immorally and in a fashion 'inimical to public welfare and contrary to accepted standards.' Such a conclusion could not rest solely upon evidence of the conversation with Brown. Nor can this court determine how much of the conclusion gained support solely from that finding. Therefore the entire conclusion is tainted and cannot stand."

The board contends that the Superior Court Judge erred in ruling that the board's conclusions were not supported by findings based on competent evidence. It claims that the court should not have reweighed the evidence and that if the board's conclusions were supported by sufficient evidence, they should withstand judicial review, provided no other provision of G.S. 143-315 is violated. We agree.

[6, 7] The board's first, fourth and sixth conclusions relate to insubordination and we shall discuss them together. Specifically, the board concluded that petitioner's continued use of "damn" and "hell," his slapping, kicking, hair-pulling, and "frogging" of students, and his sanctioning of card games in study hall was contrary to school policy and thus constituted insubordination. Judge Alvis overturned these conclusions due to lack of evidence that these acts were in contravention of a "stated policy" of the board. We agree. "Insubordination im-

ports a willful disregard of express or implied directions of the employer and a refusal to obey reasonable orders." *School District v. Superior Court,* 102 Ariz. 478, 480, 433 P. 2d 28, 30 (1967). It appears to us that it would be unrealistic to require local school boards to counsel teachers in advance against all possible types of misconduct before those teachers could be found guilty of insubordination, and that repeated acts of teacher misconduct which are obviously contrary to accepted standards of behavior in the teaching profession and the community in general should constitute insubordinate conduct. Further we find it difficult to believe that petitioner did not know, or should not have known, that his behavior violated the implied if not the express policies of the board. Nevertheless, while the record shows that petitioner's conduct was often highly questionable under the circumstances, there is no evidence that the acts here objected to were continued *after* petitioner was admonished or counselled to behave differently. Therefore, petitioner's conduct did not constitute insubordination within the meaning of G.S. 115-142(c), and Judge Alvis correctly overruled these conclusions of the board.

The board's second conclusion, which involved petitioner's entering the girls' bathroom and seizing a student from therein, found the petitioner free of immoral conduct in the incident. This finding has sufficient support in the record.

[8] The board's third conclusion found petitioner's characterization of a female student as a whore to be an immoral act, contrary to accepted community standards. Judge Alvis found that although there was competent evidence of the fact that petitioner did refer to the student in this manner, ". . . the remainder of the conclusion is without support." We agree. While we deplore petitioner's use of language in the presence of his students, we do not think that the language used in this case warrants a finding of immorality as contemplated by G.S. 115-142(e)(1)b. Therefore, this conclusion of law was properly overturned in the Superior Court.

[9] The board's fifth conclusion found petitioner's allowance of fighting constituted neglect of duty relating to the encouragement of order and discipline. The Superior Court, citing petitioner's version of the fighting incident, overturned this conclusion of the board because it was ". . . not supported by a finding based on competent evidence." We disagree. It was

not the function of the trial judge to weigh the credibility of the evidence but only to test its sufficiency. We have previously discussed the sufficiency of the testimony concerning the fight incident and believe that when the record is viewed in its entirety, there is competent evidence in it which supports this conclusion of law. Therefore, this conclusion should not have been overturned in the Superior Court.

[10] The board's seventh and final conclusion, which found that petitioner's acts showed mental incapacity, was correctly overturned by the Superior Court. Petitioner's conduct was not such as would indicate lack of mental capacity as that term has been legally defined and applied.

We are mindful of the fact that, in reversing the order of the Superior Court, we reinstate petitioner's dismissal based solely on his neglect of duty arising from his failure to maintain discipline and good order. While there may be those who would argue that the breakdown of classroom order and discipline should not form the basis for so drastic a remedy as a teacher dismissal, we must again state the role of this Court in reviewing a dismissal proceeding. It is our function to examine the whole record to determine whether there is substantial evidence on which the findings of the school board are based and whether the conclusions are based on such facts and are not contrary to law. If the school board's findings and conclusions are substantiated in this manner, its order should be affirmed, regardless of the number or nature of the offenses charged. Further, the record in this case clearly reveals that other incidents involving petitioner grouped under other charges and specifications could have also been included by the board in its specifications under the neglect of duty charge.

We, therefore, reinstate the dismissal of petitioner as ordered in the board's resolution of 27 August 1974. The order of the Superior Court is

Reversed.

Judge VAUGHN concurs.

Judge CLARK dissents.

Judge CLARK dissenting.

I regret that I am unable to agree with the majority opinion in this case. It is obviously based on a thorough analysis of the evidence. I do not voice extravagant forebodings but seek to mildly refute error. Since the majority opinion includes a detailed listing of unproved allegations and irrelevant findings, some comparison between innuendo and fact, between what was charged and that the majority upholds, is in order.

The Superintendent of Schools preferred four charges against petitioner to justify the immediate suspension without pay and the recommendation to fire: (1) mental incapacity, (2) immorality, (3) insubordination, and (4) neglect of duty. Mr. Thompson was not charged with "inadequate performance" under G.S. 115-142(e)(l)a.

The Superintendent listed eight specifications under the four charges. The Board of Education held hearings on three occasions and the transcript of these hearings amounts to over 500 pages. The Board made seven findings of fact and reached seven conclusions of law. It found sufficient evidence to fire Mr. Thompson on all four grounds. Much time and effort were obviously spent in attempting to establish the charges against petitioner. After all was said and done and after all the unfounded accusations and evidence not remotely relevant to the charges have been disregarded, the majority sustains the firing of petitioner on the basis of a single incident, whose telling in the record on appeal takes approximately three pages out of 177 pages of testimony.

Since the reversal by the majority rests upon only one finding of fact and one conclusion of law, I will concern myself only with those parts of the order of the Superior Court. I might note that I would be inclined to treat more sympathetically other parts of the order of the Superior Court reviewing other findings of fact were they germane to the majority holding.

The majority has correctly stated the proper scope of review in the Superior Court to the extent that it holds that appellate courts do not sit to reweigh the evidence in a trial *de novo*. The majority errs in its interpretation and application

of the revelant review statute. G.S. 150A-51 (then G.S. 143-315) provides that the decision of the school board may be reversed if

> "[T]he substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> * * * *
>
> (5) Unsupported by competent, material, and *substantial evidence in view of the entire record as submitted;* . . . " (Emphasis added.)

Our Supreme Court has clearly stated that under G.S. 150A-51 (then G.S. 143-315) "the 'whole record' test is applicable. . . . The 'whole record' test must be distinguished from the 'any competent evidence' standard." *Underwood v. Board of Alcoholic Control,* 278 N.C. 623, 629, 181 S.E. 2d 1, 5 (1971).

In determining the substantiality of evidence supporting a decision of the Board, under the whole record test, a reviewing court must take into account whatever in the record fairly detracts from the weight of the evidence. A decision of the Board cannot be upheld merely on the basis of evidence which in and of itself justifies the action, without taking into account contradictory evidence or evidence on which conflicting inferences could be drawn. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951).

The majority feels that the order of the Superior Court was based upon an unduly restrictive definition of "competent" evidence and that because *some* competent evidence was apparently disregarded by the court, its review of the record violated the statutory standard. While focusing on the supposed evidentiary errors of the reviewing court, the majority overlooks the fact that even with the inclusion of this "competent" evidence, the *entire record as submitted* does not support the action of the Board in firing petitioner.

Thus the majority may not properly sustain the decision of the Board because there is "any competent evidence" to support it. When the "whole record" test is applied, it becomes clear that the Superior Court did not, as stated by the majority, weigh the credibility of the evidence but properly reviewed the "entire record as submitted."

Using the "whole record" test for reviewing the decision of an administrative agency under G.S. 150A-51 it is appropriate to evalute the decision of the Board and the order of the Superior Court. The majority bases its reversal upon the portions of the Board's seventh finding of fact and fifth conclusion of law that pertain to the fight between Mike Novick and Eddie Barker. The Board found that "Mr. Thompson allowed students under his supervision to settle disputes by fighting among themselves" and concluded that this constituted neglect of duty.

The finding of the Board rested upon the testimony of two students, Joe Jungers and Johnette Smith. The majority opinion has quoted only portions of their relevant testimony as proof of "competent" evidence which Judge Alvis ignored. When the "whole record" is surveyed, a different picture emerges. Joe Jungers also testified that he was not in the immediate vicinity of the fight and that he was not in a position to know why the fight had started. ("I came in the class a bit late. I was sitting over there playing chess and they started fighting for some reason.") Nor did he know when Mr. Thompson entered the room because he was playing chess. He did not deny Mr. Thompson's version of the incident or state that he was sure he had heard everything that Mr. Thompson said. He merely said "That's all *I heard* said." (Emphasis added.) In short, Joe Jungers was not in a position to testify to the complete content of Mr. Thompson's remarks. At the least the whole record standard requires that all the evidence of a single witness be considered and, in the terms of *Universal Camera Corp.*, be evaluated by "taking into account evidence on which conflicting inferences could be drawn." It is consistent with the statements of Joe Jungers to conclude that his attention was drawn away from his chess game and to the fight by the noise and commotion and that only then did he see Mr. Thompson and hear what he was saying.

The quotation by the majority of the testimony of Johnette Smith is similarly selective. She testified more fully that

> "He would *probably* be out of the room and they would be fighting. He would come in and *more than likely* he would look at them and he would *probably* tell them *more than likely,* say 'Go ahead and beat the hell out of each other!' . . ." (Emphasis added.)

I do not believe that such an unclear and inconclusive statement is a sufficient basis to uphold a man's firing. Applying the whole record test, I do not believe that the testimony of Joe Jungers, which itself revealed an insufficient opportunity to observe the entire incident and the testimony of Johnette Smith, which manifestly is unclear and inconclusive are "substantial in view of the entire record as submitted."

Finally, although I believe that the testimony of the two students alone does not rise to the level of "substantial," I believe this conclusion becomes even more apparent when petitioner's version is considered, as *Underwood* makes clear is proper. In that case, our Supreme Court held that the Superior Court had properly considered the licensee's evidence in reviewing an administrative decision to the extent it did not explicitly contradict that of the Board. There the Board had revoked a liquor license on the basis of evidence which showed there had been a fight on the licensee's premises. Petitioner did not dispute that the fight had taken place, but offered complementary evidence showing he had acted properly in the circumstances. On two other charges the Superior Court also properly considered the petitioner's testimony to the extent it did not explicitly contradict the Board's evidence.

Here petitioner's version is that he admonished the boys by telling them that animals settled their disputes by fighting and added sarcastically that if they couldn't settle their disputes with their brains then they should go ahead and beat the hell out of each other. This testimony does not explicitly contradict that of the students. Rather, as in *Underwood*, it complements the version presented by the agency. It provides the preface for the remarks heard by Joe Jungers when his attention was finally drawn to the fight. It was properly considered by the Superior Court under the "whole record" standard.

We do not sit to judge the wisdom of the legislature in extending the concept of tenure to secondary schoolteachers. The procedures and grounds for firing have been set by the proper constitutional body. Under G.S. 150A-51 the Superior Court may reverse a decision of the school board which is not supported by "material, competent and substantial evidence in view of the entire record as submitted." The majority has erroneously applied the "any competent evidence" test. For reasons already stated I do not believe that the few lines of

testimony by the two students are "substantial." When the petitioner's version is also considered, as is proper under the "whole record" standard, this conclusion is even more apparent.

Because I would affirm the order of the Superior Court on statutory grounds, I would not need to reach the constitutional question and therefore express no opinion on that issue.

STATE OF NORTH CAROLINA v. B. C. WEST, JR.

No. 761SC288

(Filed 17 November 1976)

1. **State § 2.1— bills of indictment — statutory requirement of permanent retention**

In an action by the State to be declared owner and to regain possession of two bills of indictment issued in 1767 and 1768 and held by defendant, the State met its burden of proving that the indictments were required by law to be permanently retained by virtue of the requirement in G.S. 14-76.

2. **State § 2.1— title to government property — passage according to statute only**

It is a well settled principle of law that title to government property may pass only in the manner prescribed by the duly constituted legislative body and that title to any such property may not be forfeited through the oversight, carelessness, negligence or even intentional conduct of any of the agents of the government.

3. **Clerks of Court § 10— duty to maintain court records — indictments in hands of private individual — presumption that clerk performed duty overcome**

In an action by the State to be declared owner and to regain possession of two bills of indictment issued in 1767 and 1768 and held by defendant, the State's evidence that the clerks of court were required by law to maintain records of the court and that statutory provisions were made for the transfer of records from one court to another as various court reforms were made through the years was sufficient to overcome the presumption that public officers had properly performed their duty, since the documents were in defendant's hands.

4. **Clerks of Court § 10— indictments in court records — clerk charged with safe keeping — sufficiency of proof of improper removal**

In an action by the State to be declared the owner and to regain possession of two bills of indictment issued in 1767 and 1768 and held by defendant, the State's evidence tending to show that the indictments were at one time in the records of the Salisbury Court of Jus-

tice and that the clerk of that court was charged with the responsibility of safe keeping the court records pursuant to Chapter I of the 1766 Laws of N. C. was sufficient to prove that the indictments were in a public archive and were stolen or otherwise improperly removed.

5. **State § 2.1— public records — property of State — no title in individual**

Public records and documents are the property of the State and not of an individual who happens to have them in his possession; when such records are deposited in the place designated for them by law they can be removed only pursuant to an act of the legislature and in the manner and for the purpose designated by law.

6. **State § 1— defeat of Britain by 13 colonies — incidents of sovereignty devolved upon State — public records owned by State**

Pursuant to the well established rule of international law that sovereignty is never held in suspense but survives changes in government and forms of government, all the property, rights and other incidents of sovereignty held by the British Crown immediately devolved to the thirteen colonies or states upon the defeat of Great Britain by the colonies in the Revolutionary War; therefore, the State of N. C. succeeded to the public records of N. C. previously owned by the Crown and could properly claim ownership of two indictments which originated as records of a British colony.

7. **State § 1— defeat of Britain by 13 colonies — government property held by Britain devolved to States**

Since the Articles of Confederation adopted in 1781 provided for 13 sovereign states, each almost completely autonomous within its territorial boundaries, any property of government held or owned by Great Britain prior to the Revolutionary War immediately upon Great Britain's defeat devolved to the individual states rather than to the central government of the thirteen states.

8. **State § 2.1— public records — disposition not provided for by legislature**

The General Assembly has not authorized the sale, disposition or forfeiture of public documents or court records but has authorized a manner in which such documents are to be maintained; moreover, the General Assembly has not prescribed a statutory period within which the State must recover its lost or stolen public records, and in addition, there has never been a legally authorized means of selling, forfeiting or abandoning public documents of the State of N. C.

9. **State § 2.1— public document — bona fide purchaser only after legal disposition by public authority**

There can be no bona fide purchaser of a public document absent a showing that the duly authorized public authority has legally disposed of that document.

10. **State § 2.1— bills of indictment — title in State — no title in private individual in possession of indictments**

Ownership of bills of indictment issued in 1767 and 1768 rested in the State and could not be forfeited through the oversight, carelessness or even intentional conduct of any of the agents of the

State; thus, legal title to the documents could not pass to a private individual who happened, 200 years later, to have them in his possession.

11. State § 2.1— public court records — purchase by citizen in good faith — no title in citizen

The public is not to lose its rights to public court records through loss, theft or the unexplained removal of the records from the court, nor because one of its citizens purchased the documents in good faith, since it was his duty, as much as that of every other citizen, to protect the State in its rights.

Judge BRITT dissenting.

APPEAL by the State from *Webb, Judge.* Judgment entered 6 November 1975 in PASQUOTANK Superior Court. Heard in the Court of Appeals 24 August 1976.

The State filed complaint seeking to be declared owner and to regain possession of two bills of indictment held by defendant. The indictments were issued in 1767 and 1768 and were signed by William Hooper (who later signed the Declaration of Independence) as attorney for the King. Defendant answered and asserted that the documents were his property since he had purchased them for value and in good faith on the open market. Defendant addressed certain interrogatories to the State and the State responded through Dr. Thornton Mitchell, Chief of the Archives and Record Section of the Division of Archives and History, Department of Cultural Resources. These interrogatories reveal that the indictments were issued by the Salisbury District Superior Court; that a 1766 act of the Colonial Assembly provided for the appointment of a clerk who was to give bond "for the safekeeping of the records"; that the colonial District Superior Courts closed in 1773; that such courts were re-opened in 1778 as State District Superior Courts; that these District Superior Courts were succeeded by County Superior Courts in 1806; that the legislature made certain provisions for the transfer of old court records and that it is assumed that records from the colonial District Superior Courts were to be turned over to the new clerk; that certain further provisions were made in 1868 for the transfer of old court records, but that these latter provisions did not refer to the colonial District Superior Courts. State's answers to the interrogatories further reveal that the State possessed certain bills of indictment from the Salisbury District Superior Court of 1767-1770; that other indictments from this period

were missing; that the State did not know who or when the indictments held by defendant had been removed from the clerk's office; and that the State learned of these indictments when defendant offered to sell them in late 1974 or early 1975. It was stipulated between the parties that William Hooper's signatures on the indictments were genuine and authentic. State moved for summary judgment. A hearing was held which the State presented the two indictments as exhibits and also presented certified copies of pages from the Salisbury Crown Docket of 1767-1768. Certain docket entries referred to the defendant and charges contained in the indictments, and thus tended to authenticate them.

Evidence for defendant tended to show that State demanded possession of the indictments pursuant to G.S. 132; that it was not known whether the State had possession of the indictments when G.S. 132 became effective in 1935; that the State first undertook control over public records by legislation of 1903; that since 1903 some public records have been authorized destroyed; and that it is not known whether there were any guidelines for destroying public documents prior to 1903. Defendant identified and introduced as exhibits certain pages from "The Historical Records of North Carolina." These books, prepared in the 1930's, surveyed the public records of Rowan County and tended to show that these indictments were not accounted for at that time. Defendant testified that he purchased the indictments at 1974 auctions in New York. It was stipulated that the New York auction house had obtained the indictments from a resident of East Bend, North Carolina, and that he had in turn obtained one of the indictments from a Winston-Salem resident and the other indictment from the Greensboro Historical Museum. Defendant presented four witnesses who either sold or collected historical manuscripts and autographs. These witnesses' testimony tended to show that public records have gotten into private hands by various means, that private collectors are important in the preservation of historical manuscripts, and that public records are often traded in the manuscript market. The clerk of superior court of Pasquotank County testified that she had possession of no court records from prior to 1925, that certain records had been stored in the bell tower of the courthouse, but that these records were "taken away." In rebuttal, State called Mitchell back to the stand and had him testify that in 1961 the State had authorized Pasquotank County to transfer certain old court records to a

local historical society for safe keeping with legal custody remaining in the county.

The plaintiff moved for summary judgment on the ground that there was no genuine issue as to any material fact and in the alternative to determine the facts controverted and make an order specifying the facts that appear without substantial controversy.

Judgment was entered finding that there was no evidence as to how long the indictments had stayed on file with the Salisbury District Superior Court or any successor court or as to how the indictments had been removed from the courts and that the judge "cannot hold as to what the officially sanctioned practices of the various clerks and other custodians of court records have been in regard to the disposition of bills of indictment in the more than 200 years in which these documents have been in existence." The judge therefore concluded that he could not determine that the indictments had been taken from the courts "in any irregular manner." He concluded that defendant was entitled to possession of the documents, that plaintiff's motion for summary judgment should be denied, and that plaintiff's action should be "dismissed with prejudice." Plaintiff appealed.

Attorney General Edmisten, by Special Deputy Attorney General T. Buie Costen, and Assistant Attorney General Thomas M. Ringer, Jr., for the State.

Leroy, Wells, Shaw, Hornthal, Riley & Shearin, by Dewey W. Wells, for the defendant.

MARTIN, Judge.

It appears that plaintiff complied with G.S. 1A-1, Rule 7(b)(1), requiring that motions made prior to a hearing or trial be in writing, and G.S. 1A-1, Rule 56(c) relating to service of motions for summary judgment. The record does not reveal that defendant filed affidavits in opposition to plaintiff's motion.

Under Rule 56(e)

> "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his plead-

ing, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

In this proceeding Mr. West was the "adverse party." However, the parties stipulated that ". . . upon the hearing of plaintiff's Motion for summary judgment the defendant may present oral testimony of witnesses, and such testimony may be considered by the Court both for the purposes of ruling on the Motion for summary judgment, and for determination of the case on its merits."

In 6 Moore, Federal Practice § 56.11[8] at 56-295, (2d ed. 1976), it is said:

"Of course, if all the parties desire to and do turn the summary judgment into a court trial they cannot be heard to object. In that event the court should make findings of fact and conclusions of law in accordance with Rule 52."

In view of the condition of the record and the stipulations of the parties, we will proceed to consider the appeal on its merits.

The authenticity of the indictments and their presence in public custody were established by the pleadings, answers to interrogatories and stipulations and also found as a fact by the court in its findings that "two bills of indictment were docketed in the Salisbury District Superior Court shortly after they were drawn in 1767 and 1768 respectively." The character of the indictments as court records having been established, the legal question of ownership remained for decision in the trial court.

The defendant's claim of ownership set forth in his pleadings is as follows:

"The documents referred to in the Complaint are privately owned papers which, along with many others of like nature, constitute the subject matter of international trade whereby they are bought, sold and exchanged by amateur and commercial collectors, privately and through established trading facilities. The documents described in the Complaint were acquired in good faith by the defendant by purchase for value on the open market from an established auction

facility and in defendant's hands said documents retained their character as private property. Notwithstanding the public office then held by the signer of the specific documents referred to in the Complaint, the plaintiff has no present interest therein nor does plaintiff have an interest in similar publicly traded documents held by bonafide collectors."

By its sixth assignment of error plaintiff contends the court erred in its conclusions of law contained in the judgment. We agree.

The conclusions of law upon which the judgment is based are numbered 1 and 2. Conclusion 3 and 4 merely follow. Conclusions 1 and 2 read as follows:

"1. This Court cannot hold that in the more than two hundred years existence of each of these Bills of Indictment that either of them left the possession of the Salisbury District Superior Court or any of its successors in any irregular manner.

"2. The defendant has possession of the documents which he obtained in good faith. The State of North Carolina has not overcome the presumption of title which arises in the defendant's favor through his possession of the documents."

Defendant contends that in order to bear its burden of persuasion, the State must (a) prove the indicments were required by law to be permanently retained; (b) overcome the presumption that public officials have properly performed their duty; and (c) prove that the indictments were in a public archive and were stolen or otherwise improperly removed.

[1] First, has the State proved that the indictments were required by law to be permanently retained? The answer is yes.

This obviously is a question of law rather than one of fact. G.S. 14-76 would appear to lay this question to rest. See also *State v. Bellar,* 16 N.C. App. 339, 192 S.E. 2d 86 (1972), concerning a modern court file which for its holding cites Am. Jur. as follows:

" 'The custodian of a public record cannot destroy it, deface it, or give it up without authority from the same source which required it to be made. Thus, an indictment

duly filed cannot be removed legitimately by anyone, including the district attorney, except for purposes of the trial thereon, or for purposes of evidence under a subpoena duces tecum or an order of court. 45 Am. Jur., *supra* Sec 12, p 425.' " *State v. Bellar, supra* at 343, 192 S.E. 2d at 89.

G.S. 14-76 may be traced back to 8 Henry VI, Chapter 12, Section 3 wherein the prohibition appears as follows:

"III. And moreover it is ordained, That if any record, or parcel of the same writ, return, panel, process, or warrant of attorney in the King's courts of chancery, exchequer, the one bench or the other, or in his treasury, be willingly stolen, taken away, withdrawn, or avoided by any clerk, or by other person, because whereof any judgment shall be reversed; that such stealer, taker away, withdrawer, or avoider, their procurators, counsellors, and abettors, thereof indicted, and by process, thereupon made thereof duly convict by their own confession, or by inquest to be taken of lawful men, whereof the one half shall be of the men of any court of the same courts, and the other half of other, shall be judged for felons, and shall incur the pain of felony. (2) And that the judges of the said courts of the one bench or of the other, have power to hear and determine such defaults before them, and thereof to make due punishment as afore is said."

The 1749 Laws of North Carolina, enacted in New Bern, specifically declared certain English statutes to be in

". . . as full Force, Power, and Virtue, as if the same had been specially Enacted and made for this Province, or as if the same had been made and Enacted therein, by any General Assembly thereof." Laws of North Carolina, 1749, c. 12 (Swan).

Among the statutes enumerated by this 1749 statute is 8 Henry VI, Chapter 12. Later, after the Declaration of Independence, the 1778 Laws of North Carolina, enacted at New Bern, declared to be in full force

". . . all such Statutes, and such Parts of the Common Law, as were heretofore in Force and Use within this Territory . . . as are not destructive of, repugnant to, or inconsistent with the Freedom and Independence of this State." Laws of North Carolina, 1778, c. 5.

In addition, Chapter 34, Sec. 33 of the North Carolina Revised Statutes of 1837 carried 8 Henry VI, Chapter 12 over into the statutes of the State in almost word for word form. It was likewise carried over in Chapter 34, Section 31 of the 1855 Revised Code and continues on our books to the present date. See G.S. 14-76.

Additionally, early commentaries on the common law support the position that court records were to be permanently retained. Sir Edward Coke, basing his holdings on Glanville, Bracton, and Britton, wrote that a record ". . . is a memorial or remembrance . . . of the proceedings and acts of a court of justice. . . ." 3 Coke, Institutes *322. In addition, Blackstone also wrote that all courts of record are the King's Courts and ". . . the acts and judicial proceedings [of such courts] are enrolled in parchment for a *perpetual* memorial and testimony." 3 Blackstone, Commentaries, *24 (emphasis added).

The laws of the colony and of Great Britain provided for the indictment of criminals. The bills of indictment were handwritten by a clerk, signed by the attorney for the King and maintained in the clerk's custody. The bills of indictment here in question were issued from the Salisbury District Superior Court of Justice.

The Salisbury Court had been established by the Colonial Assembly in 1766 by an act which also authorized the Chief Judge to appoint a clerk to keep the records. Section V of that act provided:

> ". . . that the Chief Justice is hereby impowered to appoint experienced and Discreet Clerks of the Superior Court; who shall each of them give Bond, with good and sufficient Security, to our Sovereign Lord the King, his Heirs and Successors, in the Penalty of Two Thousand Pounds, for the SAFE KEEPING OF THE RECORDS, AND FAITHFUL DISCHARGE OF HIS DUTY IN OFFICE." Laws of North Carolina 1766 (2nd. Session, 1767), c. 1, s. 5 (emphasis added).

In his answers to interrogatories propounded by the defendant, we quote from testimony of Dr. Thornton W. Mitchell, Chief of the Records Section of the Division of Archives and History as follows:

> "We presume that the documents were in the custody of the respective clerks of court until their unauthorized removal.

To the best of our knowledge, John Frohock was the clerk of the Salisbury District Superior Court at the time that these indictments were made. The names of the succeeding clerks and custodians are not easily available, but the titles of the persons who were authorized to maintain custody of these documents are listed below:

1767-1773—Clerk of the Crown, Salisbury District Superior Court.

1773-1777—Clerk of the Oyer and Terminer, Salisbury District.

1777-1806—Clerk of Salisbury District Superior Court.

1806—Undetermined date—Clerk of Superior Court of Rowan County."

* * *

"We are of the opinion that from at least the year 1760 until the twentieth century, clerks of court of record have been required to maintain in their custody bills of indictment and other court records. . . . This court was designated a court of record by a 1760 act of the Colonial Assembly and the records created by this court were open for inspection as public records (I 1760 NC Laws, pt II, C 1, S 4, 7, 38 passim). The court act of 1762, amended and continued in 1764, repeated the salient features of the superior court act of 1760 (1762 NC Laws, c 1, s 6, 9, 36, passim, and 1764 NC Laws, pt II, c 1).

"The court act of 1766 provided for the appointment of clerks of district superior courts (including the Salisbury District Superior Court) who were to give bond in the amount of Two Thousand Pounds 'for the Safe Keeping of the Records, and faithful discharge of [their] Duty in Office.' This act further provided that wills were to be kept 'in the Clerk's Office, amongst the Records of the respective Superior Courts . . . whereunto any Person may have recourse as to other Records, except for the Time the same shall or may be removed before any other Court, upon the Determination of any Controversy.' (1766 NC Laws, c 1, s 5, 18.) This act expired on March 6, 1773, whereupon the colonial District Superior Courts closed (1764 NC Laws, pt. II, c 1). When the courts were reopened in 1778 as State District Superior Courts, the court act of

1777, and subsequent years, provided for continuation of causes from the dockets prior to 1773 to dockets to commence in 1778. The continuation of cases from the dockets of 1772 to the dockets of 1778 presupposes the assumption that such dockets are a continuation of the same series of public records.

"When the District Superior Courts came to an end with the creation of County Superior Courts in 1806, specific provisions were made for the transfer and transition of records of the superseded courts (Potter, LAWS, c 694, s 10, 11). Clerks of the former District Superior Courts were 'constituted clerks of the superior courts to be holden in the several counties in which their respective offices are now situated. . . .'

"At the time of the court reforms of 1868, specific provisions were made for transfer and preservation of records of the abolished Court of Pleas and Quarter Sessions, the County Superior Courts of Law, and the County Courts of Equity . . . . [C]lerks of the new superior court were to receive 'all the records, books, papers, monies, and property' of those former courts."

Secondly, has the State overcome the presumption that public officials have properly performed their duty? The answer is yes.

[2, 3] It is obvious from the foregoing discussion that some court official has not properly performed his statutory and common law duty with regard to the preservation of these indictments since they are now found in the hands of defendant. Such official, regardless of when the offense occurred, would have either been in violation of G.S. 14-76 or its various prior enactments or negligent in the performance of his duties. It is a well settled principle of law that title to government property may pass only in the manner prescribed by the duly constituted legislative body and that title to any such property may not be forfeited through the oversight, carelessness, negligence, or even intentional conduct of any of the agents of the government. See *U. S. v. Mallery,* 53 F. Supp. 564 (1944). This legal principle applies to government land, personal property or public records. The underlying rationale of this rule is that property owned by the government is held in trust for the people and that the intentional or negligent acts of the agents of the government should

not serve to deny the people of the benefits and enjoyment of "their" property. See *Bartholomew v. Staheli,* 86 Cal. App. 2d 844, 195 P. 2d 824 (1948).

[4] Thirdly, has the State proved that the indictments were in a public archive and were stolen or otherwise improperly removed? The answer is yes.

The State introduced the court docket entries pertaining to the subject indictments, the indictments themselves, and the testimony of Dr. Thornton Mitchell in establishing their presence at one time in the records of the Salisbury Court of Justice. In fact, the court found as a fact that the two bills of indictment were filed in the Salisbury District Superior Court.

There is no evidence of abandonment nor of any legal means to abandon indictments in the face of English and North Carolina law. Even if the indictments were mislaid or lost, the finder derives no title against the true owner. See 1 Am. Jur. 2d *Abandoned Property* § 19, § 23 (1962). Moreover, the owner may sue for its recovery. See 1 Am. Jur. 2d, *supra,* § 25, § 26.

Defendant cites the general rule from 29 Am. Jur. 2d Evidence § 235 (1967) as follows:

> "As a general rule, proof of the possession of personal property is prima facie evidence of title or is said to raise a presumption of ownership, which may be rebutted or overcome by evidence of ownership in another or by evidence of the circumstances surrounding the possession."

Defendant's own authority then goes on to refer to another section from American Jurisprudence which clarifies this point. That section states that:

> "Mere possession, however, unaccompanied by other circumstances giving it a specific character, is not such evidence of ownership as to prevail against the true owner except with reference to negotiable instruments and whatever comes under the general denomination of currency." 63 Am. Jur. 2d *Property* § 36 (1972).

[5] The above general rules govern most species of property. However, the rule respecting public records is as follows:

> "Public records and documents are the property of the State and not of the individual who happens, at the moment,

to have them in his possession; and when they are deposited in the place designated for them by law, there they must remain, and can be removed only under authority of an act of the legislature and in the manner and for the purpose designated by law." 66 Am. Jur. 2d *Records and Recording Laws* § 10 (1973).

We take judicial notice of Chapter I of the 1766 Laws of North Carolina which dealt with six judicial districts, including the Salisbury District Superior Court of Justice in Salisbury, North Carolina. The act creating this court gave this court jurisdiction over both civil and criminal matters within the boundaries of that district. The act further provided for the appointment of a clerk who was to be bonded as security for " . . . the Safe Keeping of the Records, and Faithful Discharge of his Duty in Office." See Laws of North Carolina 1766, *supra*. Therefore, as a matter of law, the Clerk of the Salisbury District Superior Court was charged with the responsibility of "safe keeping" court records pursuant to the 1766 court act.

Bills of indictment were kept by the clerks during this period as a part of the court records. In its response to interrogatories, the plaintiff has listed eleven criminal case files which originated in the Salisbury District Court between 1767 and 1770 and which contains bills of indictment. Those court records are now permanently lodged in the State Archives. They are as follows:

KING v SAMUEL MOORE — March Term, 1767
KING v HUGH BERRY — September Term, 1767
KING v DOROTHY ERVIN — March Term, 1768
KING v JAMES MATHEWS — September Term, 1768
KING v EZEKIEL SMITH — September Term, 1768
KING v LEWIS LOWERY, ET AL — March Term, 1769
KING v JOHN RYALL — March Term, 1769
KING v HUGH FOSTER, ET AL — September Term, 1769
KING v JOHN FROHOCK — September Term, 1769
KING v HENRY SMITH — September Term, 1769
KING v WILLIAM HUDGEONS — September Term, 1770

Thus, we conclude that the State has proved (a) the indictments were required by law to be permanently retained, (b) overcome the presumption that public officials have properly performed their duty, and (c) proved that the indictments were

in a public archive and were stolen or otherwise improperly removed.

[6] Orginating as records of a British colony, the remaining crucial question is by what authority does the State of North Carolina now claim ownership of these documents?

The documents were court records originating out of the Salisbury District Superior Court of Justice shortly after it was formed in 1766. Although the clerk was designated as custodian of the records of this court, the records were the property of the Crown. In addition, the Court Act of 1766 provided for the appointment of a clerk in the Salisbury District Superior Court who was to give bond for the "Safe Keeping of the Records." After the defeat of Great Britain by the thirteen colonies, the Crown lost all rights which it previously held in the property of government, including public records, except as otherwise provided by treaty. However, there was no lapse in ownership after the British defeat since all the property, rights and other incidents of sovereignty immediately devolved to the new sovereign colonies, or states. It is a well established rule of international law that sovereignty is never held in suspense. Sovereignty survives changes in government and forms of government. See *U. S. v. Curtiss-Wright Export Corporation,* 299 U.S. 304, 81 L.Ed. 255, 57 S.Ct. 216 (1936). See also 45 Am. Jur. 2d. *International Law* § 40 (1969). The second edition of American Jurisprudence quotes from Wheaton on this same point:

> " 'As to public debts, *whether due to or from the State,* a mere change in the form of the government or in the person of the ruler does not affect their obligation. The essential power of the state, that which constitutes it an independent community, remains the same; its accidental form only is changed. The debts being contracted in the name of the state, by its authorized agents, for its public use, the nation continues liable for them, notwithstanding the change in its internal constitution. *The new government succeeds to the fiscal rights, and is bound to fulfil the fiscal obligations, of the former government.*' " 45 Am. Jur. 2d *International Law, supra* (emphasis added).

The property interest of the sovereign in a debt owed to the sovereign is analogous to the property interest of the sovereign in its public documents. For this reason, the State of

North Carolina succeeded to the public records of North Carolina previously owned by the Crown.

[7] The Revolutionary War officially ended upon the signing of the Treaty of Paris in 1783. At the time that this document was signed, the former colonies existed as states under the Articles of Confederation, which had been adopted in 1781. Under this system of confederation, each state retained a large measure of independence. There were thirteen sovereign states, each almost completely autonomous within its territorial boundaries. Thus, any property of government formerly owned or held by the Crown devolved, under the aforementioned theory, immediately to the individual states rather than to the central government of the thirteen states.

The "Treaty of Paris" specifically provided for the restoration of archival documents and public records to the states requiring Great Britain to:

> " . . . also order and cause all Archives, Records, Deeds and Papers belonging to any of the said States, or their Citizens, which in the Course of the War may have fallen into the Hands of His [the Crown's] officers, to be forthwith restored and delivered to the proper States and Persons to whom they belong." Definitive Treaty of Peace, 1783, Article 7, 8 Stat. 83.

The effect of the above-cited provision was to extinguish all right or interest which the British Crown held in the "Archives, Records, Deeds and Papers" of the government of North Carolina. Moreover, as a matter of sovereignty law, all such archives, records and papers belonging to the Crown remained the property of the Crown until the State became the sovereign.

With respect to public records, the applicable law has been summarized as follows in the second edition of American Jurisprudence:

> "Public records and documents are the property of the state and not of the individual who happens, at the moment, to have them in his possession; and when they are deposited in the place designated for them by law, there they must remain, and can be removed only under authority of an act of the legislature and in the manner and for the purpose designated by law. The custodian of a public record cannot destroy it, deface it, or give it up without authority

from the same source which required it to be made. *Thus, an indictment duly filed cannot be removed legitimately by anyone, including the district attorney,* except for purposes of trial thereon, or for purposes of evidence under a subpoena duces tecum or an order of court. Hence, where a district attorney for the purpose of trapping a criminal removes an indictment from the files, even though it is done with the knowledge and informal consent of a judge, the removal is improper and the indictment is not legitimately in his possession, but is to be considered as being the possession of the state; for neither the act of the district attorney nor the consent of the judge is binding on the state." 66 Am. Jur. 2d *Records and Recording Laws, supra,* (emphasis added).

More specifically, the Supreme Court of North Carolina ruled as early as 1873 that the possession and custody of court records are by statute " . . . vested in the clerk, AND THE PROPERTY IS IN THE STATE." *Commissioners v. Blackburn,* 68 N.C. 406, 410 (1873) (emphasis added).

In North Carolina, the General Assembly has acted in certain instances to prescribe the manner in which its property may be disposed. See G.S. 146, G.S. 1-35, G.S. 121-5, and G.S. 132-3.

[8] An examination of the above statutory provisions indicates that the General Assembly has prescribed a method for the sale of surplus State land and personal property and that it has established a statute of limitations within which the State must evict would-be adverse claimants to State land. However, the General Assembly has not authorized the sale, disposition or forfeiture of public documents or court records. Rather, it has authorized a manner in which such documents are to be maintained. Moreover, the General Assembly has not prescribed a statutory period within which the State must recover its lost or stolen public records. In addition, there has never been a legally authorized means of selling, forfeiting or abandoning public documents of the State of North Carolina.

The case at bar is similar in many respects to a case ruled upon by the Supreme Court of New York in 1868 in *Mayor of the City of New York v. Lent,* 51 Barb. 19 (1868). That case involved a letter written in 1785 by George Washington and addressed to the mayor, recorder, and aldermen of the City of

New York. In 1863, a distinguished book collector, John Allan, died and in the next year his library was advertised for sale at auction. The Washington letter, which had been delivered to the mayor and aldermen in 1785, was among the papers found in the Allan library. It was sold to a Mr. DeWitt C. Lent.

A question was raised as to how that document left the archives of the City of New York. The City brought suit against Mr. Lent for the return of the document. The Supreme Court of New York delivered the following opinion:

> "In the present action the letter was a particular and peculiar species of property. Its style, address and responsive character to a legislative act, should of itself be regarded as having imparted notice to all, that from the moment of its reception and sending it became the property of the corporation to whom it was addressed.
>
> "Unlike other personal property, which ordinarily possesses but little, if any, distinctive mark which might place individuals upon inquiry, this letter, so written, in such terms, and so addressed, held Allan to constantly recurring notice of its ownership by the corporation.
>
> "His possession was wholly unexplained, and the jury have charitably found that he had become possessed of it, but without title by any alienation from the corporation who were originally and rightfully its possessors and owners.
>
> "No notice is shown to have been at any time given to the corporation of the possession by Allan. Had such notice been shown, the statute of limitations by appropriate lapse of time might have had application." *Mayor of the City of New York v. Lent, supra* at 27.

The form, substance, and nature of the indictments involved in the instant case imparted notice to the world that they were court records of North Carolina. As in the Washington letter case, the manner in which these indictments left the custody of the State is totally unexplained. Moreover, no notice was ever given to the State that the indictments were in the hands of private collectors until late 1974 or early 1975, when two State archivists discovered the proposed sale of these indictments in catalogues published by the defendant.

[9] The effect of the holding in the New York Washington letter case is that there can be no bona fide purchaser of a public

document absent a showing that the duly authorized public authority has legally disposed of that document.

The State's superior right in the documents here in question is further supported by an opinion of the New Mexico Supreme Court. In *De La O v. Acoma,* 1 N.M. 226, 236 (1857), the court held:

> "We can not admit that whoever comes into the possession of a public document, paper, or record, by finding or otherwise, thereby gains such a property in the same as to authorize him to estimate the value the record or other writing may be to him to whom it may belong, or who may have an interest therein, and to withhold the same from the rightful owner, or lawful custodian, until the sum estimated or demanded for the picking up and keeping shall be paid. The wrongs that might be perpetrated where such a doctrine should be recognized and enforced can neither be counted nor measured. Every man's title and all documents would become the prey to insecurity. The fraudulent man would riot in this species of plunder, and the extortionist revel in this iniquity."

We have carefully examined the cases cited by defendant as supportive of his claim of ownership of the indictments and found them inapplicable to the facts of this case.

The Court found that the indictments were filed in the Salisbury District Superior Court and dated March 23, 1767, and September 5, 1768, and signed by William Hooper as attorney for the King. All the evidence supports these findings.

The trial court having found that the bills of indictment were docketed in the Salisbury District Superior Court, it follows without question that they became public records and therefore property of the State. As court records, it follows as a matter of law that they are required to be permanently retained in the custody of the court and can be removed only by authority of an act of the legislature and in the manner and for the purpose designated by law.

[10] Since ownership to the bills of indictment is in the State, it cannot be disposed of except as provided by law. It cannot be forfeited through the oversight, carelessness or even intentional conduct of any of the agents of the State. Thus, the documents in question left the custody of the court in an unlawful manner

and legal title thereto cannot pass to the individual who happens, at the moment, to have them in his possession.

[11] The public is not to lose its rights through loss, theft or the unexplained removal of the public records from the custody of the court, nor because one of its citizens purchased the documents in good faith, because it was his duty, as much as that of every other citizen, to protect the State in its rights.

For the reasons stated, we hold that the two bills of indictment are property of the State of North Carolina and it is entitled to the possession thereof to be held in trust for the public.

Reverse.

Judge HEDRICK concurs.

Judge BRITT dissenting.

While I commend the efforts of our division of Archives and History to diligently preserve documents and artifacts relating to the history of our great State, I do not feel that plaintiff has established title to the documents in question, namely, two bills of indictment signed by William Hooper, one of the persons who, in 1776, signed the Declaration of Independence on behalf of North Carolina.

The two indictments purportedly were signed by Hooper in 1767 and 1768 when he was serving the Salisbury District Superior Court as attorney for King George the Third. The most that plaintiff showed in attempting to establish title to the documents was (1) that they were signed by an official of the Crown in 1767 and 1768, and (2) that they were found in the possession of private citizens more than 200 years later. There was no showing that either document has been in the possession of any government official since 1768.

I suggest only a few questions that plaintiff failed to answer. Were court officials in colonial North Carolina required to preserve bills of indictment after they had served their purpose? During the turbulent 1770's were court papers deliberately discarded? Were colonial court papers included in the "property" that the new State wrested from Great Britain? If so,

have the laws of our State since 1776 continuously forbidden the discarding of all court papers?

The burden was on plaintiff to establish title to the documents. Since the foregoing and other questions have not been answered to my satisfaction, I respectfully dissent to the majority opinion.

ITT-INDUSTRIAL CREDIT COMPANY, PLAINTIFF v. MILO CONCRETE CO., INC., DEFENDANT v. J. I. CASE CO., THIRD PARTY DEFENDANT

No. 7626SC392

(Filed 17 November 1976)

1. **Uniform Commercial Code § 73— installment contract — waiver of defenses against assignee**

A "waiver of defenses against assignee" clause in a retail installment contract for sale of a concrete pump precluded the buyer from asserting against an assignee of the contract a counterclaim or defense based upon breach of warranty by the seller where the assignee took the assignment for value, in good faith, and without notice of any claims or defenses. G.S. 25-9-206(1).

2. **Uniform Commercial Code § 73— waiver of defenses against assignee clause — effect of assignee's involvement with seller**

The fact that the assignee of a retail installment contract supplied the contract form to the seller, was the assignee of twelve contracts from the seller over a two-year period, and approved the buyer's credit and financing did not prohibit the assignee from asserting a "waiver of defenses against assignee" clause in the contract in opposition to the buyer's defense and counterclaim based on breach of warranty.

3. **Uniform Commercial Code § 79— public sale of collateral — presumption of commercial reasonableness**

If a secured creditor disposes of collateral in a manner in substantial compliance with G.S. 25-9-601 *et seq.*, a conclusive presumption of commercial reasonableness in the disposition is created.

4. **Uniform Commercial Code § 79— public sale of collateral — commercial reasonableness — jury question**

The evidence was insufficient to establish the conclusive presumption of commercial reasonableness in the disposition of collateral where it failed to show whether the notice of sale was in substantial compliance with G.S. 25-9-602 and whether notice was posted at the courthouse as required by G.S. 25-9-603; however, the evidence raised an issue for the jury as to whether the sale of collateral was conducted in a commercially reasonable manner as to "method, manner, time, place and terms."

5. Uniform Commercial Code § 79— public sale of collateral — commercial reasonableness — no conclusive presumption — question of fact

Absent the establishment of the conclusive presumption of commercial reasonablenss in the public sale of collateral by showing that the sale substantially complied with G.S. 25-9-601 *et seq.*, a question of fact remains as to whether the sale was conducted in a commercially reasonable manner under G.S. 25-9-504(3).

6. Uniform Commercial Code § 79— public sale of collateral — commercial reasonableness — burden of proof

A creditor suing for a deficiency has the burden of proving that the disposition of the collateral was conducted in a commercially reasonable manner.

7. Appeal and Error § 49— harmles error in exclusion of evidence

The erroneous exclusion of testimony as to the cash price of a concrete pump was not prejudicial where a contract showing the cash and time prices had been admitted in evidence and another witness had testified as to the cash and time prices.

8. Evidence § 48— refusal to accept witness as expert — error

In an action to recover an amount due on an installment contract executed for the purchase of a concrete pump wherein defendant buyer counterclaimed for breach of warranty, the trial court erred in refusing to accept the seller's area marketing manager as an expert witness on the mechanics of the pump where the witness had previously been responsible for all sales and service of the seller's concrete machinery in thirteen southeastern states; he had spent time on the assembly line of the pump in question, observing it in fabrication and testing; he had presented lectures on the sales and service of the pump; and he was familiar with all types of pumps and was trained in the procedures outlined in the service manual of the pump in question.

9. Evidence § 36— statements by agent — failure to show scope of agency

The trial court properly excluded testimony as to statements allegedly made by defendant's agent where there was no showing that the statements were made within the scope of the agent's authority.

10. Uniform Commercial Code § 20— acceptance of goods — use for five months — act inconsistent with seller's ownership

The buyer of a concrete pump accepted the pump where defects in the pump were observed at the beginning of its operation but the buyer retained and operated the pump for more than five months, and where the buyer did an act inconsistent with the seller's ownership by attempting to sell the pump after using it for five months; furthermore, a revocation of acceptance was not available to the buyer after the five-month period since revocation must occur within a reasonable time after the buyer discovers the ground for it. G.S. 25-2-606(1); G.S. 25-2-608(2).

11. Uniform Commercial Code § 21— breach of warranty — action after acceptance of goods

The buyer of a concrete pump properly brought an action for breach of warranty *after* an acceptance of the pump where it had duly notified the seller of the defect in the pump. G.S. 25-2-714.

12. Uniform Commercial Code § 20— breach of warranty — value at acceptance — price of sale to third party

The trial court in an action for breach of warranty of a concrete pump did not err in refusing to instruct the jury that the value of the pump at acceptance must be controlled by the price received by the buyer from its sale of the pump to a third party since the price received for the pump was only some evidence of its value, and this was properly presented to the jury.

13. Uniform Commercial Code § 15— express warranty — instructions — seller's opinion or commendation of goods

In an action for breach of warranty of a concrete pump wherein the question was raised as to whether an express warranty was created by the seller's purported statement as to the ability of the pump to handle a particular type of concrete, the trial court erred in failing to give the jury an instruction which would permit a finding that the seller's purported statement was not an express warranty but was merely the seller's opinion or a commendation of the goods within the purview of G.S. 25-2-313(1).

APPEAL by defendant Milo Concrete Co., Inc., and third-party defendant J. I. Case Company, from *Griffin, Judge.* Judgment entered 23 January 1976 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 21 September 1976.

Plaintiff instituted this action to recover from defendant (Milo) the balance allegedly due on a retail installment contract and security agreement executed by Milo to the third-party defendant (Case) and by it assigned to plaintiff.

In its complaint plaintiff alleged: On 27 April 1973 Milo purchased a new TB80 concrete pump with certain attachments and other equipment from Case. Milo executed a contract setting forth that the total sales price was $56,292.23; that Milo paid $7,000, leaving a balance of $49,292.23 payable in thirty-six monthly installments. The contract and security agreement was assigned to plaintiff. Milo has defaulted in making payments and owes plaintiff $40,049.99. Plaintiff asked for judgment for the balance due plus $6,407.99 attorney fees and costs.

Milo filed answer denying that it was indebted to plaintiff. It also pleaded a counterclaim against plaintiff and a third-party action against Case alleging that the concrete pump

was defective and that it is entitled to recover damages from plaintiff and Case for breach of expressed and implied warranty. Case filed an answer and plaintiff filed a reply denying that there had been any breach of warranty.

Plaintiff presented evidence tending to show: Milo purchased the concrete pump from Case, made a down payment of $7,000 and executed a contract in which it agreed to make monthly payments totaling $49,292.23. Case assigned the contract to plaintiff for $39,800.00 and plaintiff had no knowledge of anything being "wrong" with the contract at the time it was purchased from Case. Milo made five payments and two payments were made by George Kesler, but no payments were made after December 1973. The unpaid balance at the time of default was $40,049.99 and the pump and equipment were repossessed, sold and the net proceeds of the sale were applied on the debt. After crediting Milo with the proceeds of the sale, less expense incurred in repairing the pump prior to the sale and other expenses thereof, the total amount of Milo's debt to plaintiff is $37,109.03. The contract which Milo executed and plaintiff purchased is a standard retail installment contract form supplied by plaintiff to sellers of equipment. Before plaintiff purchases an installment contract it makes an investigation of a buyer's credit and approves a sale before a contract is executed by the buyer.

Milo offered evidence tending to show: Before purchasing the pump employees of Case represented to Milo's president that a TB80 concrete pump would pump standard 3,000 psi concrete. This type of concrete is cheaper than other types and the fact that a TB80 pump could pump 3,000 psi concrete was one of the main reasons why Milo bought it. The pump did not perform satisfactorily for Milo because the elbows blew off frequently whenever the pump was being used. When the elbows blew off concrete would not move through but would harden inside of the pump. Several months after purchasing the pump Milo sold it to George Kesler, one of its employees. Kesler executed a note to Milo for $7,000 and agreed to assume the unpaid payments on the contract; however, plaintiff refused to approve this arrangement until Kesler had made three payments and Kesler made only two payments before defaulting.

Case offered evidence tending to show: It never warranted that the equipment would pump standard 3,000 psi concrete.

Milo's president asked Frederick Williams, Case's regional sales manager, if it would pump a 3,000 mix and Williams said it would pump a 3,000 "pump mix." A pump mix differs from a standard mix in that it contains more cement and can slide through pipes more easily. After Milo bought the pump, it was returned to Case's place of business on several occasions for repairs and on those occasions it was very dirty. Concrete was splattered over the outside of the pump and the moving parts inside. The elbows were attached to the pump by clamps which must be secured tightly in grooves, and when Milo brought the pump to Case's place of business the grooves had concrete in them.

Other evidence offered and rulings by the trial judge pertinent to the questions presented on appeal are alluded to in the opinion.

Pursuant to peremptory instructions by the court the jury found that plaintiff was a holder in due course. The jury further found that Milo had breached its contract and that plaintiff was entitled to recover $37,109.03 from Milo; that Case had warranted that the pump would pump 3,000 psi concrete, that Case had breached this warranty, and that Milo was entitled to recover $35,000 from Case.

From judgment entered on the verdict and ordering that plaintiff recover $37,109.03, together with $6,007.50 in attorney fees from Milo, and that Milo recover $35,000 from Case, Milo and Case appealed.

Richard A. Cohan for plaintiff appellee.

Mullen, Holland & Harrell, P.A., by Graham C. Mullen, for defendant appellant and third-party plaintiff appellee.

Mitchell & Matus, by T. Patrick Matus, for third-party defendant appellant.

BRITT, Judge.

APPEAL OF MILO

[1] Milo contends that the trial court erred in directing a verdict with respect to its counterclaim against plaintiff based on breach of warranty and in instructing the jury that plaintiff was not subject to a defense based on breach of warranty. These contentions are without merit.

Plaintiff is the assignee of a retail installment sales contract entered into between seller Case and the buyer Milo. This contract contains a valid "waiver of defenses" provision which provides that: "Buyer agrees not to assert against the assignee any defense, offset or counterclaim which he may have against the Seller." G.S. 25-9-206(1) permits a contractual waiver of certain defenses by the buyer by providing:

> "Subject to any statute or decision which establishes a different rule for buyers or lessees of consumer goods, an agreement by a buyer or lessee that he will not assert against an assignee any claim or defense which he may have against the seller or lessor is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under the Article on Commercial Paper (Article 3). . . ."

We note first that the General Assembly has enacted Chapter 25A, entitled Retail Installment Sales Act, in which G.S. 25A-25 alters the rule as to waiver of defenses against an assignee of a contract in all consumer credit sales. That statute is not applicable in the present case (see G.S. 25A-2), therefore, G.S. 25-9-206(1) is controlling.

Milo argues that plaintiff was not a holder in due course since the contract involved did not meet the requisites of negotiability. Although this argument is correct, plaintiff was still free of all defenses (including breach of warranty) except those that may be asserted against a holder in due course, if plaintiff met the requirements of G.S. 25-9-206(1). In the instant case, the waiver of defenses clause is enforceable since all the evidence showed that plaintiff took the assignment for value, in good faith, and without notice of any claims or defenses.

[2] Milo further argues that plaintiff, by its degree of involvement with the seller Case, was so "inextricably intertwined" in the sales transaction that it is "unfair" to foreclose Milo's defense based on breach of warranty. Milo supports this argument with the evidence that plaintiff supplied the contract form, that plaintiff was the assignee of twelve contracts from seller Case during 1973 and 1974, and that plaintiff approved the customer's credit and financing. We are aware that the arguments made by Milo have been accepted by some courts,

particularly in consumer transactions, in holding that waiver of defense clauses may be unenforceable as against public policy. *Commercial Credit Corp. v. Orange Co. Mach. Works,* 34 Cal. 2d 766, 214 P. 2d 819 (1950); *Unico v. Owen,* 50 N.J. 101, 232 A. 2d 405 (1967); *Rehurek v. Chrysler Credit Corp.,* 262 So. 2d 452 (Fla. 1972); Navin, Waiver of Defense Clauses in Consumer Contracts, 48 N.C.L. Rev. 505 (1970).

Nevertheless, we think that in the commercial setting of the instant case the waiver of defenses clause was effective in cutting off, as to plaintiff, the defense and counterclaim based on breach of warranty. The validity of the statutory provision [G.S. 25-9-206(1)] authorizing the inclusion of waiver of defense clauses has been upheld many times. *First Nat. Bank v. Husted,* 57 Ill. App. 2d 227, 205 N.E. 2d 780 (1965); *Beam v. John Deere Co.,* 240 Ark. 107, 398 S.W. 2d 218 (1966); *B. W. Acceptance Corp. v. Richmond,* 46 Misc. 2d 447, 259 N.Y.S. 2d 965 (Sup. Ct. 1965); *Jennings v. Universal C.I.T. Credit Corp.,* 442 S.W. 2d 565 (Ky. 1969); *Cox v. Galigher Motor Sales Co.,* 213 S.E. 2d 475 (W. Va. 1975); *Westinghouse Credit Corp. v. Chapman,* 129 Ga. App. 830, 201 S.E. 2d 686 (1973). Milo's attempt to assert a breach of warranty against the plaintiff was effectively waived in the contract, therefore, this contention is rejected.

Milo next contends the trial court erred in refusing to submit to the jury an issue as to whether plaintiff disposed of the collateral in a commercially reasonable manner. We think this contention has merit.

G.S. 25-9-504(3) provides in pertinent part:

> "Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the *method, manner, time, place* and *terms* must be *commercially reasonable.* . . . " (Emphasis added.)

[3] To minimize difficulties arising from the quoted statute, our General Assembly has enacted part 6 of Article 9 of the North Carolina Uniform Commercial Code entitled "Public Sale Procedures." If the secured creditor disposes of the collateral in a manner in substantial compliance with G.S. 25-9-601,

et seq., a conclusive presumption of commercial reasonableness is created. *Graham v. Northwestern Bank*, 16 N.C. App. 287, 192 S.E. 2d 109, *cert. denied*, 282 N.C. 426, 192 S.E. 2d 836 (1972); *Hodges v. Norton*, 29 N.C. App. 193, 223 S.E. 2d 848 (1976). These procedures provide for the contents of the notice of sale (G.S. 25-9-602), the posting and mailing of the notice of sale (G.S. 25-9-603), and the postponement of public sale (G.S. 25-9-605), among others. These procedures are not a part of the "Official Text of the U.C.C." and appear to be peculiar to this State. *Hodges v. Norton, supra.*

[4] The evidence presented in this case is insufficient to establish the conclusive presumption of commercial reasonableness provided by G.S. 25-9-601, et seq. Plaintiff's evidence tends to show: The equipment was voluntarily surrendered; approximately $6,000 worth of repairs were made before it could be sold; there were advertising expenses of $8.94 on 4 February 1975, $10 on 31 March 1975, and $18.25 on 10 August 1975; it cost $792 to sell the equipment at auction; and the equipment sold for $9,900 at the auction. Plaintiff's sole witness stated that there were several contacts with Milo "prior to the month of default, and subsequent to that date also." On cross-examination, plaintiff's witness testified that the public sale was held at the Mecklenburg County Fairgrounds in July of 1975. It was shown that plaintiff advertised the sale on several dates and one notice of sale was produced that indicated that the sale would take place on 6 March 1975. On redirect examination plaintiff's witness identified a notice of sale sent by certified mail to Miles Hamrick (Milo's president) advertising a sale to be held on 19 July 1975 and received by Jane A. Hamrick on 8 July 1975. This notice of sale was not introduced into evidence and there is no evidence of its contents. The record does not indicate whether the contents of the notice of sale were in substantial compliance with G.S. 25-9-602, or whether a notice was posted at the courthouse as required by G.S. 25-9-603. The requirements of G.S. 25-9-601, et seq. are neither difficult to comply with nor to prove a trial. Substantial compliance is required and based on the lack of evidence presented in this case, we hold that no conclusive presumption of commercial reasonableness was established.

[5, 6] We recognize that a public sale may be commercially reasonable even though it does not substantially comply with G.S. 25-9-601, et seq. *Hodges v. Norton, supra.* However, absent

the establishment of the conclusive presumption of commercial reasonableness, we think a question of fact remains as to whether the sale was conducted in a commercially reasonable manner under G.S. 25-9-504(3). We also think that under the greater weight of authority a creditor, when suing for a deficiency, has the burden of proving that the disposition of the collateral was conducted in a commercially reasonable manner. *Clark Leasing Corp. v. White Sands Forest Prod., Inc.*, 87 N.M. 451, 535 P. 2d 1077 (1975); *Vic Hansen & Sons, Inc. v. Crowley*, 57 Wis. 2d 106, 203 N.W. 2d 728 (1973); *Mallicoat v. Volunteer Finance & Loan Corp.*, 57 Tenn. App. 106, 415 S.W. 2d 347 (1966); *First Nat. Bank v. Rose*, 188 Neb. 362, 196 N.W. 2d 507 (1972).

[4] In the absence of the establishment of conclusive presumption, the issue of commercial reasonableness requires a factual determination in light of the relevant circumstances of each case. In the present case, a proper issue was raised for the jury as to whether the sale was conducted in a commercially reasonable manner as to "method, manner, time, place and terms." *Clark Leasing Corp. v. White Sands Forest Prod., Inc., supra; Fort Knox Nat. Bank v. Gustafson*, 385 S.W. 2d 196 (Ky. 1964); *Ennis v. Atlas Finance Co.*, 120 Ga. App. 849, 172 S.E. 2d 482 (1969); *California Airmotive Corp. v. Jones*, 415 F. 2d 554 (6th Cir. 1969); *Atlas Constr. Co. v. Dravo-Doyle Co.*, 3 UCC Rep. Serv. 124 (Pa. C.P. 1965). The trial court, therefore, erred when it refused to submit this issue to the jury.

APPEAL OF CASE

[7] Case contends first that the trial court erred in allowing Milo's president to testify that the value of the pump would have been $56,000 had it performed as warranted, and then excluding his testimony on cross-examination that the cash price of the pump was $46,800. Under the facts in this case, we find no merit in the contention.

We think that evidence showing the cash price was competent on the question as to the value of the equipment as warranted. Nevertheless, any error committed by the court in refusing to allow the testimony was cured by the previous introduction of plaintiff's exhibit #1 which was a copy of the sales contract. This contract, which was properly before the jury, showed the cash price of $46,800 and the total time price of

$56,293.23. Moreover, plaintiff's first witness had already testified as to the cash price and the time price. The prior introduction of this evidence rendered harmless any error in excluding the testimony of Milo's president as to the cash price. 1 Strong, N. C. Index 3d, Appeal and Error § 49.2.

[8] Case next contends the court erred in excluding the testimony of Fred Williams, an employee of Case, with respect to his background and qualifications and in refusing to accept Mr. Williams as an expert witness. We think this contention has merit.

In *Cogdill v. Highway Comm.*, 279 N.C. 313, 321, 182 S.E. 2d 373, 378 (1971), our Supreme Court said:

> . . . An expert witness is one better qualified than the jury to draw appropriate inferences from the facts. Stansbury § 132 states:
>
> "The question, then, in every case involving expert testimony, ought to be, Is *this witness* better qualified than *this* jury to form an opinion from *these facts?* If the answer is Yes, his opinion is admissible whether he is called a 'true expert' or is mildly disparaged by being classified as a 'witness specially qualified as to facts,' or an 'expert on the facts,' or 'not strictly an expert.' "

We note the general rule that the competency of a witness to testify as an expert is a question addressed primarily to the sound discretion of the trial court. *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705 (1972). An expert witness is one who through study or experience, or both, has acquired skill that makes him better qualified than the jury to form an opinion on the subject in question. In the instant case, Mr. Williams was the area manager for the marketing division of Case. He had previously been the regional manager of the concrete division and was responsible for all sales and service of Case's concrete machinery in thirteen southeastern states. He had spent time on the assembly line of the pump in question, observing it in fabrication and in testing. He had presented lectures on the sales and service of this equipment. Outside the presence of the jury he testified that he was familiar with all types of pumps and that he was trained in the procedures outlined in the service manual of this pump. Furthermore, during a normal week, he sees at least one pump a day.

We hold that this evidence was sufficient to qualify Mr. Williams as an expert and the exclusion of this testimony based on the facts in question constituted prejudicial error. The trial court abused its discretion in failing to qualify this witness as an expert. As stated in *Utilities Comm. v. Telephone Co., supra:* ". . . The fact that the witness is an officer or employee, or a consultant specially retained by a party to the litigation, does not disqualify him as an expert. The effect of this circumstance upon the weight to be given his opinion is for the trial body to determine." We think the testimony of Mr. Williams, as an expert, would have been not only proper but also helpful as an aid to the jury in understanding the mechanics and possible malfunctions of the concrete pump in question.

[9] Case next assigns as error the exclusion of certain testimony offered by its witness Mr. Williams relating to declarations of Mr. Kesler, an alleged agent of Milo. This assignment is without merit.

Mr. Williams, as a witness for Case, testified that he was at the Case office in Charlotte when Mr. Kesler, an employee of Milo, came into the office and stated that he was interested in buying a concrete pump. An objection was then interposed and sustained. The jury was excused and Williams testified that Kesler said he wanted a TB80 pump rather than a TB336 pump "because he sold concrete pumps, he had pumped against a TB80 on demonstration, he knew what it would do and he wanted a tandem truck . . . ." Objection was again interposed and sustained. We think the court properly excluded this testimony.

On their face, these statements indicate that Kesler *personally* wanted this concrete pump and, in fact, Kesler later purchased the pump in question from Milo. Case's argument that the statements were made while Kesler was an agent of Milo *and* acting within the scope of his authority is not supported by the record. Conceding that Kesler was the agent of Milo, there was no showing that the statements sought to be introduced were within the scope of authority of the declarant and the burden of so showing is on the party who seeks to introduce the testimony. *Williams v. Highway Commission,* 252 N.C. 514, 114 S.E. 2d 340 (1960). Since there was no showing that these declarations were within the scope of Kesler's authority, the evidence was properly excluded.

Case next contends that the trial court erred in allowing Milo to amend its pleadings to conform to the evidence and thereby pray for damages greater than asked for in the complaint. This contention is without merit and since Case is being awarded a new trial on other grounds, we deem it unnecessary to discuss this contention. Suffice it to say, the amendment was fully authorized by G.S. 1A-1, Rule 15(b).

Case next contends the trial court erred in failing to submit an issue to the jury regarding acceptance and revocation of acceptance of the concrete pump by Milo. This contention is without merit.

G.S. 25-2-606(1) provides:

> Acceptance of goods occurs when the buyer (a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; or
>
> (b) fails to make an effective rejection (subsection (1) of § 25-2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or
>
> (c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

[10] Milo seeks to assert its claim for breach of warranty under G.S. 25-2-714 after acceptance of the goods. The evidence established that Milo retained the pump for more than five months and had ample time to effectively reject the goods, particularly since the pump's defects were observed at the beginning of its operation. We conclude that Milo's failure to make an effective rejection within the five-month period constituted an acceptance. Moreover, Milo's attempt to sell the pump, after five-months operation, to Kesler constituted an act under G.S. 25-2-606(1)(c) which was inconsistent with the seller's ownership. Furthermore, a revocation of acceptance was not available to Milo after this five-month period of use since, under G.S. 25-2-608(2), "revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it . . . ."

[11] Milo duly notified Case of the defect, therefore, we think Milo has properly brought this action for breach of warranty *after* an acceptance of the goods. G.S. 25-2-607(3). The pleadings nor the evidence raised any issue as to acceptance or revocation of acceptance.

[12] Case's next contention is that the trial court erred in its jury instructions relating to the measure of damages recoverable in a breach of warranty action. This contention is without merit.

G.S. 25-2-714(2) provides:

> "The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount."

Although, as noted by the comments to the statute, this is not exclusive measure of damages for breach of warranty, the jury in the instant case was properly charged according to the statute. Case argues that the court should have instructed the jury, as requested, that the value of the goods at acceptance must be controlled by the price received by Milo from its sale of the pump to Kesler. The determination of the amount of damages recoverable was properly a question for the jury upon consideration of all the evidence presented. We recognize that the price received for the pump was *some* evidence of its value and this was properly presented to the jury.

[13] Case contends that the trial court improperly charged the jury with respect to the creation of an express warranty. We think this contention has merit.

It is conceded that what the court charged was correct. However, Case contends that the failure to include in the charge the substance of the last section of G.S. 25-2-313(2) precluded the jury from finding that statements made by Case did not create an express warranty but were merely the seller's opinion or a commendation of the goods.

The court properly instructed the jury under G.S. 25-2-313(1) and concluded by charging under subsection (2) of that statute that: "No particular word or form of expression is necessary to create an express warranty. Nor is it necessary

that the seller use formal words such as warrant or guarantee or that he have a specific intention to make a warranty." Case contends that the court should have charged on the last section of G.S. 25-2-313(2) which states that " . . . an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty." We agree with this contention.

Although we recognize that the inclusion of this statement may not be required in all instances, in the present case a factual question was raised as to what was said by Case concerning the performance of the pump. The issue revolved around whether a warranty was created as to the ability of the pump to handle a particular type of concrete. We think the jury could have reasonably determined that the seller's purported statement was merely the seller's opinion or a commendation of the goods under the statute. We hold that a proper charge to the jury under the evidence in this case should have recognized this possibility and included the second portion of the statute quoted above.

We have considered the other assignments of error argued in Case's brief but, finding them to be without merit, they are overruled.

* * *

We conclude that the errors in the trial which we have discussed in Milo's appeal and in Case's appeal were sufficiently prejudicial to require a new trial on all issues and it is so ordered.

New trial.

Judges PARKER and CLARK concur.

BETTY H. HUSS v. JAMES B. HUSS

No. 7627SC394

(Filed 17 November 1976)

1. Rules of Civil Procedure § 56— summary judgment motion — attorneys' oral argument not considered

Though the court on a motion for summary judgment may consider evidence consisting of affidavits, depositions, answers to inter-

rogatories, admissions, and documentary materials which would be admissible in evidence at trial, information adduced from counsel during oral arguments cannot be used to support a motion for summary judgment under G.S. 1A-1, Rule 56(c).

2. **Husband and Wife § 14— deed to man and wife — presumption of estate by entireties**

It is well settled law in this State that there is a presumption that a deed to a man and wife creates an estate by the entireties in them even though he furnished the entire consideration; however, the presumption of a gift may be rebutted by clear, strong and convincing proof.

3. **Reformation of Instruments § 4— reformation of deed for mutual mistake — allegations required**

The party seeking reformation of a deed on the ground of mutual mistake must allege the provision that was agreed upon, the provision that was written, and that the mistake was mutual; it is not required that the pleader allege facts as to how and why the mutual mistake came about.

4. **Reformation of Instruments § 4— reformation of deed for mutual mistake — sufficiency of allegations to state claim**

In a proceeding for a partition sale of realty owned by the parties as tenants by the entirety prior to their divorce and as tenants in common subsequent to their divorce, respondent's allegations in his answer that (1) petitioner's name was in the deed as a grantee with him because of a mutual mistake, (2) he instructed the grantors to put the property in his name alone, (3) he had not seen the deed at the time of transfer, (4) the grantors told him the property had been put in his name alone and he relied on this statement, (5) and he learned of the mistake 13 years after the land was purchased during a dispute over a divorce order were sufficient to state a claim for reformation of the deed due to mutual mistake.

5. **Limitation of Actions § 7; Reformation of Instruments § 1— reformation of deed for mutual mistake — three year statute of limitations**

In an action for reformation of a deed on the ground of mutual mistake, G.S. 1-52(9) establishes the period of limitation as three years, and the period begins to run from the time the mistake is discovered or should have been discovered in the exercise of due diligence.

6. **Reformation of Instruments § 7— reformation of deed — action barred by statute of limitations — insufficiency of evidence**

In a proceeding for partition of realty where respondent sought reformation of the deed on the ground of mutual mistake, the trial court erred in determining as a matter of law that respondent failed to exercise due diligence to discover the mistake, and the counterclaim was therefore barred by the statute of limitations, where the pleadings disclosed only that respondent did not see the deed at the time of the transaction and that he relied on the statement of the grantor as to the persons named as grantees.

7. Equity § 2— laches — action not barred by statute of limitations — no equitable relief

Delay which will constitute laches depends upon the facts and circumstances of each case, but when the action is not barred by the applicable statute of limitations, equity will not bar relief except upon special facts demanding extraordinary relief; such facts were not presented in this partition proceeding where respondent sought reformation of the deed on the ground of mutual mistake.

APPEAL by respondent from *Briggs, Judge.* Judgment entered 5 April 1976 in Superior Court, GASTON County. Heard in the Court of Appeals 21 September 1976.

Petitioner and respondent are now divorced. On 20 November 1975, the former wife petitioned the Clerk of the Superior Court, Gaston County, for the partition sale of realty. She alleged that the tract of land which they originally owned as tenants by the entirety was now, as a result of the divorce, owned by them as tenants in common.

Respondent alleged in his answer that his former wife had no interest in the property and that her name was in the deed as a grantee with him because of a mutual mistake. He further alleged that he had purchased the land in 1962; that he had instructed the grantors to put the property in his name alone; that he had not seen the deed at the time of the transfer; that the grantors had told him the property had been put in his name alone and that he had relied on this statement; and that he had learned of the mistake only in 1975 during a dispute over the divorce order. He prayed for reformation of the deed.

In her reply petitioner denied his allegation of mistake and also raised the defenses of the statute of limitations and laches.

The case was transferred to the civil issue docket of the Superior Court. On 20 January 1976, petitioner moved "for a judgment upon the pleadings or a Summary Judgment." No affidavits, answers to interrogatories, depositions, or admissions were filed in support of the motion. Based solely upon an examination of the pleadings and oral arguments, the court entered a "summary judgment" for petitioner.

Respondent appealed.

Whitesides and Robinson by Henry M. Whitesides and Arthur C. Blue III for respondent appellant.

Bob W. Lawing for petitioner appellee.

CLARK, Judge.

[1] The trial court examined the pleadings and heard oral arguments from counsel in ruling on petitioner's motion. Information adduced from counsel during oral arguments cannot be used to support a motion for summary judgment under Rule 56(c). On a motion for summary judgment the court may consider evidence consisting of affidavits, depositions, answers to interrogatories, admissions, documentary materia's, facts which are subject to judicial notice, and any other materials which would be admissible in evidence at trial. *Koontz v. City of Winston-Salem,* 280 N.C. 513, 186 S.E. 2d 897 (1972); *Singleton v. Stewart,* 280 N.C. 460, 186 S.E. 2d 400 (1972). Oral testimony may also be admissible in proper cases under G.S. 1A-1, Rule 43(e). *Chandler v. Savings and Loan Assoc.,* 24 N.C. App. 455, 211 S.E. 2d 484 (1975); *Insurance Co. v. Chantos,* 21 N.C. App. 129, 203 S.E. 2d 421 (1974). Certain verified pleadings, not present in this record, may be treated as affidavits for purposes of a motion for summary judgment. *Page v. Sloan,* 281 N.C. 697, 190 S.E. 2d 189 (1972).

Since the parties offered and the trial court in this case considered only the unverified pleadings in hearing petitioner's motion, the motion must be considered to have been one under G.S. 1A-1, Rule 12(c) for a judgment on the pleadings and not one under G.S. 1A-1, Rule 56 for a summary judgment. *Reichler v. Tillman,* 21 N.C. App. 38, 203 S.E. 2d 68 (1974).

Upon a motion for judgment on the pleadings the allegations of the non-movant are taken as true and all contravening assertions of the movant are taken as false. *Tilley v. Tilley,* 268 N.C. 630, 151 S.E. 2d 592 (1966). Judgment on the pleadings is not favored by the law, and the non-movant's pleadings will be liberally construed. *Edwards v. Edwards,* 261 N.C. 445, 135 S.E. 2d 18 (1964); *Bessire and Co. v. Ward,* 206 N.C. 858, 175 S.E. 208 (1934). The trial court is required to view the facts and permissible inferences in the light most favorable to the non-movant. *Ragsdale v. Kennedy,* 286 N.C. 130, 209 S.E. 2d 494 (1974).

Respondent's plea for reformation due to mutual mistake, though denominated a defense, was a counterclaim and should be judged as such under G.S. 1A-1, Rule 8(c), which provides that

". . . When a party has mistakenly designated a defense as a counterclaim or a counterclaim a defense, the court, on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."

The equitable right to reformation may be invoked by way of counterclaim in an action based on the deed. *Lawrence v. Heavner,* 232 N.C. 557, 61 S.E. 2d 697 (1950). In her reply to respondent's counterclaim, petitioner alleged three defenses: (1) that there was no mistake; (2) that the counterclaim was barred by the statute of limitations; and (3) that the counterclaim was barred by laches. We now turn to examine respondent's pleading to see if the judgment of the trial court should be sustained.

[2-4] Respondent alleged, and we must accept as true, that he furnished the entire consideration for the purchase price of the land. It is well settled law in this State that there is a presumption that a deed to a man and wife creates an estate by the entireties in them even though he furnishes the entire consideration. *Honeycutt v. Bank,* 242 N.C. 734, 89 S.E. 2d 598 (1955). The presumption of a gift may, however, be rebutted by clear, strong, and convincing proof. *Bowling v. Bowling,* 252 N.C. 527, 114 S.E. 2d 228 (1960). A mutual mistake, if established, would negate the donative intent necessary for a valid gift. An allegation that the mistake was "through error" is insufficient to support a claim for reformation. *Smith v. Smith,* 249 N.C. 669, 107 S.E. 2d 530 (1959). The party seeking reformation must allege the provision that was agreed upon, the provision that was written, and that the mistake was mutual. It is not required that the pleader allege facts as to how and why the mutual mistake came about. *Matthews v. Van Lines,* 264 N.C. 722, 142 S.E. 2d 665 (1965). 6 Strong, N. C. Index, Reformation of Instruments § 4 (2d Ed. 1968). We think the allegations by respondent as set forth in the initial statement of facts are sufficient to state a claim for reformation due to mutual mistake.

[5, 6] Petitioner's second defense was the statute of limitations. G.S. 1-52(9) establishes three years as the limitation on actions based on mistake. The period begins to run from the time the mistake is discovered or should have been discovered in the exercise of due diligence. *Lee v. Rhodes,* 231 N.C. 602, 58 S.E. 2d 363 (1950). Taking respondent's allegations as true, it is clear that the action was instituted within three years of

actual discovery of the mistake. Therefore, the trial court must have felt that respondent's allegations disclosed that the mistake should have been discovered more than three years earlier as a matter of law, but with this conclusion we cannot agree. Whether the plaintiff in the exercise of due diligence should have discovered the facts more than three years prior to the institution of the action is ordinarily for the jury when the evidence is not conclusive or is conflicting. *Lowery v. Wilson,* 214 N.C. 800, 200 S.E. 861 (1939). Failure to exercise due diligence in discovering a mistake has been determined as a matter of law where it was clear that there was both capacity and opportunity to discover the mistake. *Moore v. Casualty Co.,* 207 N.C. 433, 177 S.E. 406 (1934). A judgment on the pleadings based on the statute of limitations is proper when, and only when, all the facts necessary to establish the limitation are alleged or admitted, construing the non-movant's pleadings liberally in his favor and giving him the benefit of all relevant inferences of fact to be drawn therefrom. *Reidsville v. Burton,* 269 N.C. 206, 152 S.E. 2d 147 (1967). Applying this standard, we are unable to agree with the trial court that the pleadings disclose as a matter of law that in the exercise of due diligence the respondent should have discovered the mistake more than three years prior to filing the relevant pleading. The pleadings disclose only that respondent did not see the deed at the time of the transaction and that he relied on the statements of the grantors. Whether failure to read a deed will bar relief depends on the facts and circumstances in each case. *McCallum v. Insurance Co.,* 262 N.C. 375, 137 S.E. 2d 164 (1964). The pleadings disclose nothing of the facts and circumstances surrounding the delivery of the deed or other aspects of the transaction. We need not speculate on what circumstances should have led respondent to discover the mistake more than three years previously, nor are we to judge the likelihood of respondents' success on his claim. We think it clear that the pleadings do not disclose sufficient facts to establish as a matter of law that respondent failed to exercise due diligence.

Cases in our State granting a judgment on the pleadings based on the statute of limitations have concerned sections of the statute wherein the beginning date was readily fixed and did not depend upon any standard of reasonableness. 5 Strong, N. C. Index, Limitation of Actions § 18 (2d Ed. 1968). See Annot. 61 A.L.R. 2d 300 (1958).

[7] Petitioner's final defense was laches. The doctrine of laches is more flexible than the statute of limitations, and may bar an equitable remedy by reason of inexcusable neglect or prejudicial delay for a period shorter than that in the statute. *Teachey v. Gurley,* 214 N.C. 288, 199 S.E. 83 (1938). Delay which will constitute laches depends upon the facts and circumstances of each case. When the action is not barred by the statute, equity will not bar relief except upon special facts demanding extraordinary relief. *Creech v. Creech,* 222 N.C. 656, 24 S.E. 2d 642 (1943). As we have stated above, we do not think the pleadings disclose sufficient facts and circumstances to dispose of this case. The mere fact of divorce, absent a showing of reliance upon the entirety title or prejudice to the wife or any other appropriate ground, is not sufficient to establish the defense of laches at the pleading stage.

A judgment on the pleadings is not appropriate merely because the claimant's case is weak and he is unlikely to prevail on the merits. If the parties had offered new matter which revealed circumstances such as the person or persons in possession of the deed, concealment of the deed, the listing of the land for taxation and other relevant facts, it is possible that this proceeding could have been determined by summary judgment, but this was not done. It may be difficult for respondent to offer evidence tending to show that, though the realty was conveyed to him and his wife as tenants by the entirety by deed made thirteen years prior to this suit, he nevertheless used due diligence but failed to discover for a period of about ten years that the deed was so made. But we do not find that the pleadings preclude respondent from offering such evidence.

The judgment on the pleadings is

Reversed and the cause remanded.

Judges BRITT and PARKER concur.

In re Mikels

IN THE MATTER OF BRENDA DARLENE MIKELS

No. 769DC361

(Filed 17 November 1976)

1. **Infants § 1; Insane Persons § 1— commitment of juvenile to mental health care facility — authority of juvenile division of district court**

The juvenile division of the district court does not have the authority to commit a minor directly to a State mental health institution under G.S. 7A-286(6), since the only statutory provisions for commitment to mental treatment facilities are set forth in Articles 4 and 5A of Chapter 122, which provide for hearings to be held within strict time limits, with counsel provided for indigents, with procedural safeguards, to determine that the juvenile is mentally ill and in need of treatment.

2. **Constitutional Law § 30; Infants § 1— due process protections afforded juveniles**

Juveniles are entitled to the same due process protections as adults in any proceeding where a loss of liberty is a possible result.

3. **Infants § 1; Insane Persons § 1— commitment of juvenile to mental health care facility — jurisdiction of court to hold rehearing**

Since the Granville County Court was required by G.S. 122-58.11 to hold rehearings on all patients involuntarily committed to John Umstead Hospital and since the original order of the Durham County Court committing respondent to the hospital was void, then the Granville County District Court properly had jurisdiction over the respondent, had statutory authority to determine whether her commitment should be extended, and acted properly in ordering that she had been improperly committed and that she should be immediately released until committed in accordance with the statutory requirements.

APPEAL by respondent from *Peoples, Judge.* Judgment entered 23 January 1976 in District Court, GRANVILLE County. Heard in the Court of Appeals 14 September 1976.

In response to a juvenile petition filed 20 January 1975 on behalf of the Durham County Department of Social Services, Brenda Darlene Mikels, a child, was placed in John Umstead Hospital for 60 days of interdisciplinary evaluation by order of the Durham County Juvenile Court dated 31 January 1975. On 27 March 1975, an amended petition was filed alleging that, based on her behavior of setting fires, assaulting others and destroying property while at the hospital, the respondent was undisciplined, delinquent, and in need of the care, protection, or discipline of the State. By order dated 4 April 1975, Judge Read of the Durham County District Court, purporting to act

pursuant to G.S. 7A-286, committed respondent to John Umstead Hospital beginning 6 April 1975 and ordered her to remain there until further order of that court.

On 4 November 1975 a request for rehearing of involuntary commitment pursuant to G.S. 122-58.11, was filed by the hospital. After a hearing held on 23 December 1975 at John Umstead Hospital, an order was entered by Judge Linwood T. Peoples of the Granville County District Court finding that respondent had been improperly committed to the hospital under G.S. 7A-286 by the Durham County District Court since she had not been admitted pursuant to either Article 4, or Article 5A of Chapter 122, and ordering that she be immediately released until such time as the proper statutory procedures were followed. Notice of appeal was given and a stay was granted by the trial court pending appeal.

Attorney General Edmisten, by Special Deputy Attorney General William O'Connell and Associate Attorney Patricia H. Wagner, for the State.

Paul, Rowan & Galloway, by James V. Rowan, for respondent appellant.

MARTIN, Judge.

[1] The ultimate issue presented by this appeal is whether the juvenile division of the district court has the authority to commit a minor directly to a State mental institution under G.S. 7A-286(6). The answer is no.

Appellant and appellee both seem to agree that respondent is in need of treatment for mental illness. The record on appeal is lengthy and we do not believe a review of the facts is necessary for an understanding of the question raised.

Judge Peoples made extensive findings of fact from which he concluded:

"1. The 1971 amendment to G.S. 7A-286(6) removed the power which juvenile judges previously had to commit a juvenile directly to a mental institution and required that the provisions of Chapter 122 control all commitments to mental treatment facilities.

"2. The amendment to G.S. 7A-286(6) which became effective July 1, 1974, as quoted in Finding of Fact No. 7,

particularly the language, 'In no case will a child be committed directly to a State hospital or mental retardation center,' clearly indicates that the only statutory provisions for commitment to mental treatment facilities are those provided in Articles 4 and 5A of Chapter 122.

"3. The addition of Section 122-56.7 to Article 4 of Chapter 122 by the 1975 session of the General Assembly is further indication that commitment for mental illness shall be governed by the procedures of Chapter 122 and subject to the due process protections of that chapter, including the requirement of Section 122-58.11 that rehearings be held at regularly prescribed intervals.

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

"1. The respondent, Brenda Darlene Mikels, was improperly committed to John Umstead Hospital and shall be immediately released until such time as she is properly admitted or committed in accordance with either Article 4 or Article 5A of Chapter 122.

"2. Since the Durham County District Court had no statutory authority to commit the respondent to John Umstead Hospital under G.S. 7A-286, a rehearing under Section 122-58.11 is not required, and this hearing is hereby dismissed."

Prior to the 1971 amendments to this statute, a juvenile judge had the authority to commit a delinquent minor directly to a mental institution upon the certification of two physicians (former subsection 5 of G.S. 7A-286). There were few or no requirements for a hearing, appointment of counsel, a "clear cogent and convincing" standard for a specific finding of mental illness and dangerousness, or a rehearing within a definite time period. Neither were all these requirements found in the mental commitment laws, Chapter 122 of the General Statutes.

There was, however, growing concern that there should be adequate procedures to protect individuals threatened with a loss of liberty, a basic constitutional right. This was evident both in the courts and in the legislature. This Court, for example, found certain sections of the State commitment statutes as they existed in 1971-72 unconstitutional for lack of adequate

procedural safeguards in *In re Confinement of Hayes*, 18 N.C. App. 560, 197 S.E. 2d 582 (1973), (cert. denied and appeal dismissed), 283 N.C. 753, 198 S.E. 2d 729 (1973).

The language of 7A-286 was changed by the 1971 Session of the General Assembly to provide that "the court may cause the mental health director to arrange admission or commit the child to the appropriate state or local facility." Moreover, in 1973, the General Assembly clarified the language of 7A-286(6) and consistent with an earlier Attorney General interpretation, provided: "In no case will a child be committed directly to a State hospital or mental retardation center." The statute (G.S. 7A-286(6)) expressed a preference for voluntary admission of the child with consent of a parent and in subsection (7) made explicit provision for voluntary admission with the consent of a court-appointed guardian even over the parent's objections, if treatment in a mental institution were determined to be in the best interest of the child.

There is no ambiguity in the statutory prohibition against direct commitment of a child by a juvenile judge. The plain meaning of that language is clear making an inquiry into legislative intent unnecessary. See *Peele v. Finch*, 284 N.C. 375, 200 S.E. 2d 635 (1973). If it is determined that treatment in a mental institution is in the best interest of the child, then voluntary admission may be arranged with the parents' consent. If the parents refuse consent, a guardian can be appointed and such guardian acting *in loco parentis* may voluntarily admit the child. See G.S. 7A-286(6) and (7). In respondent Brenda Mikels' case, the Durham County Department of Social Services had already been awarded custody, and it would have been a simple matter for them to consent to her voluntary admission to John Umstead Hospital. An involuntary commitment proceeding under Article 5A of Chapter 122 would have been necessary only if there were no one to act *in loco parentis* to admit her under G.S. 7A-286.

The legislature has made the considered judgment that a person should not be deprived of his liberty unless he is both mentally ill and dangerous to himself or others. See G.S. 122-58.1. An absurd result does not ineluctably follow, as appellant contends, since mentally ill juveniles can be admitted by consent of a parent or guardian. See G.S. 7A-286(6) and (7) and mentally ill criminal defendants can be committed under Article 11 of Chapter 122.

Conversely, to interpret the juvenile statute as appellant suggests would cause not only an illogical result but a potentially unconstitutional one. A basic rule of statutory construction is that a statute will be interpreted in such a way as to make it constitutionally valid if possible. See *North Carolina Milk Commission v. National Food Stores, Inc.*, 270 N.C. 323, 154 S.E. 2d 548 (1967). Chapter 122 was written to provide constitutionally defensible procedural and evidentiary rules. To allow juvenile judges to commit minors to mental institutions with a lesser standard than that set forth in Chapter 122 would subject such commitments to constitutional challenge as a deprivation of liberty without due process of law.

[2] This Court has recently held that juveniles are entitled to the same due process protections as adults in any proceeding where a loss of liberty is a possible result. See *In re Meyers*, 25 N.C. App. 555, 214 S.E. 2d 268 (1975).

The addition of G.S. 122-56.7 to Chapter 122 by the 1975 Session of the General Assembly indicates that the legislature shared the Court's concern for the protection of the rights of juveniles. This section requires that even in the case of a voluntary admission of a juvenile by parental consent, a hearing must be held within strict time limits, with counsel provided for indigents, and with all the procedural safeguards of an involuntary commitment under Chapter 122, Article 5A, to determine that the juvenile is mentally ill and in need of further treatment.

If we were to agree with respondent appellant's position, then the commitment of an individual under Chapter 7A would leave the mental institution in the precarious position of having to obey a court order in direct conflict with several statutes. For example, G.S. 122-56.7 requires a hearing in the district court in the county in which the treatment facility is located within ten days of admission of a minor and regular rehearings thereafter; G.S. 122-58.11 requires rehearings before a judge of the judicial district in which the facility is located at regular intervals; G.S. 122-58.11(d) requires the district court of the district where the facility is located to unconditionally discharge any patient it determines to be not in need of continued hospitalization; and G.S. 122-58.13 requires the chief of medical services of the mental health facility to discharge a committed patient unconditionally at any time he determines that the patient is no longer in need of hospitalization.

The provision in 7A-286(6) that a juvenile judge may not commit a child directly to a mental institution was clearly designed to prevent just such conflicts. Clearly, the Durham County Court exceeded its authority, and the order committing Brenda Mikels is void and unenforceable.

[3] The next question facing this Court is whether the subsequent Granville County Court order is valid and enforceable. G.S. 122-58.11 requires the clerk of superior court of the county in which a State mental institution is located to calendar a rehearing at least 10 days before the end of the initial commitment period and before the end of any commitment periods ordered thereafter. This statute clearly proscribes the indeterminate commitment of any patient without periodic rehearings. The duty to hold rehearings for John Umstead Hospital is in the district court of the Ninth Judicial District, where the hospital is located. See G.S. 122-58.11(b). The Granville County Court, therefore, clearly had jurisdiction of this matter.

It is equally apparent to this Court that the order entered by the Durham County Court is void. A judgment is void if the court rendering it does not have jurisdiction either of the asserted cause of action or of the parties. See *East Carolina Lumber Company v. West,* 247 N.C. 699, 102 S.E. 2d 248 (1958). A void judgment binds no one, and its invalidity may be asserted at any time and in any action where some benefit or right is asserted thereunder. See *East Carolina Lumber Company v. West, supra.* Moreover, a court may always treat a void order as a nullity. See *Veazey v. City of Durham,* 231 N.C. 357, 57 S.E. 2d 377 (1950).

In the instant case, the order was void as to respondent since a juvenile court judge is specifically forbidden to commit a juvenile to a mental institution by the language of G.S. 7A-286(6), under which the judge purported to act. When the juvenile court in Durham County purported to commit respondent under the juvenile statutes, it was therefore without authority to do so and was without jurisdiction. The judge had no power to commit, and his order to commit was thus void.

Since the Granville County Court was mandated by statute to hold rehearings on all patients involuntarily committed and since the order of the Durham County Court was void, then the Granville County District Court properly had jurisdiction over the respondent Brenda Mikels, had statutory authority to deter-

mine whether her commitment should be extended, and acted properly in ordering that she had been improperly committed and that she should be immediately released until committed in accordance with the statutory requirements.

The order appealed from is affirmed.

Chief Judge BROCK and Judge VAUGHN concur.

SALVATORE CORDARO v. J. A. SINGLETON, JR. AND VIRGINIA SINGLETON v. JUANITA CORDARO

No. 764DC465

(Filed 17 November 1976)

1. **Trial § 58— non-jury trial — presumption court disregarded incompetent evidence**

In non-jury trials it is presumed that the trial judge disregarded any incompetent evidence that may have been admitted unless there is some indication in the judgment that the court relied upon the incompetent evidence.

2. **Evidence § 36— statements by agent**

A principal is bound by statements made by an agent acting within the scope of his authority and in the course of his agency.

3. **Evidence § 32; Vendor and Purchaser § 11— parol evidence rule — statements and conduct of parties — meaning of "inability to get financing"**

Evidence of statements and conduct of the parties to a real estate purchase agreement, both before and after execution of the agreement, was admissible to explain an ambiguous handwritten term added to the form agreement stating that "Inability to get financing on the basis of credit will void this contract," and the evidence supported the court's determination that the parties intended the handwritten term to encompass a failure to obtain an adequate amount of financing as well as a failure to obtain credit because of personal credit history.

4. **Evidence § 32— parol evidence rule — conduct after execution of contract**

Evidence of conduct by the parties after executing a contract is not subject to the parol evidence rule and is admissible to show intent and meaning.

5. **Principal and Agent § 5— apparent authority of real estate agent**

A real estate agent with whom property was listed for sale had apparent authority to contract on behalf of the sellers for a sale of the property.

Cordaro v. Singleton

APPEAL by defendants, J. A. Singleton, Jr. and Virginia Singleton, from *Crumpler, Judge.* Judgment entered 20 January 1976 in District Court, ONSLOW County. Heard in the Court of Appeals 13 October 1976.

Plaintiff seeks to recover $1,500.00 deposited with defendants under a purchase agreement for a house and lot in Cape Carteret known as the "R. L. Pittman house." The "Purchase Agreement" dated 9 December 1973 contained a description of the realty and the following terms:

"Lot Price *$55,000*

* * *

DEPOSIT ..... *$ 1,500* DATE *10 Dec. 1973*

BALANCE OF DOWN PAYMENT DUE/OR FORFEIT ..... *$53,500* DATE *10 Jan. 1974*

THREE ANNUAL PAYMENTS (Plus 3% interest) ..... *$ Cash* Seller to give warranty deed. Title to be clear of liens.

Inability to get financing on the basis of credit will void this contract."

The agreement was signed by plaintiff, his wife, Juanita Cordaro, J. A. Singleton, Jr. and his wife, Virginia Singleton. The italicized portions were handwritten in the agreement by Tom Singleton, realtor and son of defendants.

Plaintiff alleged that he was unable to get financing and so notified defendants, but that defendants refused to return the $1,500 deposit to him.

Defendants denied plaintiff was entitled to recover the deposit, counterclaimed for breach of contract and the recovery of $1,500, made Juanita Cordaro a third-party defendant, and alleged against her and plaintiff a cross action for breach of contract and damages of $1,500.

At trial without a jury the plaintiff and his wife, third-party defendant, testified. The evidence is summarized in the

opinion. Defendants offered no evidence. The trial court made findings of fact, including a finding that the " 'Purchase Agreement' . . . and the subsequent conduct of the parties manifested clear intent of the parties that the $1,500.00 deposit would be returned to the plaintiff if the plaintiff was unable to secure financing." The court concluded that plaintiff and third-party defendant had not breached the contract and entered judgment for plaintiff in the sum of $1,500.00, plus interest at the rate of 8% per annum from 10 January 1974 until paid.

Defendants excepted to the findings of fact and conclusions of law and appealed.

Cameron and Collins by William M. Cameron, Jr. for plaintiff appellee.

Taylor and Marquardt by Nelson W. Taylor for defendant appellants.

CLARK, Judge.

The issue upon appeal is whether the trial court erred in finding that the contract term "Inability to get financing on the basis of credit will void this contract" encompassed a failure to obtain an adequate amount of financing.

[1] Defendants contend there is no competent evidence to support the court's findings of fact. In non-jury trials it is presumed that the trial judge disregarded any incompetent evidence that may have been admitted, unless there is some indication in the judgment that the court relied upon the incompetent evidence. *Williams v. Town of Grifton and Parker v. Town of Grifton,* 19 N.C. App. 462, 199 S.E. 2d 288 (1973).

The allegedly incompetent evidence on which the trial court relied is the testimony by plaintiff and his wife to statements made by them and by Tom Singleton during the negotiations. These statements were relevant to the finding that the contract was signed "with the understanding that if plaintiff could not get financing his cash deposit would be refunded."

[2] Although the testimony to statements made by Tom Singleton is clearly hearsay, it is admissible if he were an agent of the defendants. (The agency issue is treated later.) A principal is bound by statements made by an agent acting within the scope of his authority and in the course of his agency.

Norburn v. Mackie, 262 N.C. 16, 136 S.E. 2d 279 (1964). The testimony about his statements was therefore properly admitted under the exception to the hearsay rule for admissions by a party opponent. 2 Stansbury, N. C. Evidence § 167 (Brandis Rev. 1973).

[3] The defendants contend that even if Tom Singleton were their agent, evidence of statements and conduct by the parties and their agents, both before and after execution, was not admissible under the parol evidence rule to vary, add to or contradict the agreement. We reject this contention in view of the ambiguous contract terms. The heart of a contract is the intention of the parties, which is to be ascertained from the language used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time. *Sell v. Hotchkiss,* 264 N.C. 185, 141 S.E. 2d 259 (1965). Where the language of a contract is plain and unambiguous the construction of the agreement is a matter of law for the court, and its terms may not be contradicted by parol or extrinsic evidence, *unless the terms of the instrument itself are ambiguous and require explanation. Root v. Insurance Co.,* 272 N.C. 580, 158 S.E. 2d 829 (1968).

We do not find plain and clear the language "Inability to get financing on the basis of credit will void this contract." There is doubt and uncertainty as to the meaning of this language. In order to clarify this ambiguous term, relevant, extrinsic evidence to clarify its terms was properly admitted.

The "Purchase Agreement" was in the nature of a printed form memorandum. The sentence "Inability to get financing on the basis of credit will void this contract" was added to the printed form after a discussion between Tom Singleton and plaintiff and his wife, during which plaintiff expressed concern about obtaining adequate financing. The evidence discloses that this sentence was written in the printed agreement by Tom Singleton, that he did so at the request of the Cordaros to protect them against loss of the $1,500 deposit if they were unable to get financing. It is not clear whether the language inserted was dictated by them or was the language of the writer.

[4] Evidence of conduct by the parties after executing the contract is not subject to the parol evidence rule, and is admissible to show intent and meaning. *Preyer v. Parker,* 257 N.C. 440, 125 S.E. 2d 916 (1962). The evidence discloses that to purchase

the house and lot the plaintiff needed a long-term mortgage loan, and so advised Tom Singleton, who referred plaintiff to Cooperative Saving and Loan Association in Jacksonville, and that plaintiff made an application to Cooperative for a mortgage loan of $45,000. Plaintiff expected to obtain the balance of $8,500 from his brother to add to his $1,500 deposit. Plaintiff made a reasonable effort to obtain financing. He was unable to obtain a loan in any amount by 10 January 1974, the due date in the agreement. On 15 January 1974 he received notice from Cooperative that his application for a loan of $45,000 was not approved, but a loan of $40,000 was approved. The plaintiff had a conversation with Tom Singleton at the Singleton Agency office in mid-January in which he was referred to another bank for financing. He thereafter continued to seek adequate financing, including a second mortgage loan that would provide sufficient funds to pay the purchase price, but he was unsuccessful.

[3] We think that the evidence of the negotiations and of subsequent conduct in general was competent and supports the determination by the trial court that the parties intended the handwritten term of the contract to mean more than a failure to obtain credit because of personal credit history, and specifically, intended it to include a failure to obtain adequate financing.

[5] The defendants also contend that there is no competent evidence that Tom Singleton was their agent. We find no merit in this contention. The evidence tends to show that the "R. L. Pittman house" was listed for sale by the Singleton Agency of Emerald Isle. The plaintiff called the agency and arranged for a showing of the house and lot on Saturday, 10 December 1973. Plaintiff and his wife were met by Tom Singleton, who showed the property to them and advised them that the purchase price was $55,000. After discussion Tom Singleton prepared the "Purchase Agreement," and Salvatore Cordaro and wife Juanita Cordaro signed the agreement. Tom Singleton took the agreement, and it was thereafter signed by defendants Singleton, as owners of the property. Thereafter, first in mid-January and then in February 1974, the Cordaros went to the Singleton Agency office at Emerald Isle and talked with Tom Singleton, primarily about financing the purchase of the property and the return of the $1,500 deposit. The evidence was clear and uncontradicted that Tom Singleton had apparent authority to contract in behalf of defendants Singleton, the sellers of the

property. A principal who has clothed his agent with apparent authority to contract in behalf of the principal, is bound by a contract made by such agent, within the scope of such apparent authority, with a third person who dealt with the agent in good faith, in the exercise of reasonable prudence and without notice of limitations placed by the principal upon the agent's authority. *Research Corporation v. Hardware Co.*, 263 N.C. 718, 140 S.E. 2d 416 (1965). The evidence is clear that Tom Singleton had apparent authority to contract in behalf of the defendants Singleton, and they acknowledged his authority by signing the contract which he negotiated with the Cordaros.

Since plaintiff testified that he continued to seek financing after the "due date" of 10 January 1974, and did not seek a refund of the $1,500 deposit until late February 1974, the judgment is modified to provide for payment of the $1,500 with interest from the 1st day of March 1974, at the rate of six percent per annum (the legal rate under G.S. 24-1).

Modified and affirmed.

Judges BRITT and PARKER concur.

NANCY H. SIDERS v. LARRY WAYNE GIBBS

No. 7614SC26

(Filed 17 November 1976)

1. **Automobiles § 73— defendant driver's negligence imputed to plaintiff owner — wilful and wanton negligence of third defendant — plaintiff's negligence no bar**

In an action by plaintiff to recover for personal injuries sustained when one defendant's car collided with plaintiff's car which was being driven by a second defendant, plaintiff's allegation of "wilful and wanton" negligence on the part of the first defendant, though supplemented only by allegations of bare factual circumstances, was sufficient to give notice of a claim of wilful and wanton negligence which would allow plaintiff to recover even if the defendant who was driving her car was negligent and such negligence was imputed to plaintiff. A prior opinion in this case, *Siders v. Gibbs*, 29 N.C. App. 540, is withdrawn.

2. **Negligence § 7— wilful or wanton negligence defined — carelessness and recklessness less than wilfulness and wantonness**

"Wilful and wanton" negligence is conduct which shows either a deliberate intention to harm, or an utter indifference to, or conscious

disregard for, the rights or safety of others, but "carelessness or recklessness," though more than ordinary negligence, is less than wilfulness or wantonness.

APPEAL by plaintiff from *Hall, Judge.* Judgment entered 11 December 1974, Superior Court, DURHAM County. Heard in the Court of Appeals 15 April 1976.

The facts of this case are set out in *Siders v. Gibbs,* 29 N.C. App. 540, 225 S.E. 2d 133 (1976). In apt time, the plaintiff filed a petition to rehear. This Court, under Rule 31, Rules of Appellate Procedure, granted the petition to rehear, in pertinent part, as follows:

"1. No oral argument will be permitted upon the rehearing unless further ordered by this Court.

2. Each of the parties will file supplemental briefs restricted to the following questions:

(a) Do the allegations of plaintiff's complaint sufficiently allege wilful and wanton negligence of the Defendant Gibbs?

(b) If so, will contributory negligence of the plaintiff, imputed to her by her allegations of negligence of the driver of her own vehicle, bar her recovery in the event of her proof of wilful and wanton negligence on the part of Defendant Gibbs."

Grover C. McCain, Jr. for plaintiff appellant.

Haywood, Denny & Miller by George W. Miller, Jr., for defendant appellee.

CLARK, Judge.

In the decision of this Court reported in *Siders v. Gibbs, supra,* the summary judgment for defendant Gibbs by the trial court was affirmed because it appeared that plaintiff as owner-occupant knowingly permitted or directed the negligent operation of her automobile by driver Young, and that the negligence of Young was imputed to plaintiff, which barred her recovery from the defendant Gibbs, the alleged negligent operator of a second vehicle. Plaintiff's petition to rehear is based on the contention that since she alleges in her complaint wilful and wanton negligence on the part of defendant, her allegation of

negligence by the driver of her own vehicle does not bar her recovery against the defendant. Plaintiff relies on *Brewer v. Harris,* 279 N.C. 288, 182 S.E. 2d 245 (1971).

Plaintiff in her complaint alleged that Young was driving in a westerly direction on Green Street, turned left in a southerly direction in order to drive east on Green Street "when he brought his automobile to a stop at the southern curb of Green Street." Plaintiff further alleged that defendant Gibbs was operating an automobile in a westerly direction on Green Street when it "collided with the automobile operated by . . . Young, in the southernmost lane of Green Street." These allegations are the only factual allegations in the complaint relative to the circumstances of the collision.

We gather from these sparse allegations of fact that the car operated by Young and also occupied by plaintiff-owner was followed by the car operated by defendant Gibbs. The distance between vehicles is not alleged. Young turned left from the westbound lane of Green Street across the eastbound lane intending to make a u-turn and stopped the car, headed south, with its front wheels against the southern curb of the street. Defendant Gibbs' trailing vehicle collided with the stopped vehicle in the eastbound lane.

Plaintiff then alleged that defendant Gibbs "was *wilfully, wantonly and recklessly negligent* in that . . . he was operating his automobile in an intoxicated condition, he was driving . . . at a speed much in excess of the posted speed limit. . . ." (Emphasis added.)

Plaintiff further alleged that Young was negligent in that "he made an illegal turn in the roadway . . . and he was driving carelessly and recklessly."

Plaintiff relies on the following rule of law: "Ordinarily, contributory negligence on the part of a plaintiff does not bar recovery when the wilful and wanton conduct of a defendant is a proximate cause of plaintiff's injuries. *Pearce v. Barnham,* 271 N.C. 285, 156 S.E. 2d 290; *Blevins v. France, supra; Brendle v. R. R.,* 125 N.C. 474, 34 S.E. 634." *Brewer v. Harris, supra,* at 297, 182 S.E. 2d at 350.

The defendant Gibbs takes the position that *Brewer* is distinguishable because in that case the plaintiff alleged the factual situation leading up to the collision in detail, but in the case

before us the plaintiff alleges no factual detail but alleges the conclusion of law that defendant Gibbs was "wilfully and wantonly" negligent.

[1] On this motion for summary judgment the factual circumstances of the collision appear only in the complaint. The new matter supporting the motion is directed solely to plaintiff's ownership of the vehicle operated by Young and is relevant only to the issue of whether the negligence of Young should be imputed to plaintiff. Defendant Gibbs offered no supporting material to controvert plaintiff's allegation that he was wantonly and wilfully negligent. Under the notice theory of pleading, the allegation of "wilful and wanton" negligence, though supplemented only by allegations of bare factual circumstances, is sufficient to give notice of a claim of wilful and wanton negligence, which would allow plaintiff to recover even if her driver had been negligent. Since defendant offered nothing to controvert this allegation, we hold that it was sufficient to withstand a motion for summary judgment. *Brewer v. Harris, supra.*

The defendant Gibbs further argues that the complaint alleges the same degree of negligence on the part of Young and that the words "carelessly and negligently" have the same meaning as the words "wilful and wanton." But we find no support for this argument in the decisions of the courts of this State. In *Hinson v. Dawson,* 244 N.C. 23, 92 S.E. 2d 393 (1956), the court for the first time dealt directly with the doctrine of punitive damages, based on allegations of wilful and wanton conduct, as applied to an automobile collision case. In that decision Justice Bobbitt (later Chief Justice) for the Court stated:

> ". . . Moreover, the words 'reckless' and 'heedless' would seem to import an uncertain degree of negligence somewhat short of wantonness.
>
> An analysis of our decisions impels the conclusion that this Court, in references to gross negligence, has used that term in the sense of wanton conduct. Negligence, a failure to use due care, be it slight or extreme, connotes inadvertence. Wantonness, on the other hand, connotes intentional wrongdoing. Where malicious or wilful injury is not involved, wanton conduct must be alleged and shown to warrant the recovery of punitive damages. Conduct is

wanton when in conscious and intentional disregard of and indifference to the rights and safety of others. . . . (Citations omitted.)

* * * *

. . . The alleged conduct of the driver of the Dawson car . . . is described as in reckless and wanton disregard of and indifference to the rights and safety of Leonard E. Hinson.

True, this additional allegation is made on information and belief; but the amended complaint, including the additional allegation, must be considered in the light most favorable to plaintiff. (Citation omitted.) When so construed, we cannot say that plaintiff had no right, in relation to the facts, alleged, to allege that defendants' conduct was wanton and to include a claim for punitive damages in her prayer for relief." 244 N.C. at 28, 29, 92 S.E. 2d at 396, 397.

[2] We must reject the contention that the alleged negligence of Young, imputed to plaintiff owner-occupant, is of the same calibre and character as the alleged wilful and wanton negligence of the defendant Gibbs. "Wilful and wanton" negligence is conduct which shows either a deliberate intention to harm, or an utter indifference to, or conscious disregard for, the rights or safety of others. "Carelessness and recklessness," though more than ordinary negligence, is less than wilfulness or wantonness. See 65 C.J.S., Negligence § 9 (1) (1966).

We reiterate that our ruling in this case is based entirely on the pleadings, and we do not speculate upon the outcome upon trial or upon any pretrial hearing where plaintiff has the burden of proving the alleged wilful and wanton negligence of the defendant Gibbs. Since the pleadings raise a genuine issue of material fact, the summary judgment was improvidently entered.

Because our determination of the issue raised in the rehearing of this appeal, which was not considered in the original opinion, changes the result reached by this Court, we withdraw our opinion previously filed in *Siders v. Gibbs*, 29 N.C. App. 540, 225 S.E. 2d 133 (1976), and declare that it is no longer the law of this case.

The summary judgment for defendant Gibbs is reversed for the reasons herein stated, and this cause is remanded.

Reversed and remanded.

Chief Judge BROCK and Judge HEDRICK concur.

ANNE ELIZABETH PIFER v. RICHARD DONALD PIFER

No. 7625DC484

(Filed 17 November 1976)

1. **Judgments § 17— absence of jurisdiction — void judgment**

If a court has no jurisdiction over the subject matter, the court's judgment is void.

2. **Parent and Child § 10— Uniform Reciprocal Enforcement of Support Act — authority to condition support on visitation privileges**

A district court judge had no authority under the Uniform Reciprocal Enforcement of Support Act to condition the payment of support for children residing in Florida upon certain visitation privileges in Florida and North Carolina; consequently, *ex parte* orders entered by the court permitting a discontinuance of the support payments based upon an alleged violation of the condition of visitation privileges were null and void, and another district court judge erred in refusing to hear the State's motion to set those orders aside.

APPEAL by the State on behalf of the plaintiff pursuant to G.S. 52A-10.1 from *Edens, Judge.* Order entered 26 November 1975 in District Court, CATAWBA County. Heard in Court of Appeals 20 October 1976.

This is a proceeding brought under the Uniform Reciprocal Enforcement of Support Act wherein the plaintiff, Anne Elizabeth Pifer, seeks to have the court order defendant, Richard Donald Pifer, to pay ninety dollars per week support for his five minor children, and any arrearages due under said duty of support.

Plaintiff and defendant were divorced in 1972 by order of the Circuit Court in Charlotte County, Florida. In the order, plaintiff was granted custody of the five minor children of the marriage and was awarded $90 per week child support. Defendant was granted reasonable rights of visitation within the

State of Florida unless otherwise ordered by the court or agreed to by plaintiff.

After the divorce defendant moved to North Carolina and on 1 May 1973 plaintiff filed a Petition for Support and affidavit in Florida under the Uniform Reciprocal Enforcement of Support Act. The Petition and the affidavit, which were transmitted to the Catawba County District Court, alleged that defendant has intermittently failed to comply with the Florida divorce decree, having paid only $4,124 since its entry, leaving an arrearage of $1,080 as of defendant's last payment received on 13 March 1973; that defendant is presently earning $1,100 per month and is capable of making the support payments; and that plaintiff has no substantial income of her own. On 24 August 1973 Judge Cline entered an order finding that defendant owes a duty of support to his children and has sufficient earning capacity to support them and ordering defendant to pay to the Clerk of Superior Court the sum of $90 per week beginning 24 August 1973, said sums to be dispersed to the Florida court. Judge Cline refused to award plaintiff any arrearages, however, on the ground that plaintiff failed to show any supporting evidence of the arrearage other than her allegation of such in her Petition, which allegation the court determined was an insufficient basis for an order with respect to the arrearage. The court also included the following final paragraph in the order: "This order is given with the express understanding that defendant shall be permitted to see his children at any reasonable time and on reasonable notice in the State of Florida, and that plaintiff permit the children to visit with defendant at any reasonable time and for a reasonable period in the State of North Carolina. Upon the first report by defendant to this Court that he has been denied such visits, all support payments herein ordered shall immediately cease."

In December 1973 defendant ceased making support payments and after much correspondence among the Florida Attorney General's office, the North Carolina district attorney, the North Carolina Administrative Office of the Courts and Judge Cline, it was discovered that Judge Cline had issued an oral order to defendant to cease making the payments based upon defendant's report to Judge Cline that plaintiff had refused to allow the children to visit him in North Carolina. On 16 July 1974 Judge Cline filed a written Order dated 15 February 1974 containing findings that a hearing was held on 15 Feb-

ruary 1974 upon motion of defendant to terminate support payments at which it was shown that plaintiff willfully refused to allow defendant to visit with his children, and concluding that all support payments by defendant should be terminated as of 18 December 1973.

On 9 October 1975 plaintiff, through the district attorney, filed a motion in the cause requesting that the order terminating defendant's support obligation be stricken and declared null and void and that a hearing be held to determine defendant's arrearages. Plaintiff also filed an affidavit stating that she had never denied defendant his visitation privileges and that in fact defendant never even attempted to visit the children or to contact plaintiff concerning arrangements for visits prior to the order terminating support payments. Judge Edens dismissed plaintiff's motion on the ground that it was a collateral attack on a previous order of the district court and must remain in effect until reversed or modified on appeal. Plaintiff's petition for writ of certiorari was allowed by this Court.

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

Sigmon & Sigmon by W. Gene Sigmon for the defendant appellee.

HEDRICK, Judge.

While the parties in this proceeding have argued extensively the merits and demerits of the several orders entered in this cause, the only question properly before us for review is whether Judge Edens erred in entering the order dated 26 November 1975 declining to hear and rule on the State's motion to have the *ex parte* order of Judge Cline filed on 16 July 1974 set aside as being null and void and to order defendant to make support payments, including arrearages, pursuant to the order entered on 16 August 1973.

[1] If a court has no jurisdiction over the subject matter, the judgment is void. *Powell v. Turpin,* 224 N.C. 67, 29 S.E. 2d 26 (1944). "A void judgment is a nullity, and no rights can be based thereon. It can be disregarded, or set aside on motion, or the court may of its own motion set it aside, or it may be attacked collaterally." 2 McIntosh, N. C. Practice and Procedure, § 1713, p. 163.

[2] While we are of the opinion that the *ex parte* orders of Judge Cline entered on 18 December 1973 and 15 February 1974 and filed on 16 July 1974 are void for more reasons than one, we deem it appropriate to discuss only whether Judge Cline had any jurisdiction under the Uniform Reciprocal Enforcement of Support Act (URESA) to condition the payment of child support upon certain visitation privileges in Florida and North Carolina.

The purpose of URESA, Chapter 52A of the General Statutes, is "to improve and extend by reciprocal legislation the enforcement of *duties of support* and to make uniform the law with respect thereto." G.S. 52A-2. (Emphasis added.) G.S. 52A-13 provides, "If the court of the responding state finds a *duty of support,* it may order the defendant to furnish support or reimbursement therefor, and subject the property of the defendant to such order." (Emphasis added.) This duty of support is the only subject matter covered by URESA. Nothing in the act allows the adjudication of child custody or visitation privileges or other matters commonly determined in domestic relation cases.

In the present case it is our opinion that Judge Cline in the responding state of North Carolina had jurisdiction only to determine whether the defendant owed a duty of support to his children in the initiating state of Florida, and to enter an order requiring the defendant to furnish such support. Judge Cline had no jurisdiction whatsoever to condition the support payments upon certain visitation privileges for the defendant with his children in the responding or initiating state. Consequently Judge Cline had no authority to permit a discontinuance of the support payments upon a finding by him of an alleged violation of the condition of visitation privileges. Thus the *ex parte* orders, entered on 18 December 1973 and 15 February 1974 and filed 16 July 1974 permitting the defendant to cease support payments, are manifestly null and void, and Judge Edens erred in refusing to hear the State's motion to set these orders aside.

While we recognize that some states have adopted a contrary position with regard to the authority of the courts of the responding state to condition the payment of support upon visitation privileges, *Chandler v. Chandler,* 109 N.H. 477, 256 A. 2d 157 (1969), it is our opinion that our view is in accord with the better reasoned opinions of other jurisdictions. *Vecellio*

v. Vecellio, Fla. App., 313 So. 2d 61 (4th Dist. 1975); *Commonwealth v. Posnansky,* 210 Pa. Super. 280, 232 A. 2d 73 (1967). As stated in *Vecellio v. Vecellio, supra,* at 62, "The father's remedy, if aggrieved, is to simply return to Pennsylvania [initiating state] where the mother and children reside and there obtain adjudication of any and all other matters of concern having to do with the family. In other words, the innocent children should not be deprived of support under these circumstances and where the Support Law does not contemplate that the mother must come to Florida [responding state] to enforce the support claim and defend against all other equitable and family matters."

Suffice it to say that we believe for the courts of the responding states to become involved in matters of custody and visitation in proceeding under URESA would create more problems than it solves, and is foreign to that portion of the act which provides, "Participation in any proceeding under this Chapter does not confer jurisdiction upon any court over any of the parties thereto in any other proceeding." G.S. 52A-22.

For the reasons stated the order appealed from is reversed and the cause is remanded to the district court for a hearing upon the State's motion filed 9 October 1975.

Reversed and remanded.

Chief Judge BROCK and Judge PARKER concur.

HYDE INSURANCE AGENCY, INC. v. DIXIE LEASING CORPORATION

No. 7628SC439

(Filed 17 November 1976)

1. Insurance § 8— early cancellation of policy — method of prorating annual premium — modification of contract — burden of proof

In an action to recover premiums due under a contract to provide defendant with certain insurance coverage for one year after defendant cancelled the insurance before the expiration of a year, the pleadings and stipulations established that the only triable issue was whether the parties had modified the contract to provide for proration of the annual premium on a daily basis, rather than the higher "short rate" proration basis prescribed by N. C. insurance regulations, in

the event of early cancellation, and defendant had the burden of establishing such modification.

2. **Insurance § 8— early cancellation of policy — method of prorating annual premium — modification of policy — sufficiency of evidence**

Evidence that plaintiff insurer's agent told defendant that the interim cost of insurance would be on a "pro rata basis" was sufficient to support submission of an issue as to whether the parties modified the insurance contract to provide for proration of the annual premium on a daily basis, rather than the higher "short rate" basis prescribed by N. C. insurance regulations, in the event of early cancellation, since the jury could find that plaintiff's agent knew when he used the word "pro rata" that it could mean the premium would be figured either on the short-rate basis or on the daily basis of proration, and that defendant, having no reason to know that it might mean short-rate basis of proration, interpreted it to mean daily basis of proration.

3. **Insurance § 8— early cancellation of policy — method of prorating annual premium — modification of policy — consideration**

Defendant's agreement to delay cancellation of insurance to give plaintiff agency an opportunity to re-estimate its premium for such coverage constituted sufficient consideration for an agreement that, upon early cancellation of the policy, the annual premium would be prorated on a daily basis rather than on the higher "short-rate" basis prescribed by N. C. insurance regulations.

APPEAL by defendant from *Martin, Judge (Harry C.)*. Judgment entered 11 Febrnuary 1976 in Superior Court, BUNCOMBE County. Heard in Court of Appeals 12 October 1976.

This is a civil action wherein the plaintiff, Hyde Insurance Agency, Inc., seeks to recover from defendant, Dixie Leasing Corp., insurance premiums allegedly due on a contract to provide defendant with certain insurance coverage for one year, upon cancellation by defendant before the expiration of one year.

This case was appealed to this Court and heard on 8 May 1975, and our opinion is reported in *Insurance Agency v. Leasing Corp.*, 26 N.C. App. 138, 215 S.E. 2d 162 (1975). On that first appeal the defendant asserted that it was not liable to plaintiff for the higher short-term premium rate prescribed by North Carolina insurance regulations in the event of cancellation during the first year, because the parties modified the contract to provide for proration of the annual premium on a daily basis in the event of early cancellation. The trial court granted summary judgment for plaintiff upon the theory that such a modification was unenforceable as against public policy. Summary judgment for plaintiff was reversed by this Court,

and the cause was remanded to the superior court for trial on the single issue of whether the parties had entered into an agreement to modify the original contract with respect to the payment of premiums. For a more detailed analysis of all the facts and circumstances involved in this case and this appeal see Chief Judge Brock's opinion in *Insurance Agency v. Leasing Corp., supra.*

Upon remand, the trial court concluded that the only issue for trial was whether the parties entered into a binding agreement to modify the original contract. The court held that the burden of going forward with the evidence in proof of this issue was on the defendant, and at the close of its evidence directed a verdict in favor of plaintiff. Defendant appealed.

Van Winkle, Buck, Wall, Starnes, Hyde & Davis by Albert L. Sneed, Jr., for plaintiff appellee.

McGuire, Wood, Erwin & Crow by Charles R. Worley for defendant appellant.

HEDRICK, Judge.

[1] Defendant first contends the trial court erred in declaring that the only triable issue was whether there had been a modification of the contract between the parties, and that the burden was on the defendant to establish the modification. Plaintiff alleged in its complaint that defendant owed it $7,851 in premiums upon a contract to provide insurance coverage. The parties stipulated that plaintiff provided automobile liability, workmen's compensation, and general liability insurance coverage beginning 7 September 1973 at an annual premium of $46,035. The parties also stipulated that the amount of premium due when calculated on a short-term basis as required by North Carolina insurance regulations was $7,851. Defendant asserted in its answer, however, that it was not liable for the greater short-term premium because the original contract was modified by an agreement between the parties. The pleadings and stipulations clearly establish that the only triable issue was the alleged modification of the contract. Obviously defendant has both the burden of going forward with the evidence and the ultimate burden of proof on this issue. *Russell v. Hardwood Co.*, 200 N.C. 210, 156 S.E. 492 (1931); *Tile and Marble Co. v. Construction Co.*, 16 N.C. App. 740, 193 S.E. 2d 338 (1972).

[2] Defendant next contends the court erred in directing a verdict for the plaintiff on the issue of whether there had been a modification of the contract to provide for daily proration of the annual premium upon cancellation. The evidence pertinent to the resolution of this issue, except where quoted, is summarized as follows:

In August 1973 defendant, a truck leasing company, entered into negotiations with the plaintiff for the purchase of automobile, workmen's compensation, and general liability insurance. Wallace Hyde, plaintiff's president, and Bill McElroy handled the negotiations for plaintiff. Pursuant to the negotiations plaintiff provided defendant with insurance coverage through Travelers Insurance Co. beginning 7 September 1973 at an annual premium of $46,035. Subsequently, on or about 9 September 1973, defendant received a premium quotation of $26,000 from Allstate Insurance Co. for identically the same coverage provided by plaintiff. Defendant's president, Cecil C. Bridges, informed McElroy of this fact and indicated his intention to cancel his policy with the plaintiff. McElroy asked Bridges for an opportunity to meet Allstate's premium. Bridges testified, "I did not cancel the Travelers coverage with him at that time because I was giving him an opportunity to meet the quote." As to what the coverage would cost in the interim, Bridges testified, "He [McElroy] said it would be a small amount of money on a *prorated basis*. In fact, I questioned him specifically about a price, and he wouldn't quote a price in dollars. He just said it would be a *pro rata basis*." (Emphasis added.) On cross examination Bridges testified that McElroy "didn't promise to cut the charges." Defendant cancelled the insurance with plaintiff and accepted Allstate's proposal on 27 September 1973, the first day Allstate would enter into a binding agreement with defendant to provide the coverage. Bridges assumed that by "prorated basis" McElroy meant "daily prorated basis," and did not know there was a "short rate" basis of proration until the policies had already been cancelled.

Defendant argues that when considered in the light most favorable to it, the foregoing evidence is sufficient to support a jury finding that the parties entered into an agreement to modify the insurance contract. Plaintiff, on the other hand, argues that no agreement was made because there was no meeting of the minds, and if an agreement was made, it is un-

enforceable for lack of consideration. Plaintiff's arguments are without merit.

Plaintiff argues that there was no meeting of the minds because its agent meant "short rate" basis of proration when he used the word "pro rata" and defendant's agent interpreted it to mean "daily proration." Restatement of Contracts § 233(b) (1932) provides:

> "[W]here a party manifests his intention ambiguously, knowing or having reason to know that the manifestation may reasonably bear more than one meaning, and the other party believes it to bear one of those meanings, having no reason to know it may bear another, that meaning is given to it . . . . "

See also 3 Corbin on Contracts § 537 (1960). We hold that there is sufficient evidence to support a finding by the jury that McElroy knew when he used the words "pro rata," it could mean that the premium would be figured either on the short-rate basis of proration or on the daily basis of proration, and that defendant interpreted it to mean daily basis of proration, having no reason to know that it might mean short-rate basis of proration.

"There is consideration if the promisee, in return for the promise, does anything legal which he is not bound to do, or refrains from doing anything which he has a right to do, whether there is any actual loss or detriment to him or actual benefit to the promisor or not." *Investment Properties v. Norburn,* 281 N.C. 191, 188 S.E. 2d 342 (1972) (citations omitted).

[3] Defendant had the right to cancel the insurance with plaintiff at any time. We hold that its forebearance to do so upon plaintiff's request that it be given an opportunity to re-estimate its premium is sufficient consideration to support a binding agreement.

For the reasons stated, the judgment directing a verdict for plaintiff is reversed, and the cause is remanded to the superior court for a trial on the single issue of whether the parties entered into a binding agreement to modify the contract with respect to the insurance premiums.

Reversed and remanded.

Judges MORRIS and ARNOLD concur.

CROWELL LITTLE v. COUNTY OF ORANGE AND TOWN OF CHAPEL HILL

No. 7615SC449

(Filed 17 November 1976)

1. **Uniform Commercial Code § 71— requirements for enforceable security interest**

Requirements for an enforceable security interest in cases not involving land are (1) a writing; (2) the debtor's signature; and (3) a description of the collateral.

2. **Uniform Commercial Code § 71— writing evincing bargain — denomination of writing as security agreement unnecessary**

So long as there is written language which makes and evinces the bargain between the parties, it does not matter that the writing is not denominated a security agreement.

3. **Corporations § 24; Uniform Commercial Code § 71— financing statement covering assets of corporation — no signature of corporate officer — no security interest created**

Plaintiff's evidence was insufficient to show a valid and enforceable security interest in the assets of a motor company where such evidence consisted of (1) the purchase agreement and a note for the entire purchase price stating that the note was secured by a subordinated security interest in certain inventory of the motor company, both of which were signed only by the purchaser; and (2) a financing statement which indicated that it covered all assets of the motor company but which was not signed by any corporate officer of the motor company. G.S. 25-9-203(1)(b); G.S. 55-36(b).

APPEAL by plaintiff from *Preston, Judge.* Judgment entered 8 March 1976 in Superior Court, ORANGE County. Heard in the Court of Appeals 13 October 1976.

Plaintiff appeals from summary judgment holding that his security interest in the assets of Crowell Little Motor Company, Inc., is unenforceable against defendants Orange County and Town of Chapel Hill and that, therefore, defendants' tax liens are superior to his security interest.

On 1 November 1974, plaintiff, who was owner of 90% of the common stock of Crowell Little Motor Co., Inc., sold almost all of his shares to C. Ray Downing for $60,000. Downing gave plaintiff a note for the entire purchase price. The purchase agreement between the parties recited the terms of the note and said, further, "This obligation shall be secured by a secondary security interest in the parts and used car inventory owned by the [Crowell Little Motor] Company. Such security

interest shall be subordinate up to Twenty-Five Thousand 00/100 Dollars." The agreement was subscribed, "SELLER: C. Crowell Little" and "PURCHASER: C. Ray Downing." The signature of the Crowell Little Motor Company, Inc., did not appear on the purchase agreement. The note contained this language: "This note is secured by a subordinated security interest in certain inventory owned by Crowell Little Motor Company, Inc., and (sic) recorded in the Orange County Registry." It, too, was signed by C. Ray Downing but not by Crowell Little Motor Company, Inc.

On 13 January 1975, plaintiff filed a standard financing statement with the Orange County Registry. The document contained this language:

> "This Financing Statement covers the following types or items of collateral: All assets of Crowell Little Motor Co., Inc., including but not limited to parts, inventory and used cars. This instrument is subordinate up to $25,000 of any financing."

In the space for the debtor's signature were typed the words "Crowell Little Motor Co., Inc." In the space for the secured party was the signature "Crowell Little." No document denominated a "security agreement" was ever executed by these parties.

On 6 May 1975, Orange County and the Town of Chapel Hill levied upon all the personal property of Crowell Little Motor Company, Inc., for the balance of ad valorem taxes then due. As a result of their levy, the county and the town acquired a tax lien against the property.

Midgette, Page & Higgins, by Thomas D. Higgins III, for plaintiff appellant.

Winston, Coleman & Bernholz by Geoffrey E. Gledhill, for County of Orange, defendant appellee.

Haywood, Denny & Miller, by Emery B. Denny, Jr., and James H. Johnson III, for Town of Chapel Hill, defenaant appellee.

ARNOLD, Judge.

[1] The issue here is whether plaintiff has a security interest which is superior to the tax liens of Orange County and the

Town of Chapel Hill. Requirements for an enforceable security interest in cases not involving land are (1) a writing; (2) the debtor's signature; and (3) a description of the collateral. *Evans v. Everett*, 279 N.C. 352, 183 S.E. 2d 109 (1971). Also *see* 44 N.C.L. Rev. 716, 724. Several sections of the Uniform Commercial Code, G.S. 25-1-101 *et seq.*, are relevant. The crucial section, G.S. 25-9-203(1)(b) provides:

> " . . . a security interest is not enforceable against . . . third parties unless . . . the debtor has signed a security agreement which contains a description of the collateral. . . . "

Other sections define the terms used in G.S. 25-9-203(1)(b).

According to G.S. 25-1-201(3), an

> " 'Agreement' means the bargain of the parties in fact as found in their language [or in ways irrelevant here]. Whether an agreement has legal consequences is determined by the provisions of this chapter, if applicable. . . . "

According to G.S. 25-9-105(h), a

> " 'Security agreement' means an agreement which creates or provides for a security interest."

And, according to G.S. 25-1-201(37), a

> " 'Security interest' means an interest in personal property . . . which secures payment or performance of an obligation."

Finally, under G.S. 25-9-105(d), a

> " 'Debtor' means the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, . . . Where the debtor and the owner of the collateral are not the same person, the term 'debtor' means the owner of the collateral in any provision of the article dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires."

[2] The fact that the parties did not execute an instrument denominated as a "security agreement" is not necessarily fatal to plaintiff's claim. An agreement is the "bargain of the parties in fact as found in their language." G.S. 25-1-201(3). The requirement that the bargain be reduced to writing before it

becomes effective is in the nature of a statute of frauds. G.S. 25-9-203, Official Comment 5. So long as there is written language which makes and evinces the bargain, it does not matter that the writing is not denominated a security agreement. *Evans v. Everett, supra.*

Our Supreme Court has held that a financing statement standing alone can serve as a sufficient memorandum of the security agreement, and that court further indicated that, as in other contracts involving a statute of frauds, two or more writings can be incorporated to satisfy the requirements of G.S. 25-9-203(1)(b). *Evans v. Everett, supra.* Also *see, In re Amex-Protein Dev. Corp.*, 504 F. 2d 1056, (9th Cir. 1974); *In re Numeric Corp.*, 485 F. 2d 1328, (1st Cir. 1973); *In re Carmichael Enterprises, Inc.*, 334 F. Supp. 94, (N.D. Ga. 1971), *aff'd* 460 F. 2d 1405 (5th Cir. 1972).

[3] Assuming, arguendo, that the purchase agreement and note executed by C. Ray Downing, and the financing statement purportedly signed by Crowell Little Motor Company, Inc., taken together constitute a security agreement, in order to be effective these documents must be signed by the "debtor." G.S. 25-9-203(1)(b). G.S. 25-9-105(d) provides that if the debtor and the owner of the collateral are not the same person, "the term 'debtor' means the owner of the collateral in any provision . . . dealing with the collateral. . . . " Since the security agreement must describe the collateral, it is a document "dealing with the collateral," and, under G.S. 25-9-203(1)(b), must be signed by the owner of the collateral.

The collateral in the case before us was owned by Crowell Little Motor Company, Inc. The name of that corporation appears only on one of the three documents, the financing statement. The financing statement is not signed by any corporate officer of Crowell Little Motor Company, Inc.

G.S. 55-36(b) provides:

> "Any instrument purporting to create a security interest in personal property of a corporation, is sufficiently executed on behalf of the corporation if heretofore or hereafter signed in his official capacity by the president, a vice-president, the secretary, an assistant secretary, the treasurer, or an assistant treasurer. Any instrument so executed shall, with respect to the rights of innocent holders, be as valid as if authorized by the board of directors . . . . "

In *Realty Inc. v. McLamb*, 21 N.C. App. 482, 204 S.E. 2d 880 (1974), G.S. 55-36(a) was construed by this Court. That statute requires corporate deeds to be signed by the president and attested by the secretary of the corporation. It was held that a deed which was not attested by the corporate secretary was not a valid deed. In the instant case the typed name of Crowell Little Motor Company, Inc., on the financing statement was insufficient under G.S. 55-36(b). Nowhere is the instrument signed by any corporate officer in his official capacity. Therefore, no security interest was created, and summary judgment was proper.

Affirmed.

Judges MORRIS and CLARK concur.

CAMERON-BROWN CAPITAL CORPORATION v. RALPH W. SPENCER, AND WIFE, RITA SPENCER

No. 7610SC377

(Filed 17 November 1976)

1. **Guaranty— creditor's action against guarantor — no prior action against principal debtor**

A creditor's cause of action against guarantors of payment ripens immediately upon the failure of the principal debtor to pay the debt at maturity, and the creditor need not have diligently prosecuted the principal debtor without success before seeking payment from the guarantor of payment.

2. **Guaranty— action against guarantor — allegation that debt was extinguished — no genuine issue of material fact**

In an action to recover on a guaranty agreement executed by defendants, the trial court properly entered summary judgment for plaintiff where defendant failed to show that there was a genuine issue of material fact as to whether the principal debtor's debt to plaintiff was extinguished.

APPEAL by defendants from *McKinnon, Judge*. Judgment entered 30 March 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 15 September 1976.

This is an action to recover on a guaranty agreement executed by defendants.

Plaintiff's allegations, in substance, are as follows: It agreed to loan Tufsonic Corporation $65,000.00. As an inducement for plaintiff to make the loan defendants executed an agreement whereby they guaranteed payment of the loan to the extent of $25,000.00. Tufsonic defaulted in payment of the loan and a sale of its assets was conducted. The sum received by plaintiff from the sale was insufficient to pay the debt. Defendants are obligated to pay plaintiff a portion of Tufsonic's unpaid debt under the terms of the guaranty agreement and refuse to do so.

Defendants admitted plaintiff's loan to Tufsonic and defendants' execution of the guaranty agreement but alleged that Tufsonic's debt to plaintiff had been extinguished.

Plaintiff moved for summary judgment. The motion was supported by an affidavit and statement of account showing that Tufsonic was indebted to plaintiff for $49,667.08, through 31 October 1975.

Defendants' only response was an affidavit, in pertinent part, as follows:

> "2. On or about May 13, 1975, pursuant to the demands of Cameron-Brown Capital Corporation, Tufsonic Corporation authorized and granted permission to plaintiff and certain other creditors who were acting in concert, to seize and take possession of all assets of Tufsonic Corporation and plaintiff and such other creditors did proceed to seize and take possession of such assets.
>
> 3. Such assets were of a value greatly in excess of $49,667.08 and were of a value greatly in excess of all sums owed to plaintiff by Tufsonic Corporation.
>
> 4. The indebtedness of Tufsonic Corporation to plaintiff was thereby extinguished.
>
> Further Affiant saith not.
>
> s/ RALPH W. SPENCER"

Plaintiff's motion for summary judgment was allowed and defendants appealed.

Poyner, Geraghty, Hartsfield and Townsend, by David W. Long and Cecil W. Harrison, Jr., for plaintiff appellee.

Teague, Johnson, Patterson, Dilthey & Clay, by Robert M. Clay and Dan M. Hartzog, for defendant appellants.

VAUGHN, Judge.

The purpose of the summary judgment procedure provided by Rule 56 of the Rules of Civil Procedure is to ferret out those cases in which there is no genuine interest as to any material fact and in which, upon the undisputed facts, a party is entitled to judgment as a matter of law. The burden is upon the moving party to establish the lack of a triable issue of fact. *Kessing v. National Mortgage Corporation,* 278 N.C. 523, 180 S.E. 2d 823. The denial of a motion for summary judgment may not be based on the adverse party's mere allegations or denials of his pleading. It must be supported by affidavits or as otherwise provided in G.S. 1A-1, Rule 56. The adverse party's response must set forth specific facts showing that there is a genuine issue for trial.

The relevant portion of the guaranty agreement, which the defendants admit having executed, is as follows:

> "1. GUARANTORS [defendants] do hereby unconditionally guarantee prompt and immediate payment to CBCC [plaintiff] of the principal and accrued interest as to the loan of CBCC to COMPANY [Tufsonic] under date hereof, as the said principal and accrued interest shall become due and payable by the terms thereof or by the provisions of the Agreement. The foregoing Guaranty of payment shall be deemed a primary and not a secondary obligation of GUARANTORS, payable immediately upon default, or demand, without notice to, or recourse having first been made to or against, the COMPANY, such being hereby expressly waived; it being understood that the Guaranty is an absolute guaranty of payment and not of collection, and is a continuing guaranty and the same shall remain in full force and effect for the full term of the loan, and any extensions or renewals of same; provided, however, that the liability of the GUARANTORS hereunder for the payment of said loan shall not exceed, and shall be limited to, the maximum sum set opposite their respective names, to wit:
>
> | *Guarantors* | *Limit of Liability* |
> |---|---|
> | Delmar D. Long and wife, Genevieve Long | $25,000.00 |

Ralph W. Spencer, and wife, Rita Spencer	$25,000.00
TOTAL	$50,000.00

2. The GUARANTORS agree that this Guaranty may be enforced by CBCC without the necessity at any time of resorting to or exhausting any other security or collateral and without the necessity at any time of proceeding against the COMPANY for the payment of the Loan. The GUARANTORS further agree, however, that nothing contained herein or otherwise shall preclude CBCC from instituting suit against the COMPANY as to the loan, or from exercising any other rights available to it under the terms of the Agreement or the Note, and the institution of any such suit or the exercise of any such rights shall not constitute a legal or equitable discharge of GUARANTORS, it being the purpose and intent that their obligations hereunder shall be absolute and unconditional under any and all circumstances, subject only to total limitation of their liability not to exceed $50,000.00."

[1] The language of the Guaranty Agreement is unambiguous. Under the provisions of the agreement the defendants are guarantors of payment. The obligation of a guarantor of payment is separate and independent from the obligation of the principal debtor. The creditor's cause of action against the guarantors ripens immediately upon the failure of the principal debtor to pay the debt at maturity. The creditor need not have diligently prosecuted the principal debtor without success before seeking payment from the guarantor of payment. *Credit Corporation v. Wilson,* 281 N.C. 140, 187 S.E. 2d 752.

[2] Defendants contend that the affidavit filed by them raises a genuine issue as to whether Tufsonic's debt to plaintiff was extinguished and that resolution of that issue requires passing on the credibility of the affiants. They also contend that the affidavit requires a finding that plaintiff accepted Tufsonic's assets in payment of the debt and is now estopped to proceed against defendants. We cannot sustain those contentions.

The affidavit merely states that Tufsonic surrendered its assets to plaintiff and *other creditors* and that the assets were worth more than was owed Tufsonic. The affidavit, therefore, does not purport to state that Tufsonic surrendered assets to

plaintiff that were of sufficient value to satisfy Tufsonic's debt to plaintiff. More significantly, the affidavit fails to state that plaintiff and Tufsonic agreed that the assets would be accepted in payment of the debt. The bald statement in the affidavit that the indebtedness of Tufsonic to plaintiff "was thereby extinguished" is, therefore, without foundation in fact or law. Consequently, the affidavit filed by defendants adds nothing to the bare denial of the debt in their answer. When faced with plaintiff's motion for summary judgment, properly supported as it was, it was defendants' duty to come forward with specific facts showing that there was a genuine issue for trial. Defendants were unable to come forward with facts showing that the payment they guaranteed had been made. The court, therefore, properly granted plaintiff's motion for summary judgment. The judgment is affirmed.

Affirmed.

Chief Judge BROCK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. TYRONE FREDERICK, SOCRATES ARMWOOD, CORNELIUS LEE

No. 764SC427

(Filed 17 November 1976)

1. **Searches and Seizures § 1— warrantless search of automobile — probable cause**

Although a warrant to search defendants' automobile was defective, the officer had probable cause to conduct the search, and the search was therefore lawful, where the officer acted pursuant to information received by a second officer from a reliable informant giving a detailed description of defendants and their automobile, and advising the officer of the stolen nature of guns and other merchandise in the car, the direction defendants were traveling, and the time of their arrival in the town where the search occurred.

2. **Search and Seizures § 1— probable cause to search automobile — search after removal to police station**

Where there was probable cause to search an automobile at the place where it was stopped, the search was not rendered invalid because it occurred after the automobile had been taken to the police station.

State v. Frederick

APPEAL by State from order of *Lanier, Judge.* Order entered 3 February 1976 in Superior Court, SAMPSON County. Heard in the Court of Appeals 23 September 1976.

By nine separate indictments, defendants were each charged with three counts of breaking and entering, two counts of larceny and two counts of receiving stolen goods. In each case, defendants moved to suppress any evidence or statements taken from them, and on 2 February 1976, a voir dire was held on the motions. State's evidence tended to show that on 20 October 1975, Mount Olive policeman Glen Howard, while on duty as a dispatcher, received a call from an unnamed male asking for Officer Robert Holmes. The anonymous caller left his telephone number and requested that Officer Holmes contact him. Howard contacted Holmes and relayed the caller's number and message. Officer Holmes returned the call and recognized the unnamed man's voice as that of an informant who had previously supplied Holmes with reliable information which had resulted in convictions. The informant advised Holmes that a dark blue, 1965 or 1966 Plymouth, with license # EAX-169, was on its way to Mount Olive from the town of Faison to the south. He also stated that defendants Armwood and Lee would be in the car along with an unknown third individual and that the car's trunk would contain stolen guns and other merchandise. He further reported the approximate direction from which the car was coming and estimated its time of arrival to be within the next 10 or 15 minutes. Holmes relayed the information to Officer Billy Bonham and instructed him to be on the lookout for the car.

Approximately 40 minutes later, Bonham spotted a vehicle fitting the description given by the informant and bearing license # EAX-169. Inside the car were the three defendants. When Bonham first observed the car it was moving, but it stopped, and defendants Frederick and Lee got out of the car and went into the house of a friend. Bonham approached defendant Armwood and asked to see his operator's license, whereupon Bonham noticed a tape deck, stereo set and speakers in the back of the car. Armwood explained that the stereo equipment belonged to his girl friend, that it had just been repaired, and that he was on his way to take it back to her. Bonham walked to the house and asked to speak with Frederick. Frederick explained that the stereo equipment was broken and belonged to his girl friend and that they were on the way to Goldsboro

to have it fixed. Bonham went back to the car and asked Armwood, who owned the car, if he would open the trunk. Armwood replied that, while he did not mind opening the trunk, the lock was broken and could not be opened. The lock had been taken out of the trunk, leaving a hole. Bonham searched for a screwdriver to open the trunk but could not find one, so he asked if Armwood would follow him to the station where they could get a screwdriver to open the trunk. All defendants agreed to go to the station. Armwood drove his car, Frederick rode with Bonham, and Lee accompanied Officer Matthews.

After they arrived at the police station, Bonham left to get a screwdriver. However, Armwood changed his mind and demanded a warrant to search the car, so Bonham went to the Magistrate's Office and a warrant was issued. The warrant was read to Armwood, and Bonham opened the trunk where he discovered three rifles, three television sets, clock radios, and other merchandise.

At this point in the evidence presented on voir dire, the trial judge granted the motions to suppress the search warrant, finding as a fact that "the search was in violation of the Constitutional Rights of the three defendants." The court also found as a fact "that when the three defendants, some of whom got into the police car, and some of whom drove the Plymouth automobile to the police station . . . were placed under arrest for all intents and purposes; and that the arrests were illegal and in violation of the defendants' Constitutional Rights."

The State appeals from the allowance of defendants' motions.

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

John Parker and Herbert Hulse for defendant appellees.

MORRIS, Judge.

In its first assignment of error, the State contends that the trial court erred in its finding that the search of the car was in violation of defendant's constitutional rights. The search warrant involved in this case states, *inter alia:*

"The applicant swears to the following facts to establish probable cause for the issuance of a search warrant: Af-

fiant states that he has received numerous calls stating he has firearms in trunk of veh., and when asked if officer could look in the trunk, he refused to allow it."

The State concedes that the search warrant was defective, but argues that there were other constitutionally acceptable grounds to search defendant's automobile. We agree.

Of course, evidence which is obtained as a result of an unreasonable search and seizure may not be admitted in either the State or Federal courts. U.S. Const., Amend. IV, V, and XIV; N.C. Const., Art. I, § 20; *Mapp v. Ohio,* 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684 (1961); *State v. Woods,* 286 N.C. 612, 213 S.E. 2d 214 (1975). However, all searches and seizures are not prohibited. The Constitution proscribes only those which are "unreasonable." *Carroll v. U. S.,* 267 U.S. 132, 69 L.Ed. 543, 45 S.Ct. 280 (1925); *State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28 (1970). In most instances, the procurement of a warrant is a prerequisite for a valid search or seizure. "[E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara v. Municipal Court,* 387 U.S. 523, 528-29, 18 L.Ed. 2d 930, 87 S.Ct. 1727 (1967).

[1, 2] One of the types of cases excepted from the general warrant requirement is that involving the search of a motor vehicle. Due to its mobility, an automobile may constitutionally be searched without a warrant if there is probable cause to make the search. *Carroll v. U.S., supra; Brinegar v. U. S.,* 338 U.S. 160, 93 L.Ed. 1879, 69 S.Ct. 1302 (1949); *State v. Ratliff,* 281 N.C. 397, 189 S.E. 2d 179 (1972). In the present case, Officer Bonham acted pursuant to information from the informant, who had given Officer Holmes a detailed description of defendants and their car and had advised the officer of the stolen nature of the goods in the vehicle and defendants' approximate time of arrival in Mount Olive. On these facts, Officer Bonham had probable cause to search the vehicle. *Accord, see State v. Harrington,* 283 N.C. 527, 196 S.E. 2d 742, *cert. denied,* 414 U.S. 1011, 38 L.Ed. 2d 249, 94 S.Ct. 375 (1973). Furthermore, the fact that the car was not searched until after defendants had accompanied the officers to the station did not invalidate the search. "If there is probable cause to search the automobile at the place where it was stopped, it matters not that the search

is conducted some time later after the automobile has been transported to the police station." *U. S. v. Chalk*, 441 F. 2d 1277, 1279 (4th Cir. 1971), citing *Chambers v. Maroney*, 399 U.S. 42, 26 L.Ed. 2d 419, 90 S.Ct. 1975 (1970).

Since there was probable cause to search the car, we do not reach the issue of whether the defendants were under arrest at the time the car was searched. The order is

Reversed.

Judges HEDRICK and ARNOLD concur.

CARL JAMES BEESON v. RICHARD LEE MOORE

No. 7618SC406

(Filed 17 November 1976)

Torts § 7— release of all claims arising from accident — plaintiff's claim that release was for property damage — action for personal injuries barred

In an action to recover for personal injuries sustained by plaintiff in an automobile accident where defendant alleged that plaintiff signed a release of all claims arising from the accident, plaintiff's affidavit alleging that he signed the release in the belief that he had not suffered any personal injury as a result of the accident and that he thought the release was for property damage only was insufficient to show that the release was executed under a mutual mistake, since plaintiff offered no evidence that would indicate the defendant was mistaken about or misrepresented what he paid for.

APPEAL by plaintiff from *Long, Judge.* Judgment entered 17 February 1976 in Superior Court, GUILFORD County. Heard in the Court of Appeals 22 September 1976.

Plaintiff filed complaint on 22 September 1975 seeking to recover damages for personal injuries received in an automobile accident with defendant which occurred on 15 September 1973. Defendant answered, denying negligence and asserting that he had settled plaintiff's claim and obtained a release on 21 September 1973. Defendant moved for summary judgment on plaintiff's claim. He submitted an affidavit from his insurance company's claims adjuster to the effect that the adjuster had issued a draft for $900 to plaintiff on 21 September 1973

and that the draft contained an agreement specifying that the endorsement would constitute a release of all claims arising out of the 15 September 1973 accident. Defendant also requested plaintiff to admit the genuineness of the 21 September 1973 draft and endorsement and negotiation of the draft by plaintiff. In response, plaintiff made the requested admissions; however, he also filed an affidavit to the effect that the draft had been issued and negotiated on the belief that it only covered property damage and that plaintiff's injuries did not appear until later. Judge Long granted defendant's motion for summary judgment as to plaintiff's claim. Plaintiff appealed.

Morgan, Byerly, Post, Herring & Keziah, by James F. Morgan, for plaintiff.

Bencini, Wyatt, Early & Harris, by William E. Wheeler, for defendant.

MARTIN, Judge.

Plaintiff contends the trial court committed error by entering summary judgment in favor of defendant.

In the instant case, it is clear that the plaintiff admitted the execution of a release. It is therefore encumbent upon him to prove any matter in avoidance. See *Caudill v. Manufacturing Co.*, 258 N.C. 99, 128 S.E. 2d 128 (1962). See also *Matthews v. Hill*, 2 N.C. App. 350, 163 S.E. 2d 7 (1968).

In regards to releases, it has been held that:

> " 'A release executed by the injured party and based on a valuable consideration is a complete defense to an action for damages for the injuries and where the execution of such releases is admitted or established by the evidence it is necessary for the plaintiff (releasor) to prove the matter in avoidance.' " (Citation omitted.) *Caudill v. Manufacturing Co., supra* at 102, 128 S.E. 2d at 130.

It is generally held that one way to avoid a release is for the releasor to:

> " ' . . . show that it was executed by mutual mistake, as between himself and the releasee, of a past or present fact, material to the release or the agreement to release . . . unless it further appears that the parties intended that claims for all injuries, whether known or unknown at the time

of the execution of the release, be relinquished. . . . '" *Caudill v. Manufacturing Co., supra* at 102, 128 S.E. 2d at 130.

In the instant case, the sole issue on the motion for summary judgment as developed by the pleadings and proofs was whether there was a mutual mistake of an existing fact sufficient to render the release voidable. Plaintiff's affidavit reflects only that he signed the release in the belief that he had not suffered any personal injury as a result of the accident and that *he* thought the draft was given only for property damage.

In determining whether a release was executed under a mutual mistake, the North Carolina Supreme Court has stated that:

"'. . . all of the circumstances relating to the signing must be taken into consideration, including the sum paid for the release. A factor to be considered in cases of this kind is whether the question of liability was in dispute at the time of the settlement. The source or author of the mistake is of no consequence if the parties in good faith relied on it, or were misled by it, and the releasor was thereby induced to release a liability, which he could not otherwise have done.'" *Caudill v. Manufacturing Co., supra* at 103, 128 S.E. 2d at 131.

In the instant case, the plaintiff offered no evidence that would indicate the defendant was mistaken about or misrepresented what he was paying for. The release read "In full settlement of any and all claims arising out of accident of 9-15-73, Kernersville, N. C." Plaintiff says he knew of no injuries and thought the $900 was for repairs to his automobile. There was no evidence tending to show a corresponding mistake on the defendant's part. Moreover, the plaintiff failed to show the cost for repair to his automobile or whether it was more or less than the draft. If it was less, the difference could have been consideration for unknown injuries and if more, it may have been a compromise of a disputed claim. In either instance, the defendant would not be laboring under a mistake. In addition, there is no evidence as to the nature and extent of the injuries nor when they developed in relation to the date of the release. There is also no evidence as to whether the consideration received was grossly inadequate. Although the plaintiff contends he thought the draft was for damages to his automobile, he

does not claim that he was unable to read, that he was misled or that the release failed to express the intention of the parties at the time of the settlement.

Plaintiff has failed to plead or offer evidence of any matter which would successfully nullify the release. Rule 56(e) provides that the adverse party, when responding to motion for summary judgment, must set forth specific facts showing that there is a genuine issue for trial. This he failed to do. Therefore, the trial court properly allowed defendant's motion for summary judgment.

The judgment appealed from is

Affirmed.

Chief Judge BROCK and Judge VAUGHN concur.

GENERAL ELECTRIC CO., OUTDOOR POWER EQUIPMENT OPERATIONS v. JAMES W. PENNELL AND MRS. JAMES W. PENNELL, T/A PENNELL MOTORS AND PENNELL MOTOR COMPANY

No. 7623DC510

(Filed 17 November 1976)

Uniform Commercial Code § 20— sale of tractors — genuine issue of fact as to sum due, breach of warranty — summary judgment improper

In an action to recover a sum allegedly due plaintiff for tractors furnished by it to defendant for resale, the trial court erred in granting summary judgment for plaintiff where there were genuine issues of fact as to (1) whether defendants were liable to plaintiff for any amount at all, and (2) plaintiff's liability to defendants for breach of warranty.

Judge VAUGHN concurs in result.

Chief Judge BROCK dissents.

APPEAL by defendants from *Osborne, Judge.* Judgment entered 22 March 1976 in District Court, WILKES County. Heard in the Court of Appeals 22 September 1976.

Plaintiff alleged in its complaint that it was a New York corporation doing business in North Carolina. It had sold to defendants certain goods listed on Exhibit A attached to the

complaint. Defendants had agreed to a floor planning agreement attached to the complaint as Exhibit B, requiring them to make certain payments to plaintiff. They had defaulted and were indebted to plaintiff for $5,782.99.

Defendants denied that plaintiff was a New York corporation doing business in North Carolina. They admitted that defendant Mrs. Pennell had received certain goods from plaintiff and had signed the floor plan agreement but they denied that they were liable to plaintiff for any amount. They counterclaimed, alleging that the goods plaintiff had shipped to them were not merchantable and were not fit for the purpose for which they were purchased.

Plaintiff moved for summary judgment. In support of its motion it submitted Exhibits A and B and an affidavit of its accounting operations manager, R. J. King, who stated that Exhibits A and B were correct statements of defendants' account with plaintiff and that defendants were indebted to plaintiff for $5,782.99.

In opposition to the motion defendants submitted answers to interrogatories verified by defendant James Pennell. Pennell answered that defendants had purchased tractors and other equipment from plaintiff for resale; that in a "Dealer Franchise Agreement" submitted with his answers, they had agreed to pay for each item they had sold; that the equipment shipped by plaintiff was not fit to be sold and used by the public; that the tractors would not operate and the motors would burn out; that the batteries were not large enough for the size of the tractor and replacement batteries had to be furnished by the defendants; and that defendants had to take back all but one of the tractors sold. Defendants asked plaintiff to repair the tractors but plaintiff would not do so and defendants hired a mechanic to repair the tractors but he was unable to repair them.

The court granted summary judgment for the plaintiff for $5,782.99 and dismissed defendants' counterclaim. Defendants appealed.

Max F. Ferree and George G. Cunningham, for plaintiff.

McElwee, Hall & McElwee, by John E. Hall and William C. Warden, Jr., for defendants.

MARTIN, Judge.

Defendants contend in their only assignment of error that the court should not have granted summary judgment for plaintiff. They argue that the case raises several genuine issues of fact. We agree.

First of all, there is a genuine issue of fact as to whether the defendants are liable to plaintiff for any amount at all. It is apparent from the "Security Agreement" executed between the parties on the same day as the "Dealer Franchise Agreement" that, absent other terms in effect at the time of shipment, the defendants did not have to pay for equipment shipped by the plaintiff until the equipment had been sold. In answer to interrogatories on this point, the defendants stated that they had agreed to pay for each item of equipment only after each item was sold and within five days thereafter. Defendants then went on to answer that they had in fact complied with this part of the agreement in that they had paid for each item as soon as they had been sold. The plaintiff seems to contend on appeal that Exhibit B, an agreement in which defendants promised to go ahead and start making monthly payments totalling $7,621.19, controls over the "Dealer Franchise Agreement" and the "Security Agreement" since it was subsequent in time to those agreements. This contention is without merit, however, since the plaintiff's evidence fails to show that the promises contained in Exhibit B were supported by any consideration. The plaintiff failed to allege such facts necessary to enable this Court to see that there was a valuable consideration given for the promises contained in Exhibit B. See *Credit Co. v. Insurance Co.*, 7 N.C. App. 663, 173 S.E. 2d 523 (1970). Moreover, Exhibit B states that the promise was given "to reduce the unpaid balance past due" plaintiff, while according to defendants' evidence there was no unpaid balance past due.

There is a second genuine issue of material fact as to plaintiff's liability to defendants for breach of warranty. The attempted disclaimer by plaintiff in paragraph 4(b) of the "Dealer Franchise Agreement" is ineffective, because it is not conspicuous as required by G.S. 25-2-316(2). It is not in capital letters, nor in large or contrasting type, nor does its appearance differ in any way from the rest of the printed form. See G.S. 25-1-201(10).

Reverse.

Judge VAUGHN concurs in result.

Chief Judge BROCK dissents.

STATE OF NORTH CAROLINA v. ROLAND WATTS, JR.

No. 7610SC522

(Filed 17 November 1976)

Shoplifting— concealment of merchandise — sufficiency of evidence

The State's evidence was sufficient to be submitted to the jury in a prosecution for unlawful concealment of merchandise where the assistant manager of a store testified that he saw defendant place a box containing a chain saw into a larger box, notwithstanding the witness also testified that from an "observation tower" he could see part of the chain saw through a three to four inch crack in the larger box.

APPEAL by defendant from *Godwin, Judge.* Judgment entered 17 February 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 9 November 1976.

The defendant was charged with unlawful concealment of merchandise in violation of G.S. 14-72.1. He pled not guilty and was found guilty by a jury. From a judgment imposing imprisonment, the defendant appealed.

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

DeMent, Redwine, Yeargan & Askew, by Garland L. Askew, for defendant.

MARTIN, Judge.

Defendant contends in his only assignment of error that the court erred in refusing to allow his motion for nonsuit.

In *State v. Hales,* 256 N.C. 27, 33, 122 S.E. 2d 768, 773 (1961), the court set forth the four essential elements of the offense created by G.S. 14-72.1 as follows:

"Whoever, one, without authority, two, willfully conceals the goods or merchandise of any store, three, not thereto-

fore purchased by such person, four, while still upon the premises of the store, shall be guilty of a misdemeanor."

The court further stated:

" 'Willfully conceals' as used in the statute means that the concealing is done under the circumstances set forth in the statute voluntarily, intentionally, purposely and deliberately, indicating a purpose to do it without authority, and in violation of law, and this is an essential element of the statutory offense of shoplifting." (Citations omitted.) *State v. Hales, supra.*

In the instant case, the assistant manager of the store testified that he saw the defendant place a red and white chain saw box into a larger box, and that from an "observation tower" he could see part of a chain saw box through a three to four inch crack in the larger box. The appellant argues that because the evidence shows that the chain saw box was partially visible, the defendant attempted, but did not succeed in concealment. Therefore, he claims that nonsuit should have been granted.

The assistant manager became aware that there was a chain saw within the large box because he saw the defendant actually place the chain saw box inside the larger box. He would not have been aware of the chain saw otherwise.

Further, the assistant manager was only able to see through the crack in the larger box from a tall perch which he called an observation tower. This overhead view gave him an opportunity to see into the box that he would not have had otherwise. Complete concealment from any person on ground level was certainly well within the realm of possibility and a proper inference for the jury to make.

It is well settled in this State that upon a motion for a nonsuit in a criminal case

" . . . the trial judge is required to take the evidence for the State as true, to give to the State the benefit of every reasonable inference to be drawn therefrom and to resolve in the favor of the State all conflicts, if any, therein." (Citations omitted.) *State v. Edwards,* 286 N.C. 140, 145, 209 S.E. 2d 789, 792 (1974).

It has also been stated that "[c]ontradictions and discrepancies, even in the State's evidence, are matters for the jury and do not

warrant nonsuit." (Citation omitted.) *State v. Bolin,* 281 N.C. 415, 424, 189 S.E. 2d 235, 241 (1972). Moreover, if when so considered there is substantial evidence, whether direct, circumstantial, or both, of all material elements of the offense charged, then the motion for nonsuit must be denied and it is for the jury to determine whether the evidence establishes guilt beyond a reasonable doubt. See *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431 (1956).

Considering all the evidence in the instant case in the light most favorable to the State, as we are therefore required to do, we think the facts here disclosed constituted ample evidence to support the trial judge's denial of defendant's motion for nonsuit and that the evidence was sufficient to require submission of the case to the jury.

Defendant had a fair trial free of prejudicial error.

No error.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. LEWIS GUFFEY

No. 7629SC498

(Filed 17 November 1976)

Searches and Seizures § 3— search warrant for liquor — insufficiency of affidavit to show probable cause

In a prosecution for possession of beer for sale in violation of G.S. 18A-7(a), evidence obtained pursuant to a warrant to search defendant's home and car was inadmissible, since the affidavit upon which the warrant was based was insufficient to establish probable cause where it alleged complaints from anonymous informants but contained no information as to their credibility, alleged that county law officers observed users of beer and liquor and known drunks coming and going from defendant's residence but gave no indication as to when the observations were made, and alleged that defendant bought large quantities of liquor at S. C. liquor stores, a legal activity, but made no showing that such activity was unusual or suspicious in any way.

APPEAL by defendant from *Baley, Special Judge.* Judgment entered 18 March 1976 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 21 October 1976.

State v. Guffey

Defendant was convicted of possession of beer for sale in violation of G.S. 18A-7(a). He was sentenced to 18 months in prison. The evidence against defendant consisted of a total quantity of over 20 gallons of beer. The evidence was obtained by police officers who, pursuant to a warrant, searched defendant's home and car. The warrant was issued upon the following affidavit by Lt. Floyd A. Laughter of the Rutherford County Sheriff's Department:

> "1. Members of the Rutherford Co. Sheriff's Dept. have received complaints that Lewis Guffey is selling liquor & beer from the above residence.
>
> "2. Members of the Rutherford Co. Sheriff's Dept. have observed users of liquor and beer and known drunks come to and leave the residence after staying only a few minutes.
>
> "3. Lt. Laughter and Chief Deputy L. W. Nichols have observed Lewis Guffey in past buy large quantities of liquor at S. C. liquor stores.
>
> "4. On this date, Lt. Laughter observed Lewis Guffey buy a large quantity of liquor at a S. C. liquor store and place it in the above 1959 Ford and leave in a direction of travel toward his home."

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

Robert L. Harris for defendant appellant.

ARNOLD, Judge.

In this appeal defendant challenges the sufficiency of the affidavit to establish probable cause upon which to issue the search warrant. A search warrant may not issue except upon finding of probable cause to search, and that finding of probable cause must be supported by facts and circumstances attested to in an affidavit accompanying application for the warrant. G.S. 15A-244. Probable cause to search means a reasonable ground to believe that a search of the place named will uncover the objects sought, and that the objects sought will aid in the apprehension or conviction of an offender. *State v. Campbell,* 282 N.C. 125, 191 S.E. 2d 752 (1972); *State v. English,* 27 N.C. App. 545, 219 S.E. 2d 549 (1975).

Justice Huskins stated, on behalf of our Supreme Court, in *State v. Campbell, supra* at 130:

> "Probable cause cannot be shown 'by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the "underlying circumstances" upon which that belief is based . . . . Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police.' *United States v. Ventresca,* 380 U.S. 102, 13 L.Ed. 2d 684, 85 S.Ct. 741 (1965). The issuing officer 'must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion. . . . ' *Giordenello v. United States,* 357 U.S. 480, 2 L.Ed. 2d 1503, 78 S.Ct. 1245 (1958)."

The affidavit in the instant case avers complaints from anonymous informants, and it contains no information which enables the magistrate to judge either the credibility of the informants, or the correctness of their conclusions. *Aguilar v. Texas,* 378 U.S. 108 (1964); *see also, State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971).

While precise references to specific time and dates certainly are not required, the affidavit in question is too imprecise as to *when* observations were made by Rutherford County law officers. See, *State v. English, supra.* Moreover, the purchase of liquor in South Carolina is not an illegal activity, and the affidavit does not state how frequently purchases were made, or make any showing that such activity was unusual or suspicious in any way. Incidentally, we note that only one-half of a half pint of liquor was found on the premises.

The affidavit was insufficient to establish probable cause to issue the search warrant. Therefore, evidence obtained as a result of the search warrant was not admissible. Judgment is reversed, and this cause is remanded to Superior Court for proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. RICHARD CHARLES O'CONNOR, JR.

No. 764SC444

(Filed 17 November 1976)

Criminal Law § 145.1— probation revocation — absence of preliminary hearing

Due process did not require that defendant be accorded a preliminary hearing after his arrest for violation of his probation where defendant was served with a bill of particulars, arrested, and released on bond on the same day, and defendant remained free on bond until the time of his probation revocation hearing.

APPEAL by defendant from *Lanier, Judge.* Judgment entered 25 February 1976 in Superior Court, ONSLOW County. Heard in the Court of Appeals 12 October 1976.

This appeal challenges the sufficiency of the proceedings in revocation of defendant's probation.

Defendant was charged with the commission of a crime against nature on 17 October 1975. On 6 January 1976 defendant entered a plea of guilty to the charge and was sentenced to a term of three to five years of imprisonment. The prison sentence was suspended, and defendant was placed on probation for two years.

On 23 January 1976 a bill of particulars and order of arrest were issued charging that defendant violated the terms of his probation by committing a crime against nature on 21 January 1976. The bill of particulars and order of arrest were served on defendant on 27 January 1976, and defendant was released on a $500.00 appearance bond on the same day.

Defendant appeared before Judge Lanier on 25 February 1976 for a fact-finding hearing upon the issue of whether he had violated the terms of his probation as alleged in the bill of particulars served on him on 27 January 1976.

Judge Lanier found as a fact from competent evidence that defendant committed the crime against nature on 21 January 1976 and that this was a violation of the terms of probation. Defendant offered no evidence to refute the charge.

Judge Lanier entered an order revoking the probation and suspended sentence and ordered that defendant be imprisoned

for a term of not less than three nor more than five years as provided by the judgment entered 6 January 1976.

Defendant appealed.

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

Turner and Harrison, by F. W. Harrison, for the defendant.

BROCK, Chief Judge.

Defendant argues on appeal that the order revoking his probation should be reversed because defendant was not accorded a preliminary hearing at the time of, or near the time of, his arrest. Defendant relies upon *Morrissey v. Brewer,* 408 U.S. 471, 33 L.Ed. 2d 484, 92 S.Ct. 2593 (1972), and *Gagnon v. Scarpelli,* 411 U.S. 778, 36 L.Ed. 2d 656, 93 S.Ct. 1756 (1973).

Morrissey v. Brewer, supra, mandated both a preliminary and final revocation hearing in parole revocation proceedings. *Gagnon v. Scarpelli, supra,* applied the same reasoning in probation and suspended sentence revocation proceedings. The requirement of a preliminary hearing as promptly as convenient after arrest for parole violation as mandated in *Morrissey* was to afford the parolee minimal due process of law before he is deprived of the liberty he enjoyed on parole. The concern of the court in *Morrissey* was the arrest upon an allegation of violation of parole and the incarceration of a parolee for a substantial period of time before there can be a fact-finding hearing upon whether his parole should be revoked. Referring to the preliminary hearing stage mandated by *Morrissey,* it was stated: "Based on the information before him, the [hearing] officer should determine whether there is probable cause to hold the parolee for the final decision of the parole board on revocation. Such a determination would be sufficient to warrant the parolee's continued detention and return to the state correctional institution pending the final decision." *Morrissey v. Brewer, supra* at 487, 33 L.Ed. 2d at 498, 92 S.Ct. at 2603. *Gagnon v. Scarpelli, supra,* applied the reasoning and procedures outlined by *Morrissey* to procedures for revocation of probation or suspended sentences. Both cases, in mandating the preliminary hearing stage, were concerned with a possible unjustified incarceration of a parolee or probationer for a substantial period of time before a fact-finding hearing could be held.

The possible unjustified deprivation of the conditional liberty of a parolee or probationer is not involved in this case. The defendant was served with a bill of particulars, arrested, and released on bond, all in the same day. He was free until the time of the fact-finding hearing from which stemmed the revocation of his probation.

Defendant received every benefit he could have received from a preliminary hearing. Under such circumstances due process did not require that defendant be accorded a preliminary hearing.

The order revoking probation is

Affirmed.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. EDDIE WAYNE GILLESPIE

No. 7625SC543

(Filed 17 November 1976)

1. **Criminal Law § 151— appeals governed by Rules of Appellate Procedure — mandatory nature**

   The N. C. Rules of Appellate Procedure are mandatory, and a defendant's appeal is subject to dismissal for violation of the rules.

2. **Criminal Law § 137— possession of marijuana — correction of judgment and commitment to conform to verdict**

   Judgment and commitment which recite that defendant was found guilty of felonious possession of marijuana with intent to distribute are corrected to conform with the verdict of guilty of possession of more than one ounce of marijuana.

APPEAL by defendant from *Kirby, Judge.* Judgment entered 17 February 1976 in Superior Court, BURKE County. Heard in the Court of Appeals 10 November 1976.

Defendant was tried and convicted of the felonious possession of marijuana under G.S. 90-95(d)(4), and sentenced to a term of not less than three nor more than five years' imprisonment.

Attorney General Edmisten, by Associate Attorney Jerry B. Fruitt, for the State.

McMurray, Triggs & Hodges, by Robert E. Hodges, for the defendant.

BROCK, Chief Judge.

The record on appeal in this appeal was settled by agreement on 21 May 1976. The North Carolina Rules of Appellate Procedure, Rule 11(e) provides that "[w]ithin 10 days after the record on appeal has been settled . . . the appellant shall present the items constituting the record on appeal to the clerk of superior court for certification." Appellant in this case waited from 21 May 1976 until 28 June 1976 to obtain the clerk's certification, a total of 38 days.

The time schedules set out in the rules are designed to keep the process of perfecting an appeal to the appellate division flowing in an orderly manner. Counsel is not permitted to decide upon his own enterprise how long he will wait to take his next step in the appellate process. There are generous provisions for extensions of time by the trial court if counsel can show good cause for extension.

[1] The North Carolina Rules of Appellate Procedure are mandatory. "These rules govern procedure in all appeals from the courts of the trial divisions to the courts of the appellate division; . . . " App. R. 1(a).

[2] For violation of the rules this appeal is subject to dismissal. However, we note from the face of the record that the recitation in the judgment is inconsistent with the trial, the judge's instructions, and the verdict. The recitation in the judgment should be corrected and an amended commitment issued.

The bill of indictment charged defendant with the possession of marijuana with intent to sell and deliver. G.S. 90-95 (a) (1). The trial judge instructed the jury that it was to consider only the offense of possession of more than one ounce of marijuana. G.S. 90-95(d) (4). The jury returned a verdict of guilty upon the offense submitted by the court under G.S. 90-95(d) (4). The punishment imposed does not exceed the maximum provided for a conviction under G.S. 90-95(d) (4). Never-

theless, the judgment and commitment recite that the defendant was found guilty "of the offense of felonious possession of marijuana with intent to distribute. . . "

We find no prejudicial error in the trial. This cause is remanded with instructions that the Clerk of Superior Court, Burke County, strike from the judgment and commitment the words "with intent to distribute" appearing in the second paragraph thereof, to the end that the second paragraph of the judgment and commitment shall read: "Having been found by a jury guilty of the offense of felonious possession of marijuana which is a violation of G.S. _ and of the grade of felony." The said clerk is further directed to issue an amended commitment to conform with the judgment and commitment as corrected.

Remanded with instructions.

Judges PARKER and HEDRICK concur.

JOHNNY CALVIN LEDWELL v. COUNTY OF RANDOLPH AND CHARLES RICHARD HUGHES

No. 7619SC467

(Filed 17 November 1976)

Appeal and Error § 41— settlement of record on appeal — failure to obtain clerk's certification in apt time

Appeal is dismissed for failure of appellant to obtain the clerk's certification of the record on appeal within 10 days after the trial judge entered his order settling the record on appeal as required by App. R. 11(e).

APPEAL by plaintiff from *Walker (Hal H.), Judge.* Judgment entered 4 March 1976 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 18 October 1976.

Plaintiff brought this action to recover for personal injuries allegedly suffered as a pedestrian when struck by a motor vehicle operated by defendant Hughes, a deputy sheriff of Randolph County. At the close of all the evidence, defendants' motion for a directed verdict was allowed on the ground that plaintiff's evidence failed to show negligence on the part of

defendants and on the ground that it showed contributory negligence as a matter of law. Plaintiff appealed.

Ottway Burton for the plaintiff.

Miller, Beck, O'Briant and Glass, by Adam W. Beck, for the defendants.

BROCK, Chief Judge.

When plaintiff served his proposed record on appeal on defendants, defendants filed exceptions. Plaintiff requested settlement of the record on appeal by the trial judge.

On 6 May 1976 the trial judge entered his order settling the record on appeal. The North Carolina Rules of Appellate Procedure, Rule 11(e) provides that "[w]ithin 10 days after the record on appeal has been settled . . . the appellant shall present the items constituting the record on appeal to the clerk of superior court for certification." Appellant in this case waited from 6 May 1976 until 27 May 1976 to obtain the clerk's certification, a total of 21 days.

The time schedules set out in the rules are designed to keep the process of perfecting an appeal to the appellate division flowing in an orderly manner. Counsel is not permitted to decide upon his own enterprise how long he will wait to take his next step in the appellate process. There are generous provisions for extensions of time by the trial court if counsel can show good cause for extension.

The North Carolina Rules of Appellate Procedure are mandatory. "These rules govern procedure in all appeals from the courts of the trial divisions to the courts of the appellate division; . . . " App. R. 1(a).

Appeal dismissed.

Judges PARKER and HEDRICK concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 17 NOVEMBER 1976

BEATTY v. FOWLER No. 7613DC488	Brunswick (74CVD65)	Affirmed
FENCE CO. v. CHEMICALS, INC. No. 7618SC420	Guilford (75CVS3204)	Affirmed
INVESTMENT PROPERTIES v. NORBURN No. 7628SC445	Buncombe (70CVS33)	Reversed
STATE v. BOSTICK No. 763SC477	Pitt (75CR18678)	No Error
STATE v. BROWN No. 762SC472	Beaufort (76CR388)	No Error
STATE v. CODY No. 7629SC462	McDowell (75CR4120) (75CR4114)	No Error
STATE v. HARVEY No. 762SC457	Beaufort (75CR1234)	No Error
STATE v. IVEY No. 7620SC464	Union (76CR0288)	No Error
STATE v. LAWRENCE No. 7610SC496	Wake (75CR5927)	No Error
STATE v. LOWERY No. 7625SC426	Catawba (75CR5527) (75CR5528) (75CR5529)	No Error
STATE v. McCOY No. 7616SC523	Scotland (75CR4900)	No Error
STATE v. McFADDEN No. 7621SC469	Forsyth (75CR24362)	No Error
STATE v. NICHOLSON No. 7616SC459	Scotland (75CR5347)	No Error
STATE v. RADFORD No. 7620SC531	Union (75CR8047)	Affirmed
STATE v. RAINES No. 7610SC463	Wake (75CR60894-A) (75CR60894-B)	No Error
STATE v. THOMAS No. 7620SC507	Richmond (75CR5005)	No Error
STATE v. WILSON No. 7615SC486	Alamance (75CRS12746)	No Error
STATE v. WILSON No. 7622SC456	Iredell (75CR7335) (75CR7333) (75CR7347)	No Error
STATE v. WOODELL No. 765SC491	New Hanover (75CR9963)	New Trial

JOE ALLEN WRIGHT, BY AND THROUGH HIS GUARDIAN AD LITEM, HENRY C. FRENCK, AND JOE WRIGHT v. BLUE BIRD CAB COMPANY AND JUSTICE A. CREWS

No. 7621SC474

(Filed 1 December 1976)

1. **Automobiles § 104— hitting child — cab company liable under respondeat superior only — exclusion of cab driver's admissions**

In an action to recover for personal injuries sustained by minor plaintiff when he was struck by a taxicab operated by individual defendant in the scope of his employment with defendant cab company, the cab company could only be vicariously liable for the alleged negligent acts of the individual defendant under the doctrine of respondeat superior since plaintiffs neither alleged nor offered proof of any independent negligent acts on the part of the cab company; therefore, the jury verdict absolving the individual defendant of any liability also relieved the cab company of liability, and rendered moot any question of error on the part of the trial court in refusing to admit the individual defendant's admissions concerning the circumstances of the accident into evidence against the cab company or in granting the cab company's motion for a directed verdict.

2. **Automobiles §§ 72, 90— striking child — instruction on sudden emergency**

In an action to recover for personal injuries sustained by minor plaintiff when he ran in front of a cab operated by defendant, the trial court's reference to the negligence of the minor plaintiff in instructing on sudden emergency did not amount to prejudicial error, since no issue of contributory negligence on the part of the minor plaintiff was raised at trial, and since the court gave a subsequent clarifying instruction concerning sudden emergency.

3. **Automobiles § 63— striking child — evidence of force of impact excluded — no error**

In an action to recover for personal injuries sustained by minor plaintiff when he was struck by a taxicab operated by defendant, plaintiffs were not prejudiced by the exclusion of defendant's testimony as to whether the minor plaintiff was "tapped" by the vehicle or hit with such force as to be projected 16 feet from the point of impact, thereby sustaining severe brain damage, since the jury did not reach the issue of damages.

4. **Appeal and Error § 49— assignment of error to exclusion of evidence — excluded evidence not in record**

The trial court's alleged error in refusing to allow a police officer to testify as to the contents of an accident report is not subject to review, since the excluded testimony was not included in the record.

5. **Appeal and Error § 49— deposition as cumulative evidence — exclusion proper**

The trial court in a personal injury action did not err in excluding the deposition of a witness who testified on both direct and cross-examination at trial, since the deposition and the testimony at trial were substantially identical and the deposition was therefore cumulative to the testimony.

6. **Automobiles § 63— striking child — issue of damages not reached — child's hospital records excluded — no error**

In an action to recover for personal injuries sustained by minor plaintiff when she was struck by a taxicab operated by defendant, plaintiffs were not prejudiced by the exclusion of the minor plaintiff's hospital records introduced for the purpose of explaining and illustrating the extent of the physical injuries to minor plaintiff, since the jury never reached the issue of damages.

APPEAL by plaintiffs from *Rousseau, Judge.* Judgment entered 5 February 1976 in Superior Court, FORSYTH County. Heard in Court of Appeals 18 October 1976.

This is a civil action wherein the plaintiffs, Joe Allen Wright, by his guardian ad litem Henry C. Frenck, and Joe Wright, seek to recover from the defendants damages for personal injuries and medical expenses resulting from the alleged negligent operation of a taxicab by the defendant Justice A. Crews, in the scope of his employment with defendant Blue Bird Cab Co. (Cab Company).

The evidence offered by the plaintiffs at trial, which is pertinent to this appeal, except where quoted, is summarized as follows:

Plaintiff read the deposition of defendant Crews into evidence. In his deposition Crews stated the following: On 8 September 1971 at 2:00 p.m. he was driving his cab within the scope of his employment with the defendant Cab Company in Morningside Manor neighborhood of Winston-Salem, N. C. He turned onto Argonne Boulevard about two blocks from the plaintiff's house, and as he approached the house he was driving approximately 30 miles per hour. When he was approximately 60 feet from the driveway to plaintiff's house, the minor plaintiff ran out into the street from behind a car parked in plaintiff's driveway. Veering to neither the right nor left, Crews applied his brakes and skidded 3½ car lengths before hitting the minor plaintiff with the right front bumper of the cab and thrusting him forward. The cab stopped almost immediately

upon hitting the minor plaintiff. The car parked in plaintiff's driveway was approximately three feet from the curb at the time of the accident.

James Parks, a street washer who was in the area on the day of the accident but who did not see the accident, testified that he talked with defendant Crews at the scene of the accident a short time after the accident. Crews told him that "he saw a larger child chasing a smaller child from under a carport, under this carport at the Wright home, and he thought they were going to stop or either turn around and go back up in the yard, but they came on out into the street and he ran over one, over the smaller child." The testimony regarding Crews' statement to Parks was objected to by defendant Cab Company and excluded as to said defendant by the court. On cross-examination Parks admitted testifying in his deposition that Crews told him the children ran out of the driveway into the street and did not mention at that time that Crews also told him that he saw the children at the carport. Parks explained that he was confused when he testified at deposition.

Katherine Kellogg, a county health department employee, testified that she was visiting the minor plaintiff's mother at the time of the accident, and had parked her 1965 Valiant in the driveway. She testified that she did not recall how far up into the driveway she had parked.

At the close of plaintiffs' evidence the court allowed defendant Cab Company's motion for a directed verdict. Defendant Crews then offered the following evidence:

Defendant Crews testified that the minor plaintiff ran out from behind the car parked in the driveway and he slammed on brakes immediately upon seeing him, but the cab skidded up to and hit the child, and then immediately stopped.

Kenneth Cook, a police officer with the Winston-Salem Police Department at the time of the accident, testified, while referring to the accident report which he prepared at the scene of the accident, that Crews told him the minor plaintiff had run out in the street from behind the parked vehicle, and he could not have prevented hitting the child. Cook also testified that the rear of the car parked in the driveway was approximately two or three feet from the curb.

The parties stipulated that at the time of the accident defendant Crews was on a mission for his employer, defendant Cab Company; that the street was dry and free of defects; that the weather was clear, and that the speed limit was 35 miles per hour.

The jury determined that plaintiffs were not injured by the negligence of defendant Crews. Plaintiffs appealed.

H. Glenn Pettyjohn for plaintiff appellants.

Womble, Carlyle, Sandridge & Rice by Allan R. Gitter and William C. Raper for defendant appellees.

HEDRICK, Judge.

[1] By their first two assignments of error plaintiffs contend the court erred in refusing to admit as against defendant Cab Company defendant Crews' admissions concerning the circumstances of the accident. By their tenth assignment of error plaintiffs contend the court erred in granting defendant Cab Company's motion for a directed verdict at the close of plaintiffs' evidence. Plaintiffs neither alleged nor offered proof of any independent negligent acts on the part of Cab Company. Therefore, Cab Company could only be vicariously liable for the alleged negligent acts of its agent Crews under the doctrine of respondeat superior. Crews' admissions were admitted in the case against himself, and were considered by the jury in rendering a verdict of whether Crews was negligent or not. The jury verdict absolving Crews of any liability also relieves Cab Company of liability, and renders moot any question of error on the part of the trial court in refusing to admit Crews' admissions into evidence against Cab Company or in granting Cab Company's motion for a directed verdict. *Bullard v. Bank,* 31 N.C. App. 312, 229 S.E. 2d 245 (1976). These assignments of error are not sustained.

[2] In his instructions to the jury on the issue of sudden emergency the trial judge stated, "[I]f the defendant was confronted by a sudden emergency caused by the negligence of another in running out in front of him, that he is not held to the wisest choice of conduct, but only to such choice as a person of ordinary prudence similarly situated would have made." Immediately before the jury began deliberation, the court further charged the jury as follows:

> "Now, ladies and gentlemen of the jury, during the noon recess one of the lawyers called my attention to a

statement that I made to you, and I think I probably inadvertently used the wrong word in my charge to you this morning. If you will recall, I charged you that if the defendant was confronted by a sudden emergency created by the negligence of another. Now, I inadvertently used the word 'negligence.' I should have used 'acts.' I should have said this, and this is what I intended to say to you: I charge that if the defendant was confronted by an emergency created by the acts of another in suddenly running out in front of him, that he is not held to the wisest choice of conduct but only to such choice as a person of ordinary prudence similarly situated would have made. But this principle of sudden emergency does not apply to one who by his own negligence has brought about or contributed to the emergency. In other words, ladies and gentlemen, a child under the age of seven in the State of North Carolina cannot be guilty of any negligent acts."

By their third assignment of error plaintiffs contend the court erred in referring to the "negligence" of the minor plaintiff in its original charge to the jury because the two-year-old plaintiff is legally incapable of negligence. They argue further that the correcting instruction quoted above did not remove the alleged prejudicial effect of the original instruction. We do not agree. At trial no issue of contributory negligence on the part of the minor plaintiff was raised, and we do not see how the trial judge's inadvertent use of the word "negligence" with respect to the minor plaintiff's actions could in any way prejudice the plaintiffs, but, in any event, the court's later clarifying instruction removed any possible prejudice caused by the original instruction. This assignment of error is without merit.

[3] The court excluded from evidence the following testimony elicited by plaintiffs from defendant Crews in his deposition.

"[Q.] Did the child travel in the air sixteen feet?

A. No, sir. If he had, I believe I'd have seen him.

Q. He traveled on the ground then? Sliding or rolling or—

A. It may be—no, sir, I just think—well he was undoubtedly up off the ground, yes, but—?

Q. In the air then?

A. I guess he must have been, sir. When I saw him he was laying flat on his face."

By their fourth assignment of error plaintiffs contend that in excluding the foregoing portion of defendant Crews' deposition the court erred to their prejudice because its ruling prohibited them "from proving that this two-year-old child was not merely 'tapped' by the automobile's impact, but was in fact projected no less than 16 feet from the point of impact, and thereby causing severe brain damage to this minor child." Since the jury did not reach the issue of damages, we do not perceive any prejudice to plaintiffs in the exclusion of the testimony. *Long v. Clutts,* 16 N.C. App. 217, 192 S.E. 2d 131 (1972), *cert. denied* 282 N.C. 426, 192 S.E. 2d 836 (1972). Moreover, an examination of the excluded testimony reveals that the questions called for the witness to speculate as to matters over which he obviously had little if any knowledge. We find no prejudicial error in the court's exclusion of this testimony.

[4] By their fifth assignment of error plaintiffs contend the court erred in not allowing former Officer Cook to testify what the collision report "indicated" with respect to the location of Mrs. Kellogg's car in the driveway. Assuming that the question objected to by the defendant and excluded by the court was meant to impeach Cook by showing that what he put on the collision report was inconsistent with his testimony at trial, and assuming therefore that the court erred in sustaining defendant's objection, the alleged error is not subject to review because we are unable to determine if plaintiffs have been prejudiced by the alleged error, since the answer to the question is not included in the record. *State v. Fletcher,* 279 N.C. 85, 181 S.E. 2d 405 (1971); Stansbury, N. C. Evidence 2d (Brandis Rev.) § 26.

[5] Plaintiffs contend the court erred in excluding from evidence the deposition of Mrs. Kellogg. Mrs. Kellogg testified on both direct and cross examination at the trial. When plaintiffs offered Mrs. Kellogg's deposition into evidence, they conceded it was "somewhat cumulative" to her testimony at trial. We have carefully examined Mrs. Kellogg's deposition and her testimony at trial, and find them to be substantially identical. It is within the trial judge's discretion to exclude such repetitious testimony, *Reeves v. Hill,* 272 N.C. 352, 158 S.E. 2d 529 (1968),

and we find no abuse of discretion in the judge's exclusion of the testimony.

[6] By their seventh assignment of error plaintiffs contend the court erred in excluding the minor plaintiff's hospital records introduced for the purpose of explaining and illustrating the extent of the physical injuries to the minor plaintiff. Obviously since the jury never reached the issue of damages, the exclusion of the testimony is not prejudicial to the plaintiffs. *Long v. Clutts, supra.* This assignment of error is not sustained.

The parties stipulated that the speed limit in the area of Argonne Boulevard was 35 miles per hour at the time of the accident. Defendant Crews testified that he was driving 30 miles per hour just before the minor plaintiff ran out in front of him. Plaintiffs assign as error the court's exclusion of testimony as to defendant Crews' knowledge of the posted speed limit on Argonne Boulevard. The court properly excluded the evidence as being irrelevant. This assignment of error has no merit.

The plaintiffs' other assignments of error are formal and raise no additional questions. We hold the plaintiffs had a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. PAUL URBAN

No. 7614SC534

(Filed 1 December 1976)

1. **Criminal Law § 26— double jeopardy — offense which is element of another offense**

When an offense is a necessary element in and constitutes an essential part of another offense, and both are in fact only one transaction, a conviction or acquittal of one is a bar to a prosecution of the other.

2. **Criminal Law § 26— double jeopardy — conviction of minor offense in inferior court — trial for higher crime**

Conviction of a minor offense in an inferior court does not bar a prosecution for a higher crime, embracing the former, only where the conviction in the inferior court was a nullity.

3. Criminal Law § 26— double jeopardy — conviction of misdemeanor possession of marijuana — trial for felonious possession with intent to sell and manufacture

Where defendant pled guilty in district court to misdemeanor possession of marijuana, the trial of defendant in superior court for felonious possession of the same marijuana with intent to sell or manufacture would subject defendant to double jeopardy as to the lesser included offense of misdemeanor possession.

APPEAL by the State from *Canaday, Judge.* Judgment entered 20 April 1976 in Superior Court, DURHAM County. Heard in the Court of Appeals 9 November 1976.

The State appeals from Judge Canaday's order dismissing three indictments against defendant on the grounds of double jeopardy.

On 12 April 1976 defendant was arraigned on three bills of indictment alleging (1) unlawful and felonious possession, (2) unlawful and felonious possession with intent to sell, and (3) unlawful and felonious possession with intent to manufacture marijuana. The defendant moved to dismiss the indictments on the grounds of double jeopardy. The State presented evidence on the motion tending to show the following:

On the evening of 12 December 1975, police officers searched the defendant's home for narcotics. The police acted under the authority of a proper warrant. They found several persons in the house who were smoking marijuana. They found less than one ounce of marijuana lying on the living room table. A person who identified himself as Joseph McPherson, but who proved to be the defendant, acknowledged ownership of this marijuana. Also, several ounces of marijuana were discovered in the living room closet. Defendant, still claiming to be "McPherson," denied owning this cache of the drug. He was arrested for possession of the smaller quantity of marijuana, taken before a magistrate that night and charged with misdemeanor simple possession under G.S. 90-95(a)(3), (d)(4). The magistrate's order did not specify the amount of marijuana which defendant possessed.

On 17 December 1975, an arrest warrant issued upon a finding of probable cause to believe that on 12 December defendant Paul Urban possessed more than one ounce of marijuana. On 14 January 1976, defendant was indicted for unlawful and felonious possession and possession with intent to sell more than

one ounce of marijuana. On 2 February 1976, defendant was indicted for possession with intent to manufacture.

On 10 March 1976, defendant pled guilty in district court to misdemeanor simple possession of marijuana as charged in the magistrate's order of 12 December. This order had, by then, been altered to identify the defendant as Paul Urban, not Joseph McPherson. Defendant was sentenced to a 30-day suspended sentence and a $25 fine plus costs.

Defendant's felony case came to trial on 12 April 1976. Defendant moved to dismiss the charges against him on the ground of double jeopardy. After argument by both parties and presentation of evidence by the State describing the search of defendant's house on 12 December, the court ruled on defendant's motion. In its order, filed 20 April 1976, the court found that defendant was charged with both misdemeanor possession and felonious possession of the same unspecified quantity of marijuana found in his house on 12 December 1975. The court further found that defendant pled guilty to misdemeanor possession. Therefore, the court concluded, as a matter of law, that defendant's plea of guilty to misdemeanor possession of an unspecified amount of marijuana barred prosecution for possession of any other marijuana found in defendant's home on 12 December 1976. Based on this conclusion, the court further held that, because possession of a drug is necessarily included within the offenses of possession with intent to sell and possession with intent to manufacture, the indictments for these crimes were also barred. The court dismissed the charges against the defendant, and from this order the State appeals.

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

Vann & Vann, by Arthur Vann III, for the defendant appellee.

ARNOLD, Judge.

The evidence discloses only one transaction in which defendant was found to be in constructive possession of both the marijuana found on the table and that found in the closet. The State asserts that there are two different crimes: first, possession of less than one ounce of marijuana, and, second, felonious possession of over one ounce of marijuana with intent to

sell and manufacture. It is the State's position that the trial court erred in allowing defendant's motion to dismiss the bills of indictment for the felony charges on grounds of double jeopardy.

Prohibition against double jeopardy has long been regarded as a part of the "law of the land" in North Carolina. *State v. Preston,* 9 N.C. App. 71, 175 S.E. 2d 705 (1970). In *Benton v. Maryland,* 395 U.S. 784, 23 L.Ed. 2d 707, 89 S.Ct. 2056 (1969), the U. S. Supreme Court decided that the Fifth Amendment prohibition against double jeopardy was made applicable to the states by the Fourteenth Amendment.

[1] The rule, as conceded by the State, is that when an offense is a necessary element in and constitutes an essential part of another offense, and both are in fact only one transaction, a conviction or acquittal of one is a bar to a prosecution to the other. Thus, a plea for misdemeanor possession of marijuana would ordinarily bar further indictments for felonious possession with intent to sell or manufacture because possession is an element of possession with intent to sell or manufacture. As decided by this Court in *State v. Smith,* 27 N.C. App. 568, 219 S.E. 2d 516 (1975), unlawful possession is, by necessity, an included offense within the charge of unlawful possession with intent to sell or deliver.

The State contends, however, that this case comes within an exception to the double jeopardy/lesser included offense rules. The exception asserted by the State was stated, but not applied, in *State v. Birckhead,* 256 N.C. 494, 498, 124 S.E. 2d 838 (1962), and the exception states that "conviction of a minor offense in an inferior court does not bar a prosecution for a higher crime, embracing the former, where the inferior court did not have jurisdiction of the higher crime." In accord with this rule is the United States Supreme Court decision, *Diaz v. U. S.,* 223 U.S. 442, 56 L.Ed. 500, 32 S.Ct. 250 (1912). Mr. Justice Rehnquist notes, in his dissent in *Blackledge v. Perry,* 417 U.S. 21, 32, 40 L.Ed. 2d 628, 94 S.Ct. 2098 (1974), that *Diaz* is still the law. Also relied upon by the State are the nineteenth century cases of *State v. Huntley,* 91 N.C. 617 (1884), and *State v. Shelly,* 98 N.C. 673 (1887).

Under the North Carolina Constitution as it existed in 1884 the justice of the peace had jurisdiction over petty misdemeanors defined as those punishable by not more than 30-days imprison-

ment and $50 fine. The justice of the peace had original and exclusive jurisdiction to try simple assaults where there was no deadly weapon used nor serious damage done. Session Laws 1881, c. 210, Code 1883, § 892. Original and exclusive jurisdiction over assaults using deadly weapons or doing serious damage was in superior court. In *Huntley,* defendant was charged with beating his wife with a rod. A justice of the peace heard evidence and concluded as a matter of law that the rod was not a deadly weapon, and that serious damage was not done, and judgment was entered accordingly. Thereafter, defendant was indicted in superior court for aggravated assault, and he pled lack of jurisdiction by the superior court. On appeal, our Supreme Court did not analyze the case in terms of double jeopardy, but held that the superior court did have jurisdiction to try defendant for the aggravated assault because the justice of the peace had been without jurisdiction to try defendant on the offense raised by the facts.

In *State v. Shelly, supra,* the defense of double jeopardy was raised, discussed and rejected in a case arising out of facts quite similar to *Huntley.* Defendant beat his victim with his fists, blackened one eye and impaired vision in the other. A justice of the peace tried, convicted and fined him for misdemeanor assault. Defendant was thereafter tried and convicted in superior court for an assault in which serious damage was done. The superior court rejected the plea of former jeopardy. Our Supreme Court affirmed, citing *Huntley* for the proposition that the trial before the justice of the peace was a nullity.

[2] Although time may have vitiated *Huntley* and *Shelly* we do not disregard these decisions. As previously noted, the rule relied upon by the State was stated in *State v. Birckhead, supra,* but it was not applied in that case. Nor do we find that the rule was applied in either *Huntley* or *Shelly.* The rule that "conviction of a minor offense in an inferior court does not bar a prosecution for a higher crime, embracing the former, where the inferior court did not have jurisdiction of the higher crime" is supported by decisions of other states, but we do not find it directly applied in this State. The law in North Carolina is that conviction of a minor offense in an inferior court does not bar a prosecution for a higher crime, embracing the former, where the conviction in the inferior court was a *nullity.* That was the holding in *Shelly.* See also, *State v. Price,* 15 N.C. App. 599, 190 S.E. 2d 403 (1972).

[3] To allow defendant's prosecution in superior court for the greater offense in this case would subject him to double jeopardy as to the lesser included offense. The State argues that defendant's guilty plea to misdemeanor possession in district court did not subject him to jeopardy of the greater offense and harsher penalties within the jurisdiction of the superior court. This argument ignores the theory of double jeopardy, which is to prohibit multiple prosecutions for the same crime.

Defendant's misdemeanor conviction is not a nullity. The district attorney is responsible for all prosecutions in district court and superior court. G.S. 7A-61. The election to try defendant in district court for misdemeanor possession was perhaps an inadvertence in view of the apparent evidence which would support conviction of a felony in superior court. However, the State is bound by that election. It is true, as the State argues, that by defendant's plea to the lesser offense in district court he was not in jeopardy of the greater offense and harsher penalties of superior court. However, defendant has been convicted and punished already for the lesser offense, possession of less than one ounce, and to try defendant for the greater offense, felonious possession, would also subject defendant to trial of the lesser included offense for which he has been convicted already. Since in fact there was only one transaction this would be double jeopardy as to the lesser offense.

Affirmed.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. SHARON MOORE

No. 765SC483

(Filed 1 December 1976)

1. Criminal Law § 118— charge on parties' contentions — prejudicial error

In a prosecution for second degree murder, the trial judge's statement of the State's contentions amounted to an expression of opinion on the facts in violation of G.S. 1-180; moreover, defendant was particularly prejudiced by the court's misstatements of defendant's contentions which amounted to misstatements of the evidence.

2. Criminal Law § 163— error in judge's statement of contentions — necessity for calling attention to

Ordinarily, it is the responsibility of the parties to bring to the judge's attention any errors in the statement of contentions; however, where the misstatement of a contention upon a material point includes an assumption of evidence entirely unsupported by the record, the misstatement must be held prejudicial, notwithstanding the absence of timely objection.

APPEAL by defendant from *Martin (Perry), Judge.* Judgment entered 8 January 1976 in Superior Court, PENDER County. Heard in the Court of Appeals 20 October 1976.

Defendant was tried on a bill of indictment charging her with second degree murder of her husband, Theodore Moore. The State's evidence tended to show that on the evening of 26 July 1975 defendant and her husband had been to a night club in Currie. They both had been drinking; Theodore had been drinking heavily. They returned to their mobile home in Canetuck about 1:30 a.m. on 27 July 1975. Theodore Moore, unsatisfied with the evening, left home alone and stayed out all night. He was driven home at approximately 6:30 a.m. on 27 July by his nephew, Barry Moore, who testified that Theodore was too drunk to drive himself home. The defendant and Theodore Moore's uncle, Germie Moore, were present at the trailer. Defendant got in the car, and she and Theodore Moore drove off. They returned a short time later. Theodore Moore entered the mobile home where Barry and Germie Moore were seated. He went to the refrigerator to get a beer. The defendant then entered the trailer, at which time Theodore Moore complained that someone had been "messing" with his beer. The defendant then walked into a room where she and Theodore Moore kept liquor for sale and where Theodore Moore kept several firearms including a .22 caliber rifle.

There was testimony for the prosecution that the defendant then called Theodore into the room; that he walked to the room carrying his beer; that as he entered through the doorway, he said "Oh no"; and that immediately thereafter defendant shot Theodore Moore in the chest with the .22 caliber rifle.

The defendant's evidence tended to show that after Theodore was brought home by Barry Moore, the defendant tried to take him to her mother's house because her mother could handle him when he was drunk. When Theodore discovered their desti-

nation, he hit the defendant and had her bring him back home. After arriving back at the trailer, Theodore Moore accused the defendant of messing with his beer and said, "Woman, I am going to kill you." She replied, "Oh, to hell with it. You will have to kill me because I am leaving." She then went into the room where the rifles were located to get her shoes. Theodore Moore then picked up a sawed-off pool cue that he used for a club and followed her into the room. Defendant testified that Theodore had no beer with him when he entered the room. Once in the room he began to choke the defendant. She pushed him off, and during this scuffle she felt the rifle beside her. She picked it up to strike him with the barrel. The victim grabbed the barrel, and the rifle fired wounding him in the chest. The club was not found by the investigating officer, but a beer bottle was discovered under the bed in the room where the shooting had occurred.

The jury returned a verdict of guilty of second degree murder. The defendant was sentenced to a term of fifty years. From the verdict and judgment, defendant appeals.

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

Gary E. Trawick for the defendant.

BROCK, Chief Judge.

[1] The defendant assigns error to statements made by the trial judge in his instructions to the jury. The defendant maintains that the trial judge's statement of the State's contentions amounted to an opinion on the facts in violation of G.S. 1-180 and that this error was compounded by the trial judge's misstatement of the defendant's contentions.

General Statute 1-180 reads as follows:

> *"Judge to explain law, but give no opinion on facts.*— No judge, in giving a charge to the petit jury in a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury, but he shall declare and explain the law arising on the evidence given in the case. He shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto; provided the judge

shall give equal stress to the State and defendant in a criminal action."

In his instructions the trial judge explained to the jurors that he was going to review the evidence necessary for them to understand his charge as to the law. Rather than summarize the evidence however, he proceeded to state the contentions of the parties, which in pertinent part are as follows:

"The State further contends that the defendant is a large, strong woman, able to defend herself against a highly intoxicated man without the use of any type of force or deadly weapon other than her own hands.

"The State further contends that the defendant lured her husband into the door of the bedroom by calling him and that this was heard and seen by two witnesses that have testified in this case and that after she lured him into the bedroom she shot him in the right chest with a .22 semiautomatic rifle; that the bullet penetrated the body and caused the death of this helpless man";

* * *

"The State contends that it would be totally unreasonable for you to believe that the defendant or anyone else would go into a one door bedroom with only one way to get out, call her husband in there, possess a deadly weapon such as a .22 semiautomatic rifle, unless her motive and intent was to kill him or at least to cause him serious bodily harm.

"The State also says that the deputy sheriff's testimony in this case indicates that the State's witnesses told him basically the same thing on the date of the killing as they have testified to in this courtroom, which the State says would indicate they have told you the truth.

"The State further says there could be no reasonable doubt in the minds of any reasonable man or woman that considered all of the evidence in this case and the Court's charge as to the law."

* * *

"She further says that you should not hold the fact against her that she had an offense of prostitution in the City of New York, for she returned to this county, lived

among you as one of your citizens and lived with Theodore Moore and subsequently married him.

"She further contends that on the date of the killing she and her husband were busy working together, cleaning the house, washing the automobile, selling liquor, drinking liquor, and that that night after a good day of working together selling and drinking some liquor that they went out to a club and stayed until well after midnight or something like two o'clock in the morning";

* * *

"That she was likewise concerned about him the next morning. She got up early in the morning; her husband came home drunk and that when he came home that he followed her in the bedroom, although she admitted she called him in there, and that he came in that bedroom with a sawed-off pool stick, and that when he came in there he began to choke her, kicked her, and she pushed him back with one hand and he stumbled and fell on the bed, and that while he was getting up she picked the butt end of the rifle and attempted to hit her husband on the bed with the barrel end of the rifle and that her husband grabbed the barrel and the rifle went off as she, the defendant, herself was being assaulted by her husband lying on the bed and in the process of attempting to get up."

* * *

"The defendant not only contends that there is evidence in this case of involuntary manslaughter, but she more strenuously contends that there is evidence in this case that she acted in self-defense and says therefore that you must not convict her of murder, or of manslaughter unless you first find beyond a reasonable doubt that the defendant did not act in proper self-defense."

It is in stating the contentions of the parties in criminal cases that errors frequently arise. The trial judge is not required to state the contentions of the parties. He is, however, required by G.S. 1-180 not to express any opinion to the jury about the merits of the case. Doubtless, his honor was influenced in his statement of contentions by the arguments of counsel to the jury, but contentions which may be argued properly by counsel may be highly improper when stated by the judge. *State v. McLean*, 17 N.C. App. 629, 195 S.E. 2d 336 (1973).

The trial judge must be extremely careful in that an argument by the district attorney, when repeated by the court as a contention, may give undue emphasis that would weigh too heavily upon the defendant. *State v. Stroud* and *State v. Mason* and *State v. Willis,* 10 N.C. App. 30, 177 S.E. 2d 912 (1970).

> "It has long been held in this State that even the slightest intimation from a judge as to the strength of the evidence, or as to the credibility of a witness, will always have great weight with a jury; and, therefore, the court must be careful to see that neither party is unduly prejudiced by any expression from the bench which is likely to prevent a fair and impartial trial." *State v. McLean, supra* at 632.

If the statement of a contention amounts to the expression of an opinion, it must be held prejudicial error even though unintended by the trial judge. *State v. Stroud, supra.*

The review of the contentions by the trial court stated that the victim was "helpless" against the attack, an assumption unsupported by the evidence in this record. The court stated that the prosecution's witnesses were truthful because their testimony was the same as that given the authorities immediately after the killing. This is a determination which should be reserved for the jury. *State v. Byrd,* 10 N.C. App. 56, 177 S.E. 2d 738 (1970). Of particularly harmful effect were misstatements by the court of the defendant's contentions, which amounted to misstatements of evidence. For instance, the court said that the defendant admitted that she had called the victim into the bedroom where the shooting took place. The defendant's evidence was to the contrary. The court said that the defendant contended there was evidence of involuntary manslaughter. This expression is unsupported by the record. The fact is defendant contended only that she acted in self-defense. Though unintended, the judge's statement of contentions amounted to a prejudicial statement of opinion prohibited by G.S. 1-180.

[2] This Court is well aware that ordinarily it is the responsibility of the parties to bring to the judge's attention any errors in the statement of contentions. However, "[w]here the misstatement of a contention upon a material point includes an assumption of evidence entirely unsupported by the record, the

misstatement must be held prejudicial, notwithstanding the absence of timely objection." *State v. Stroud, supra* at 37.

Stating in detail the contentions of the parties too often improperly colors the judge's instructions.

> "In charging the jury in a criminal case, the trial judge would be well advised to refrain from giving any contentions of the State or the defendant. However, if the judge feels that it is absolutely necessary that he give some contentions, it would appear that language to the effect that the State contends the defendant ought to be found guilty and the defendant contends that he ought not to be found guilty would be a sufficient statement of the contentions. At least, this would be giving equal stress to the State and the defendant." *State v. Stroud, supra* at 38 (Mallard, C. J., concurring).

Because of the prejudicial expressions of the trial judge, the defendant is entitled to a new trial.

The law does not require the trial judge to review all of the evidence nor to recapitulate the testimony of the witnesses one by one. The duty imposed upon the trial judge is to summarize only so much of the evidence as is necessary for him to apply the law. *State v. Vickers*, 22 N.C. App. 282, 206 S.E. 2d 399 (1974). General Statute 1-180 specifically provides: " . . . He shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto . . . "

However, in this case the trial judge did not at any time summarize, review, or state the evidence on the substantive features of the case. His only reference to the evidence was contained in the rather detailed review of the contentions of the parties.

We have not addressed the remaining assignments of error brought forward by defendant because they are not likely to occur upon a new trial.

New trial.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. CALVIN DALE McCALL

No. 7626SC490

(Filed 1 December 1976)

1. **Automobiles § 46— speed of car — observation of speedometer**

In this manslaughter prosecution, a passenger in defendant's car was properly allowed to testify that she "could see that the speedometer was past a hundred," although the witness testified that she couldn't see if it was to a hundred and ten, or a hundred and twenty, or what, and could only see half of the red needle, since the ability of the witness to observe and the precision with which she observed went to the weight and not to the admissibility of her testimony.

2. **Criminal Law § 71— instantaneous conclusion of the mind — admissibility**

Testimony by a passenger in defendant's car that she could tell that defendant "was about to lose control" of the vehicle was competent as an "instantaneous conclusion of the mind"; furthermore, even if the admission of such testimony was erroneous, the error was harmless in view of other testimony to the effect that defendant did lose control of the vehicle.

3. **Criminal Law § 88— cross-examination — bias of witness — question already answered — answer not within witness's competence**

In this prosecution for involuntary manslaughter, the trial court did not err in sustaining the State's objection to a question asked a witness on cross-examination as to whether she would stand to gain from a claim that deceased's estate would file against defendant and his insurer since (1) the witness, in effect, had already answered the question by testifying that she did not know whether she was a beneficiary of the deceased's estate, and (2) the answer called for would have been too speculative and would not have been within the knowledge or competence of the witness.

4. **Automobiles § 114— involuntary manslaughter — failure to maintain proper control — instructions — culpable negligence**

The court's charge in its mandate that the jury should find defendant guilty of involuntary manslaughter if it found beyond a reasonable doubt that "defendant failed to maintain proper control of his vehicle" did not constitute error where, immediately before such instruction, the court charged on criminal negligence, and the whole charge, when construed contextually, required the jury to find that the failure to maintain proper control was done intentionally or recklessly in order for defendant to be found guilty of the requisite culpable negligence.

APPEAL by defendant from *Barbee, Judge.* Judgment entered 21 January 1976 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 20 October 1976.

State v. McCall

Defendant was tried on a bill of indictment charging him with manslaughter in the death of Rocky Sexton Cobb on 27 September 1974 and he pled not guilty. The evidence presented by the State tended to show that on the night of 27 September 1974 defendant spent an hour visiting in a home in Mecklenburg County where several other people were also present; that at 11:00 p.m. they all left, intending to go to Virginia Cobb Cowart's trailer; that Tommy Cowart and Russell Cobb rode in one car, with Tommy Cowart driving; and that Mrs. Cowart, her child Tommy, Rocky Cobb, and defendant rode in another car, with defendant driving. Before they started, Mrs. Cowart asked defendant to let her drive, but defendant insisted on driving even though he "appeared flushed in the face." Both cars proceeded north on Interstate Highway 85. Defendant passed Cowart at a speed in excess of 100 m.p.h. and lost control of his car as he was moving back into the right-hand lane. The car flipped over several times, struck a car driven by Lynwood Gerard Stroud, and went down an embankment. It was stipulated that Rocky Cobb died of injuries received in the accident.

Defendant testified that he drank two or three beers on the night of the accident and that when he lost control of the car, he was driving at about 80 m.p.h.

The jury found defendant guilty of involuntary manslaughter. From a judgment imposing imprisonment of eight years, all of which were suspended except six months, defendant appealed.

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

Burroughs, McNeely & McNeely, by Thomas A. McNeely and Patrick M. McNeely, for the defendant.

MARTIN, Judge.

Defendant first contends the court erred in allowing testimony as to the speed of defendant's automobile and the conclusion that defendant was "about to lose control."

[1] Virginia Cobb Cowart, a passenger in defendant's car, testified as follows:

> "He mashed the accelerator and passed Tommy, and I slid over to the side and I could see that the speedometer was past a hundred. I couldn't see if it was to a hundred

and ten, or a hundred and twenty, or what; but I could only see half of the red needle, and I could tell that he was about to lose control."

Defendant contends that the witness's testimony here should have been stricken because she was not giving an opinion on the basis of observation or presence in the vehicle but on the basis of a partial observance of the speedometer.

It is well established in North Carolina that a lay witness of ordinary intelligence who has had a reasonable opportunity to observe a vehicle in motion may give his estimate as to the speed of the vehicle. *State v. Clayton,* 272 N.C. 377, 158 S.E. 2d 557 (1968); *Miller v. Kennedy,* 22 N.C. App. 163, 205 S.E. 2d 741 (1974); *State v. Woodlief,* 2 N.C. App. 495, 163 S.E. 2d 407 (1968). The ability of the witness in the instant case to observe and the precision with which she observed goes to the weight to be given to her testimony, but not to its admissibility.

[2] The conclusion of the witness that the defendant was about to lose control of the automobile is an "instantaneous conclusion of the mind" and it was not error for the trial judge to allow the statement to stand. See *State v. Nichols,* 268 N.C. 152, 150 S.E. 2d 21 (1966). Even assuming, *arguendo,* that the admission of testimony concerning losing control was error, we hold that such error was harmless in view of the other testimony in the record to the effect that defendant did lose control of the vehicle.

The defendant's first assignment of error is therefore overruled.

[3] The defendant contends in his second assignment of error that the trial court erred in sustaining the State's objection to a certain question on the cross-examination of Virginia Cowart. He contends that the cross-examination testimony might have indicated an interest or bias of the witness and therefore should have been admitted. On cross-examination Mrs. Cowart testified that she did not know whether she was a beneficiary of Rocky Cobb's estate. She was asked, "Do you know whether or not you would stand to gain from a claim that his [the deceased's] estate would file against [defendant] and his insurance company?" An objection to this question by the prosecution was sustained.

It has been held that a party may cross-examine a witness with respect to any evidence which tends to show the feeling

or bias of a witness in respect to the party or the cause. See *State v. Hart,* 239 N.C. 709, 80 S.E. 2d 901 (1954). However, the evidence in the instant case indicates that the witness had already testified that she did not know whether she was a beneficiary of the deceased's estate. This testimony leads us to conclude that, in effect, the witness had already answered the question to which the objection was sustained. Furthermore, the answer to the question would have to have been based on the assumption that a civil action would be brought by the unidentified administrator of the decedent's estate *and* on the assumption that the witness would have been a beneficiary of the estate. The answer called for would have been too speculative and would not have been within the knowledge or competence of the witness. Therefore, the objection to the challenged question was properly sustained.

[4] Finally, defendant contends the court erred in its instruction to the jury. He argues that the court erred in instructing the jury

> " . . . that if you find . . . beyond a reasonable doubt that . . . defendant . . . intentionally or recklessly operated his 1968 GTO motor vehicle on I-85 in excess of seventy-five miles per hour in a posted fifty-five mile-per-hour speed zone; or the defendant failed to maintain proper control of his vehicle, thereby proximately causing the death of Mr. Rocky Cobb, it would be your duty to return a verdict of guilty of involuntary manslaughter."

Defendant contends this instruction was erroneous because it could be interpreted to permit the jurors to convict defendant on the ground that he failed to maintain proper control of his vehicle even though such failure was not intentional or reckless.

It has been held that:

> " '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. . . . ' (Citation omitted.) It will be construed contextually, and isolated portions will not be held prejudicial when the charge as a whole is correct. (Citations omitted.) . . . [T]he fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal." (Citation omitted.) *State v. Lee,* 277 N.C. 205, 214, 176 S.E. 2d 765, 770 (1970).

Immediately before the court's mandate, which is the subject of this exception, the court charged the jury as follows:

> "The second thing the State has to prove is that the defendant's violation was criminally negligent. It must have been committed intentionally or recklessly. A reckless violation is one, where judging by reasonable foresight, the defendant is heedlessly indifferent to the safety and rights of others."

In construing the charge contextually, we conclude that the jury was required to find that either the speeding violation or the failure to maintain proper control of the vehicle, or both, must have been done intentionally or recklessly to provide the requisite culpable negligence. The trial judge's instruction was therefore proper and this assignment of error is overruled.

We are not inadvertent to the holding in *State v. Gainey*, 29 N.C. App. 653, 225 S.E. 2d 843 (1976), filed 16 June 1976, wherein a similar mandate was held erroneous. This error, however, was not dispositive of the case and a new trial was awarded on other grounds.

In the trial we find no prejudicial error.

No error.

Judges BRITT and VAUGHN concur.

LESSIE MAE C. HUDSON v. GRANGER C. HUDSON

No. 761DC508

(Filed 1 December 1976)

Divorce and Alimony § 23— failure to make child support payments — contempt of court — payment of delinquent amounts before contempt hearing

The court erred in holding defendant in contempt for failure to make child support payments on time in accordance with the court's prior order where the record shows that defendant paid the delinquent amounts between the time the motion to hold him in contempt was filed and the time of the hearing on the motion.

APPEAL by defendant from *Chaffin, Judge.* Judgment entered 20 February 1976 in District Court, PASQUOTANK County.

Heard in the Court of Appeals 16 November 1976. This is a civil action instituted by the plaintiff, Lessie Mae C. Hudson, for the custody and support of minor children against defendant, Granger C. Hudson, heard on plaintiff's motion to find the defendant in contempt for his wilful failure to comply with the court's order to support the minor children. The pertinent portions of the record before us disclose the following:

On 23 August 1974 the district court entered an order providing that beginning 8 August 1974 defendant pay $50.00 "every two weeks" for the support of his two minor children plus all medical and dental expenses of said children. On 6 October 1975 the plaintiff filed a motion to have the defendant show cause why he should not be held in contempt for wilful failure to comply with the foregoing order of the court. In this motion plaintiff alleged that defendant was current with his payments as of 10 July 1975, but that he was delinquent in all payments accruing since 10 July 1975. Plaintiff also alleged that defendant had failed to make payments for certain dental and medical expenses.

According to the record a hearing on plaintiff's motion was held on 3 November 1975 at which time the court entered an order finding the defendant in contempt for wilfully failing to make the payments pursuant to the 23 August 1974 order, but the judgment was not reduced to writing until 20 February 1976. In the written judgment, dated 20 February 1976, the court made the following pertinent findings and conclusions:

> "After hearing all of the evidence that was presented by both the plaintiff and the defendant, [at the 3 November 1975 hearing], the Court found and does find the following facts:
>
> (1) That this was a hearing to determine if the defendant was in willful contempt of the Court by violation of its order dated August 23, 1974, and that the Court had jurisdiction to hear the same and that all parties were properly before the Court and had an opportunity to present their evidence.
>
> (2) That the defendant is the father of two minor children, Ronald Hudson and Donald Hudson, and that the defendant was by a previous order of Honorable Wilson F. Walker, Jr., District Court Judge, dated August 23, 1974,

ordered to pay the sum of Fifty Dollars ($50.00) every two weeks, plus all medical and dental expenses of said children including hospital and doctor expenses.

(3) That the defendant was found to be in willful contempt in that:

(A) Prior to the motion being executed by the plaintiff on October 6, 1975, the defendant had willfully made no payment for the support of said children, Ronald Hudson and Donald Hudson, since the July 10, 1975 payment which was paid on July 26, 1975, and was therefore in violation of said order previously entered by Honorable Wilson F. Walker, Jr., District Court Judge.

(B) That defendant was amply able, from his current income, to make such payments of support.

(C) That the Court found that there was not sufficient evidence to find the defendant guilty as in willful contempt for failure to make payment of the dental services rendered by Dr. William Spence and the balance owed to Albemarle Eye Care Center, Ltd. for services rendered to Ronald Hudson.

It was therefore ORDERED, ADJUDGED AND DECREED that the defendant was held to be in violation of said order and as for willful contempt of the same in that he failed to make said support payments as ordered by the Court in said order, and:

(1) He was sentenced to serve thirty (30) days in the Tri-County Jail in Elizabeth City, North Carolina.

(2) That the defendant was allowed to purge himself of this contempt by:

(A) Paying all of the delinquent payments of support for said children and continue to make each and every other support payment on date due as provided in said order through the Office of the Clerk of Superior Court of Pasquotank County, and

(B) Within thirty (30) days from date, furnish proof to the Court that the defendant has paid to Dr. William Spence the remainder of the bill owed to Dr. William Spence for dental services rendered to said children, and

has made satisfactory arrangements with the Albemarle Eye Care Center, Ltd. to make payment for services rendered to Ronald Hudson in the amount of $72.00, and

(C) Pay to E. Ray Etheridge, the plaintiff's attorney, the sum of Two Hundred Dollars ($200.00) to be applied to the plaintiff's attorney fees, which fees were to be paid within thirty (30) days from date of the hearing."

* * *

"It is therefore ORDERED, ADJUDGED and DECREED

(1) That the defendant is held to be in violation of the order of Honorable Wilton F. Walker, Jr., District Judge, dated August 23, 1974, as previously set forth in this judgment and that defendant is sentenced to serve thirty (30) days in the Tri-County Jail in Elizabeth City, North Carolina.

(2) That the defendant pay to E. Ray Etheridge, the plaintiff's attorney, the sum of $200.00 to be applied to the plaintiff's attorney fees in addition to those ordered by the Court to be paid at the hearing dated November 3, 1975.

This 20th day of February, 1976."

Defendant appealed.

E. Ray Etheridge for plaintiff appellee.

Franklin B. Johnston for defendant appellant.

HEDRICK, Judge.

The record before us shows that the parties were unable to agree upon a record on appeal and the court settled the record on appeal pursuant to Appellate Rule 11 by order dated 11 June 1976. The court included in the record on appeal its own "Statement of the Record by the Court," wherein the court attempted to set out in narrative form what had transpired in the case both before and after the hearing held on 3 November 1975. In that "Statement" we find the following: "[T]he defendant paid $300.00 to the plaintiff for the support of his children after motion for contempt was filed by the plaintiff and just prior to the date of said hearing [on 3 November]." The record affirmatively shows that when plaintiff's motion to have the

defendant show cause why he should not be held in contempt was made on 6 October 1975, the defendant was delinquent in his support payments in the amount of $250 with another $50 payment due on 9 October 1975. According to the judge's own "Statement" the defendant paid $300 "after motion for contempt was filed by the plaintiff and just prior to the date of said hearing [on 3 November]." Thus it appears the defendant purged himself of any possible contempt between the time of the filing of the motion and the hearing on the motion on 3 November which resulted in his being found in contempt. A careful reading of the findings of fact set out in the judgment dated 20 February 1976 reveals that the court chose to ignore the $300 payment made on 13 October 1975 and attempted to base its conclusion that defendant was in contempt on the finding that he had wilfully failed to make the payments on time in accordance with the court's former order. The purpose of a civil contempt proceeding such as is involved in this case is to force the defendant's compliance with the court's order. To hold the defendant in contempt after that very purpose has been achieved is ordinarily contrary to the concept of the proceeding.

We hold the record before us fails to support the court's conclusion that defendant was in contempt for his wilful failure to comply with the court's order of support dated 23 August 1974. We point out, however, that our decision is based upon the fact that at the time of the hearing on 3 November 1975 defendant was in full compliance with the court's order as of 6 October 1975, the date on which the motion was filed. Whether the defendant has complied with the orders of the court with respect to the payments of support since the payment of $300 on 13 October 1975 and whether the defendant has paid the $200 attorney fee ordered on 3 November 1975 and the additional $200 attorney fee ordered on 20 February 1976 is not before us.

For the reasons stated that portion of the order finding the defendant in contempt and ordering him to be imprisoned for 30 days must be vacated.

The judgment from which defendant appealed requires the defendant to pay plaintiff's attorney a fee of $200 for representing the plaintiff through the hearing on 3 November 1975, and an additional fee of $200 for the hearings thereafter, in-

cluding the hearing on 16 February 1976. The question of the validity of this portion of the judgment is not specifically discussed in defendant's brief. However, since the appeal itself raises the question of whether the findings support the order, we deem it necessary to point out that the record supports the award of the attorney fees totaling $400.

The result is—that portion of the judgment finding the defendant in contempt and ordering him imprisoned for 30 days is vacated; that portion of the judgment ordering the defendant to pay plaintiff's attorney fee totaling $400 is affirmed.

Vacated in part and affirmed in part.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION AND SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, APPLICANT v. RUFUS L. EDMISTEN, ATTORNEY GENERAL

No. 7610UC476

(Filed 1 December 1976)

Telephone and Telegraph Companies § 1; Utilities Commission § 6— telephone rates — charge for directory assistance

In fixing the schedule of rates and charges of a telephone company, the Utilities Commission acted within its authority in providing for a charge of twenty cents for each local directory assistance request by a subscriber in excess of five requests per month.

APPEAL by the Attorney General (Intervenor) from an order of the North Carolina Utilities Commission entered on 19 December 1975. Heard in the Court of Appeals 19 October 1976.

On 19 July 1974, Southern Bell Telephone and Telegraph Company filed an application with the Utilities Commission seeking an adjustment in its rates and charges. The Commission set the application for hearing as a general rate case and suspended the proposed rate adjustment. Interim rate relief was denied. Southern Bell filed two schedules of rates and charges, each of which was designed to produce about $45,-

184,246.00 in additional revenues. Under one of the proposed schedules the cost of providing directory assistance service would have been recovered in the basic rates. Under that schedule, as in the past, the entire cost of directory assistance would have been borne by the company subscribers as a whole without regard to whether a particular subscriber used directory assistance service. In the other, a portion of that cost was taken out of the basic rate and a separate charge placed on certain local directory assistance inquiries.

The Commission disallowed rate adjustments which would have increased revenues by $45,184,246.00, but allowed adjustment in rates and charges that are calculated to produce $28,148,633.00 in additional revenues.

The Commission had previously issued orders recognizing the intervention of the Attorney General, the Department of Defense and all other executive agencies of the United States, the North Carolina Merchants Association and the American District Telegraph Company. Only the Attorney General has appealed.

Attorney General Edmisten, by Special Deputy Attorney General Robert P. Gruber and Associate Attorney Jerry B. Fruitt, for the State.

North Carolina Utilities Commission, by Commission Attorney Edward B. Hipp and Associate Attorney Antoinette R. Wike, for plaintiff appellee.

Joyner & Howison, by Robert G. Howison, Jr., and R. Frost Branon, Jr., attorneys for plaintiff appellee, Southern Bell Telephone & Telegraph Company.

VAUGHN, Judge.

The Attorney General does not contend that the total amount of additional revenues, $28,148,633.00 is excessive. He only contests the structure of one of the many rates and charges that make up the approved rate schedule. That attack is on the portion of the order wherein the Commission seeks, in summary: to take part of the cost of directory assistance off of the customer who does not use the directory assistance service and place it on those who do; to reduce the total cost of providing directory assistance service by discouraging wasteful, unnecessary

and abusive use of the service and pass the savings along to all subscribers.

Finding of Fact No. 19 is as follows:

> "19. That charging for directory assistance is an appropriate means of requiring those subscribers who use the local directory assistance service to pay a portion of the costs incurred to provide the service."

There was ample evidence to support the finding of fact. The Commission summarized some of the evidence and its conclusions, and therefore, we think it is appropriate to quote part of the Commission's summary:

> "Based on the foregoing analysis, the Commission concludes that charges for directory assistance inquiries are an appropriate method of allocating to subscribers a portion of the cost of specific services used. It is unquestionable that a vast number of unnecessary calls are made for information that is readily available or can be made readily available on an ongoing basis. This practice is a burden on the general body of telephone rate-payers and is a hindrance to keeping basic charges for service as low as possible, which is in the best interest of all subscribers, especially those subscribers with marginal ability to maintain telephone service. The reduction of 82% of the directory assistance traffic at Cincinnati is a clear example of the fact that a D.A. charge, among other things, will cause telephone users to consult the directory for desired numbers and to record numbers once obtained from other sources. The Commission is of the firm opinion that requests for directory assistance create an identifiable cost which should be borne by those for whom it is incurred.
>
> The Commission concludes that a five (5) free call monthly allowance will adequately provide for the reasonable needs of nearly all subscribers and that a charge of $.20 for each local directory assistance request in excess of five (5) monthly per subscriber should be approved. The Commission further concludes that there should be no charge for toll directory assistance inquiries made outside the home area code. With respect to the toll directory assistance inquiries made within the home area code, a matching plan should be implemented and subscribers should be

allowed one free inquiry for each sent paid toll call to a number in the home numbering area."

(In a supplementary order the Commission provided that the directory assistance charge would not be applicable to subscribers or primary users who are blind or physically handicapped to the extent that they are unable to use the telephone directory.) We also take note of evidence tending to show that, under former schedules, the cost of directory assistance is presently borne by all subscribers even though the cost is caused by a relatively small percentage of the subscribers. (17% of the customers make 75% of all the calls to directory assistance; 54% of the subscribers originate less than 4% of the inquiries to directory assistance.) Many of the inquiries are made for numbers that are listed in the subscribers' own telephone directory.

We have considered all of the assignments of error brought forward by the Attorney General and conclude that they are without merit.

The findings of fact made by the Commission are supported by competent, material and substantial evidence. They are, therefore, conclusive. The rate schedules approved by the Commission are deemed prima facie just and reasonable. *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705. Neither such findings of fact nor the Commission's determination of what rates are reasonable can be reversed or modified by a reviewing court simply because the court might have reached a different finding or determination upon the evidence. *Utilities Comm. v. Telephone Co., supra.* The rate structure ordered by the Commission will remain under the observation of the Commission and its staff of specialists. The order was made on the basis of the statistics then available. The Commission made it clear that the approved schedules would be subject to revision. In its supplementary order it noted:

"On December 19, 1975, the Commission issued its Order in this docket granting partial increases in rates and charges and providing for a directory assistance charge of twenty cents for each use of directory assistance over and above five uses per month on an experimental basis for a test year of calendar year 1976, with the requirement that Southern Bell Telephone and Telegraph Company (hereinafter called 'SOUTHERN BELL') report fully to the Com-

mission on all data relating to the directory assistance charge as provided in ordering paragraph 8 on pages 54 and 55 of said Order for one representative month each quarter for the four quarters of 1976.

* * *

The directory assistance charge was authorized by the Commission for experimental purposes to determine the cost and effect of providing directory assistance service and the reasonableness of imposing a separate charge for such service."

In fixing the schedule of rates and charges of a public utility, the Commission is exercising a function of the legislative branch of government. There is no showing on this record that the Commission has acted other than within the scope of the authority delegated to it by the Legislature or that it has exceeded the limitation imposed upon the Legislature by the State or Federal Constitutions. The order is, therefore, affirmed.

Affirmed.

Judges BRITT and MARTIN concur.

STATE OF NORTH CAROLINA v. MICHAEL SMALL

No. 7618SC570

(Filed 1 December 1976)

1. **Rape §§ 1, 5— two acts of intercourse — two rapes — rape not continuing offense**

In a prosecution of defendant for two offenses of rape which allegedly occurred on the same night and involved the same victim, the trial court did not err in failing to grant defendant's motion for nonsuit on the second charge of rape based on defendant's argument that the second incident of sexual intercourse complained of was only a continuation of the first incident, since the offense of rape is terminated by a single act or fact, and the evidence in this case was sufficient to establish two distinct offenses and to support the verdict of guilty in both cases.

2. **Criminal Law § 165— recording of jury argument waived — defendant's objection to portion of argument — failure of court to record portion — no error**

Where counsel for the State and defendant agreed that jury arguments would not be recorded, the trial judge did not abuse his

discretion in refusing to have recorded a portion of the district attorney's argument to which defendant had objected.

3. **Criminal Law § 115— instruction on lesser included offenses — error favorable to defendant**

If the court charges on a lesser included offense when all the evidence tends to support a greater offense, the error is favorable to the defendant and he is without standing to challenge the verdict.

APPEAL by defendant from *Seay, Judge.* Judgment entered 13 February 1976 in Superior Court, GUILFORD County. Heard in the Court of Appeals 16 November 1976.

By two bills of indictment proper in form, defendant was charged with (1) first-degree rape and (2) second-degree rape. Carol Pauline is the victim named in both bills and both offenses allegedy occurred on 27 September 1976. The State elected to ask for no verdict greater than second-degree rape and the cases were consolidated for trial. Defendant pled not guilty.

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

On the evening of 26 September 1975 Carol Pauline, who was married and the mother of a two-year-old child, went out dancing with her girl friend and two male friends. At around 1:00 a.m. they returned to her girl friend's apartment in High Point where everyone except Mrs. Pauline went to sleep. Sometime between 3:00 and 4:00 a.m. she decided to walk home and as she was walking on Lexington Avenue toward Main Street a man (later identified as defendant) began following her and making gestures.

Mrs. Pauline realized that the man was a deaf mute and one of his arms was "like a nub"; she estimated that he weighed around 200 pounds. After a brief attempt at conversation with Mrs. Pauline, defendant dragged her into some bushes and threw her on the ground. She struggled to get away but when he hit her three times in her face she ceased further resistance. Defendant then proceeded to rape her.

Thereafter, she attempted to lure defendant to her friend's apartment so that she could get help. Before getting to the apartment, however, he dragged her into some bushes and raped her again. On that occasion when she attempted to resist he raised his fist as though to hit her again so she ceased strug-

gling. Following the second incident Mrs. Pauline ran to her friend's apartment, woke her up and defendant disappeared. She called her husband and he carried her to the hospital. Following the incidents Mrs. Pauline had a black and swollen eye and abrasions on her back and knees.

Earlier on the night in question defendant was seen by police in the South Main Street area of High Point near a beer joint where defendant told police he was being chased by two men who wanted to kill him.

Defendant presented no evidence.

The jury returned verdicts finding defendant guilty of second-degree rape in both cases. The court entered one judgment in the two cases, namely, that defendant be imprisoned for the term of not less than 35 nor more than 40 years, to be given credit for time spent in custody pending trial. Defendant appealed.

Attorney General Edmisten, by Associate Attorney Henry H. Burgwyn, for the State.

Boyan and Slate, by Joseph E. Slate, Jr., for defendant appellant.

BRITT, Judge.

[1] Defendant assigns as error the failure of the trial court to grant his motion for nonsuit on the second charge of rape. We find no merit in this assignment.

Defendant appears to argue that the second incident of sexual intercourse complained of was only a continuation of the first incident, hence the evidence tended to show only one offense. While defendant does not cite, and our research does not disclose, any case from this jurisdiction which we consider directly on point, we think the principle stated in *State v. Johnson,* 212 N.C. 566, 194 S.E. 319 (1937), is applicable here. In that case, in an opinion by Justice (later Chief Justice) Barnhill, our Supreme Court said (page 570) : "A continuing offense . . . is a breach of the criminal law not terminated by a single act or fact, but which subsists for a definite period and is intended to cover or apply to successive similar obligations or occurrences."

Although *State v. Johnson, supra,* involved a continuing offense, nonsupport of a child, we think the converse is true in this case. The offense of rape is terminated by a single act or fact and the evidence in the case at bar was sufficient to establish two distinct offenses and to support the verdict of guilty in both cases. In 75 C.J.S., Rape § 4, we find: "Generally rape is not a continuous offense, but each act of intercourse constitutes a distinct and separate offense."

The assignment of error is overruled.

[2] Defendant assigns as error the failure of the trial court to allow him "to get into the record the particular portion of the assistant district attorney's argument to the jury objected to and in failing to direct that the remainder of the argument of the assistant district attorney be transcribed." This assignment has no merit.

The record discloses that after all evidence was presented counsel for the State and the defendant agreed that jury arguments would not be recorded; that counsel for defendant and the State presented their arguments to the jury; that during the district attorney's argument defendant objected to a particular portion of the argument and the court overruled the objection; and that the court then refused defendant's motion to have the court reporter record the portion of the argument objected to.

It is well settled that the control of the jury arguments of counsel must be left largely to the discretion of the trial court and its rulings thereon will not be disturbed in the absence of gross abuse of discretion. 4 Strong, N. C. Index 3d, Criminal Law § 102.2. "The manner of conducting the argument of counsel, the language employed, the temper and tone allowed, must be left largely to the discretion of the presiding judge. He sees what is done, and hears what is said. He is cognizant of all the surrounding circumstances, and is a better judge of the latitude that ought to be allowed to counsel in the argument of any particular case." *State v. Thompson,* 278 N.C. 277, 179 S.E. 2d 315 (1971).

In the case at hand, in view of the agreement to waive the recording of jury arguments, we do not think the trial judge abused his discretion in refusing to have recorded a portion of the district attorney's argument. Furthermore, considering the

overwhelming evidence of defendant's guilt, we do not feel that an indiscreet statement by the district attorney was of real significance. It is only in extreme cases of the abuse of the privilege afforded counsel in making arguments to the jury that a new trial is warranted. *State v. Thompson, supra.*

Defendant assigns as error the admission of testimony tending to show his presence, some three or four hours prior to the times in question, at a beer joint and parking lot in High Point a considerable distance from the scene of the alleged offenses. We find no merit in this assignment.

Defendant argues that the testimony was irrelevant and that its only purpose was to prejudice him in the eyes of the jury. The argument is not persuasive. By his pleas of not guilty defendant imposed on the State the burden of proving every element of the charges against him, even to his being in the City of High Point on the night in question. In *State v. Davis*, 265 N.C. 720, 723, 145 S.E. 2d 7, 10 (1965), we find:

> "It is not required that evidence bear directly on the question in issue, but it is competent if it shows circumstances surrounding the parties necessary to an understanding of their conduct and motives and the reasonableness of their contentions." 2 Strong, N. C. Index, Evidence, § 15. "When evidence is material and competent, objection on the ground that it would tend to discredit a party in the eyes of the jury, is untenable." *Ibid.* . . .
>
> The assignment of error is overruled.

By his assignments of error 3, 4, 5 and 6, defendant contends the trial court erred in its instructions to the jury in that it expressed an opinion on the evidence, did not properly state his contentions, and did not give equal stress to his contentions and those of the State, in violation of G.S. 1-180. It suffices to say that we have carefully reviewed the jury charge, with particular reference to the portions challenged by these assignments, and conclude that the court did not violate G.S. 1-180. The assignments of error are overruled.

By his eighth assignment of error, defendant contends the court erred in its jury instructions with respect to second-degree rape and the lesser included offenses. Here again, we have reviewed the instructions in the light of this assignment and conclude that the court did not commit error.

Finally, defendant contends by his ninth assignment of error that the court erred in submitting as alternate verdicts the lesser included offenses of assault with intent to commit rape and assault on a female. He argues that there was no evidence tending to show a commission of the lesser included offenses.

[3] Assuming, *arguendo,* that there was no evidence tending to show the lesser included offenses, defendant has failed to show that he was prejudiced. The rule is well established in this jurisdiction that if the court charges on a lesser included offense when all the evidence tends to support a greater offense, the error is favorable to the defendant and he is without standing to challenge the verdict. *State v. Vestal,* 283 N.C. 249, 195 S.E. 2d 297, *cert. denied,* 414 U.S. 874, 38 L.Ed. 2d 114, 94 S.Ct. 157 (1973), and cases therein cited. See also *State v. Harris,* 23 N.C. App. 77, 208 S.E. 2d 266 (1974). The assignment of error is overruled.

In defendant's trial and the judgments imposed, we find

No error.

Judges VAUGHN and MARTIN concur.

HAROLD E. DRIGGERS v. COMMERCIAL CREDIT CORPORATION, LARRY HARRIS, AND HARRIS KELLY MUSIC COMPANY

No. 7618SC434

(Filed 1 December 1976)

1. **Pleadings § 11; Rules of Civil Procedure § 13— claim arising after answer — no compulsory counterclaim**

Where a cause of action, arising out of the transaction or occurrence that is the subject matter of the opposing party's claim, matures or is acquired by a pleader after he has served his pleading, the pleader is not required thereafter to supplement his pleading with a counterclaim, although G.S. 1A-1, Rule 13(e), permits the court to allow such supplemental pleading to assert a counterclaim.

2. **Pleadings § 11; Rules of Civil Procedure § 13— no knowledge of claim when answer filed — counterclaim not compulsory**

Plaintiff's claim for fraud based on differences in the original and a purported "duplicate" of a conditional sales contract was a permissive, not compulsory, counterclaim in defendant's prior action

on the contract against plaintiff to recover a deficiency remaining after repossession and sale of the property purchased under the contract where plaintiff learned of the allegedly fraudulent acts by defendant during the prior trial and there was no showing that plaintiff knew or in the exercise of reasonable diligence should have known of his alleged claim for fraud at the time he served his answer in the prior action. G.S. 1A-1, Rule 13(a).

APPEAL by plaintiff from *Lupton, Judge.* Judgment entered 30 December 1975 in Superior Court, GUILFORD County. Heard in the Court of Appeals 11 October 1976.

Action by Commercial Credit Corporation against Harold E. Driggers

On or about 11 February 1964 Driggers executed a conditional sales contract for the purchase of an organ and tone cabinet from Harris Kelly Music Company. The contract was executed on a form furnished by Commercial Credit Corporation, which was designed for assignment to Commercial Credit and which in fact was assigned by Harris Kelly Music Company to Commercial Credit. Driggers defaulted in the monthly payments on the contract, and on or about 21 June 1966 Commercial Credit repossessed the organ and tone cabinet. Commercial Credit sold the organ and tone cabinet. After applying the proceeds to the costs and balance of the indebtedness, Commercial Credit filed a complaint on or about 9 July 1973 seeking a deficiency judgment against Driggers for $726.04.

Driggers filed answer to the complaint of Commercial Credit on 21 November 1973. Discovery proceedings were initiated by Driggers on 1 February 1974. By order dated 24 January 1975 Commercial Credit was directed to produce for copying the original of the contract signed by Driggers on 11 February 1964. Instead of producing the original of the contract as ordered, Commercial Credit delivered to Driggers a "duplicate" contract.

When the Commercial Credit action against Driggers came on for trial on 24 February 1975, Driggers learned that the "duplicate" contract furnished to him by Commercial Credit differed in its terms from the original which he had signed. The original which Driggers had signed did not provide for a private sale in the event of repossession or for deficiency judgment. The "duplicate" specifically provided for private sale in the event of repossession and for deficiency judgment. Upon this

showing, Commercial Credit submitted to a voluntary dismissal with prejudice in its action against Driggers.

Action by Harold E. Driggers against Commercial Credit Corporation and Harris Kelly Music Company

The present action was commenced by Driggers against Commercial Credit and the Music Company on 26 March 1975 seeking damages for alleged fraud of defendants flowing from obtaining his carbon signature on a contract different from the original which he signed.

Defendants moved to dismiss this action on the ground that Driggers' claim of fraud constituted a compulsory counterclaim in the former action. In the order appealed from, the trial judge concluded that the matters alleged in the present action constituted the basis of a claim by Driggers in the prior action, constituted a claim arising out of the transaction upon which the complaint in the prior action was based, and did not require the presence of third parties of whom the court could not acquire jurisdiction. Holding that G.S. 1A-1, Rule 13(a), required that Driggers should have asserted his fraud claim in the prior action, the trial judge dismissed plaintiff's action with prejudice.

Max D. Ballinger for the plaintiff.

Smith, Moore, Smith, Schell & Hunter, by J. Donald Cowan, Jr., for the defendant, Commercial Credit Corporation.

BROCK, Chief Judge.

The only question properly before us for review is the interpretation placed upon G.S. 1A-1, Rule 13(a), by the trial judge. We express no opinion upon Driggers' allegations of fraud or the alleged damages arising therefrom.

The pertinent provisions of G.S. 1A-1, Rule 13(a), are:

> "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim . . . "

As can be seen, the rule refers to a claim which the pleader has at the time of serving the pleading.

Driggers' answer in the prior action was served on 19 November 1973. On 1 February 1974 Driggers sought a copy of the contract sued upon by Commercial Credit. Finally in January 1975 an order was entered requiring Commercial Credit to produce the contract. Instead of producing the contract signed by Driggers, Commercial Credit produced a "duplicate" which contained a carbon impression of Driggers' signature. It was under the terms of this "duplicate" contract that Commercial Credit was proceeding in its action against Driggers. It was not until the day of trial in February 1975 that Driggers learned of the difference between the terms of the contract that he had signed and the terms of the "duplicate" contract which had been inserted to obtain the carbon impression of his signature. As soon as this difference in terms was brought to light, Commercial Credit submitted to a voluntary dismissal of its action with prejudice.

In North Carolina an action for fraud accrues when the aggrieved party discovers the facts constituting the fraud, G.S. 1-52(9), or when, in the exercise of reasonable diligence, such facts should have been discovered. *Wilson v. Development Co.*, 276 N.C. 198, 171 S.E. 2d 873 (1970). There is nothing in the record before us to suggest that Driggers knew or should have known, at the time he filed his pleading in the former action, of the existence of the "duplicate" contract containing terms different from the one that he signed. Indeed, it was not until the day of the trial in February 1975 that Commercial Credit allowed the discrepancy to come to light. This was more than a year after Driggers had served his answer on Commercial Credit. Driggers undertook to learn of the terms of the contract as early as February 1974, but by reason of Commercial Credit's failure to strictly comply with the court order, Driggers was only furnished the "duplicate" contract. Nevertheless, Commercial Credit seems to argue that Driggers should have opposed its effort to take a voluntary dismissal in the former action. In this way Commercial Credit argues that Driggers should have sought leave to amend his answer to assert the counterclaim in the prior action.

[1] Where a cause of action, arising out of the transaction or occurrence that is the subject matter of the opposing party's claim, matures or is acquired by a pleader after he has served his pleading, the pleader is not required thereafter to supplement his pleading with a counterclaim. Although G.S. 1A-1, Rule

13(e), permits the court to allow such supplemental pleading to assert a counterclaim, such supplemental pleading is not mandated and failure to do so will not bar the claim. *See* 3 Moore's Federal Practice, ¶ 13.32.

[2] Since there is no showing that Driggers knew or by the exercise of reasonable diligence should have known of his alleged claim for fraud at the time he served answer in the prior action, his claim falls within the exception to Rule 13(a) and constitutes a permissive, not compulsory, counterclaim. His failure to assert his claim in the prior action is therefore not a bar to his present action.

Reversed and remanded.

Judges VAUGHN and MARTIN concur.

GLOVER B. COX v. McDONALD DICK

No. 7614SC497

(Filed 1 December 1976)

Negligence § 29— steadying ladder — failure to use due care — insufficiency of evidence of negligence

In an action to recover for injuries sustained by plaintiff when he fell from a ladder while removing leaves from the roof of defendant's residence, the trial court properly directed verdict for defendant where the evidence tended to show that defendant agreed to hold and steady a ladder for plaintiff; when plaintiff had one foot on the top rung of the ladder and one foot on the roof of the house, the ladder slipped, thereby causing him to fall; but there was no evidence that defendant, in holding the ladder, failed to use due care and that failure caused the ladder to slip.

APPEAL by plaintiff from *Canaday, Judge.* Judgment entered 15 January 1976 in Superior Court, DURHAM County. Heard in the Court of Appeals 20 October 1976.

This is an action to recover for injuries sustained by plaintiff when he fell from a ladder while removing leaves from the roof of defendant's residence.

In summary, plaintiff alleged the following: Defendant engaged plaintiff to clean the gutters at defendant's home and

furnished a ladder to be used for that purpose. Defendant agreed to hold the ladder upon which plaintiff was to stand. Defendant negligently failed to hold the ladder and allowed it to slip from under plaintiff and caused him to fall. The fall resulted in serious injuries to plaintiff.

At the close of plaintiff's evidence the court allowed defendant's motion for a directed verdict.

Bryant, Bryant, Drew & Crill, P.A., by Victor S. Bryant, Jr., for plaintiff appellant.

Spears, Spears, Barnes, Baker and Boles, by J. Bruce Hoof; Haywood, Denny and Miller, by George W. Miller, Jr., attorneys for defendant appellee.

VAUGHN, Judge.

The only assignment of error is that the court erred in allowing defendant's motion for directed verdict.

We must, therefore, consider the evidence in the light most favorable to plaintiff. When so considered, it tends to show the following: Plaintiff is engaged in roofing and gutter work. He solicited the job of cleaning defendant's gutters and a contract price of $14.00 was agreed upon. Plaintiff's ladder was too short and, instead of leaving the job to get a longer ladder, plaintiff accepted defendant's offer of the use of defendant's ladder. At defendant's suggestion plaintiff's helper went to work on a lower section of the roof and defendant, instead of the helper, was to hold the ladder for plaintiff. Plaintiff then proceeded to clean the gutters with defendant holding the ladder. The ladder was 32 feet long and extended about 2 feet above the gutter. Plaintiff's testimony as to what happened is as follows:

> "After we moved the ladder the second time, I went back up the ladder. Before I started up the ladder that time, Dr. Dick was standing on the lower side of the ladder and had one hand on it until I got above his head. After I got above his head, I turned and he was holding the ladder with both hands, a hand on each side. I then went on up the ladder and I cleaned out from my left to the gutters and there is a dormer coming out of the roof and it has got a valley on each side of the dormer and they were full of trash and I hollered down and told Dr. Dick I couldn't reach that and he said he would get me

a stick and I could reach it with a stick. I came down the ladder and Dr. Dick got me a stick about 3½ or 4 feet long. I took the stick and went back up the ladder. When I started up the ladder that time, Dr. Dick was on the lower side holding it with one hand and when I got above his head, I turned around and looked and he had one hand on each side holding it, kind of leaning in on it to steady it, so I went on up the ladder. Once I got up the ladder, I went as far as I could on the ladder and I still couldn't reach all of the valleys with the stick, I lacked about a foot. At that time, Dr. Dick told me to go on up to the top of the ladder and to put one foot on the roof and I could reach it all. I told him all right, to hold the ladder and I went on up and put my right foot on the top rung of the ladder and I was holding my left hand on the ledge of the edge of the dormer roof that comes out just the roof and the sheathing under it, and I threw my left foot over on the roof. I was gripping the roof of the dormer with my fingers, but I couldn't get my hand around it, there was nothing to get around. I was gripping the roof with my left hand and the valley was right in front of me running catty-cornered up the roof. I took the stick in my right hand and once I had my left foot up on the roof and my right foot on the top rung of the ladder, I reached over with my left hand and was going to clean the valley out when the ladder slipped.

I felt the ladder slide out from under my right foot and the ladder slipped to the side. I had one foot on the roof and one foot setting on top of the ladder and I kind of split. As a result of the ladder slipping to the right with my right foot on it, I fell. I don't recall anything but just falling. I don't remember anything else for about two days. Just before I fell, just before the ladder slipped, I had seen Dr. Dick standing on the ground holding the ladder. The last time I saw him, he was standing there with one hand on each side of the ladder holding, like he was when I first went up, he was on the side of the ladder away from the house."

The motion for directed verdict was made on "the grounds that the plaintiff has failed to offer evidence of negligence on the part of the defendant proximately causing injury or damage

to him, and in any event, the plaintiff's own evidence shows contributory negligence on his part as a matter of law . . . . "

We will consider whether plaintiff offered evidence of negligence on the part of defendant proximately causing injury to plaintiff. When defendant agreed to hold the ladder for plaintiff he assumed and therefore owed plaintiff a legal duty. The duty was to exercise the degree of care (in holding the ladder) for plaintiff's safety that a reasonably prudent person, under like circumstances, would have exercised. He did not, however, become an insurer of plaintiff's safety. Plaintiff's evidence tends to show that the ladder slipped and that the slipping of the ladder caused plaintiff to fall. Defendant's liability, however, cannot be predicated solely on those facts. It cannot be said that the slipping of the ladder in this case was such an occurrence that usually does not happen in the absence of actionable negligence. Plaintiff's evidence must show that defendant failed to use due care; that he failed to exercise the degree of care a reasonably prudent person would have exercised under similar circumstances, and that that failure caused the ladder to slip. There is no evidence in the record, direct or circumstantial, to support the inferences that defendant was not using due care in holding the ladder and that, if he had been doing so, the ladder would not have slipped. Plaintiff is, of course, entitled to every reasonable inference that arises on the evidence. He is not, however, entitled to go to the jury on evidence which raises only a conjecture of negligence. "To hold that evidence that a defendant *could have been* negligent is sufficient to go to the jury, in the absence of evidence, direct or circumstantial, that such a defendant *actually was* negligent, is to allow the jury to indulge in speculation and guesswork." *Jenkins v. Starrett Corp.*, 13 N.C. App. 437, 186 S.E. 2d 198.

Plaintiff's evidence fails to show actionable negligence by the defendant. We do not, therefore, reach the question of whether plaintiff's evidence shows that he was contributorily negligent as a matter of law.

Affirmed.

Judges BRITT and MARTIN concur.

STATE OF NORTH CAROLINA v. WILLIE WEEMS

No. 765SC542

(Filed 1 December 1976)

Narcotics § 4— possession of heroin for sale — defendant in close proximity to drugs — insufficiency of evidence of possession

In a prosecution for possession of heroin with intent to sell, evidence was insufficient to be submitted to the jury where it tended to show that police, acting on information the nature of which was not disclosed in the record, placed a certain automobile under surveillance; they saw three men get into the car and drive away; they followed and shortly thereafter stopped the car; defendant was found to be a passenger sitting in the right front seat; the driver was the registered owner of the car; the third man was riding in the back seat; packets of heroin were found hidden in three different locations in the car, two of which were in the front seat area and one in the back seat area; defendant was in close proximity to the heroin hidden in the front seat area; there was no evidence defendant owned or controlled the car; there was no evidence he had been in the car at any time other than during the short period which elapsed between the time the officers saw the three men get in the car and the time they stopped and searched it; and there was no evidence of any circumstance indicating that defendant knew of the presence of the drugs hidden in the car.

APPEAL by defendant from *Martin (Perry), Judge.* Judgment entered 10 February 1976 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 10 November 1976.

Defendant was tried on his plea of not guilty to an indictment charging him with felonious possession of heroin with intent to sell.

The State's evidence showed:

On 16 May 1975 after a meeting at the New Hanover County Sheriff's Department, four officers were ordered to set up a surveillance of a 1973 Grand Prix Pontiac, license number HNW-977, believed to be at the New Hanover Arms Apartments in Wilmington. The officers reached the apartments shortly after 9:00 p.m. and observed the described automobile parked directly in front of Building 1002. Two of the officers took concealed positions in the woods across from Building 1002, while the other two officers remained in the county police car and moved to a vantage point further down the road. About 10:00 p.m., three black males emerged from the building, entered the Pontiac, and drove from the apartment park-

ing lot. The officers concealed in the woods communicated this information to the officers in the parked car who began following the Pontiac once it passed their location. After following it for a short distance, the officers stopped the Pontiac. The occupants were found to be: Raymond Gooden, the driver and registered owner of the Pontiac; defendant Weems, the passenger sitting in the right front seat; and Ronnie Tyndall, the passenger sitting in right back seat.

A search of the automobile revealed: (1) located inside the crease where the top and bottom halves of the back seat join, almost directly behind the seating position of Tyndall, was a wad of aluminum foil, inside of which were 40 small foil packets containing an off-white powder later analyzed to be a mixture of heroin, quinine, and sucrose; (2) located inside the carpet overlap between the transmission hump and the front seat on the passenger's side, was a matchbox, inside of which were 45 small foil packets containing an off-white powder later analyzed to be a mixture of heroin, quinine, and sucrose; (3) located underneath the ashtray in the console, were four large foil packets—one of these contained 32 small foil packets of an off-white powder later analyzed to be a mixture of heroin, quinine, and sucrose; another contained .72 grams of a brown powder later analyzed to be heroin; and the two remaining contained 3.87 grams and 1.56 grams respectively of a white powder later analyzed to be a mixture of quinine and sucrose.

Defendant Weems presented no evidence. The jury found him guilty of possession with intent to sell and deliver heroin. From a judgment imposing a prison term, defendant appealed.

Attorney General Edmisten by Special Deputy Attorney General Edwin M. Speas, Jr., for the State.

Jay D. Hockenbury for defendant appellant.

PARKER, Judge.

The question presented is whether the evidence was sufficient to withstand defendant's motion for nonsuit. We hold that it was not.

"An accused's possession of narcotics may be actual or constructive. He has possession of the contraband material within the meaning of the law when he has both the power and intent to control its disposition or use." *State v. Harvey,* 281

N.C. 1, 12, 187 S.E. 2d 706, 714 (1972). Necessarily, power and intent to control the contraband material can exist only when one is aware of its presence. Therefore, evidence which places an accused within close juxtaposition to a narcotic drug under circumstances giving rise to a reasonable inference that he knew of its presence may be sufficient to justify the jury in concluding that it was in his possession. "However, mere proximity to persons or locations with drugs about them is usually insufficient, in the absence of other incriminating circumstances, to convict for possession." Annot., 91 A.L.R. 2d 810, 811 (1963). Consistent with this view, a number of courts have recognized the principle that "the mere presence of the defendant in an automobile in which illicit drugs are found does not, without more, constitute sufficient proof of his possession of such drugs. . . . " Annot., 57 A.L.R. 3d 1319, 1326 (1974).

In the present case, the evidence showed that the police, acting on information the nature of which is not disclosed in this record, placed a certain automoblie under surveillance. They saw three men get into the automobile and drive away. They followed and shortly thereafter stopped the car. Defendant was found to be a passenger sitting in the right front seat. The driver was the registered owner of the car. The third man was riding in the back seat. Packets of heroin were found hidden in three different locations in the car, two of which were in the front seat area and one in the back seat area. Defendant was in close proximity to the heroin hidden in the front seat area. There was no evidence defendant owned or controlled the car. There was no evidence he had been in the car at any time other than during the short period which elapsed between the time the officers saw the three men get in the car and the time they stopped and searched it. There was no evidence of any circumstances indicating that defendant knew of the presence of the drugs hidden in the car.

Viewing the evidence in the light most favorable to the State, and giving the State the benefit of every legitimate inference which may be reasonably drawn from the evidence, we find no evidence of any circumstance connecting the defendant to the drugs in any manner whatsoever other than the showing of his mere presence for a brief period in the car as a passenger. In our opinion, this was not enough. *See generally State v. Minor,* 290 N.C. 68, 224 S.E. 2d 180 (1976) ; *State v. Finney,*

290 N.C. 755, 228 S.E. 2d 433 (1976). Defendant's motion for nonsuit should have been allowed.

Reversed.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. LAWRENCE C. BUTCHER

No. 766SC530

(Filed 1 December 1976)

Criminal Law § 91— absence of subpoenaed witness — stipulation of what testimony would have been — denial of continuance

The trial court's denial of defendant's motion for a continuance made on the ground of the absence of a subpoenaed witness did not constitute an abuse of discretion or a denial of defendant's rights to confrontation and to compulsory process where, pursuant to a stipulation by the State, defense counsel was permitted to state to the jury what the witness would have testified if he had been present, the court instructed the jury to consider the statement of such testimony as though given by the witness himself under oath, and defendant did not at any time object to the stipulation or the procedure employed.

APPEAL by defendant from *Fountain, Judge.* Judgment entered 7 April 1976 in Superior Court, NORTHAMPTON County. Heard in the Court of Appeals 9 November 1976.

Defendant was indicted for discharging a firearm into an occupied building in violation of G.S. 14-34.1. Just before the case was called, defendant moved for a continuance on the ground that his only witness, his brother Timothy Butcher, was not present. He stated to the court that Timothy was an eye witness to the alleged incident; that he had been subpoenaed; and that he had been present the previous week waiting for the case to be called. The judge denied a continuance and the case was tried.

State presented several eye witnesses whose testimony tended to show that Earl Robinson operated a night club; that defendant came to the club on the night of 12 October 1975; that Robinson asked defendant to leave because he had had trouble with defendant in the past; that defendant left but later called Robinson to the door; that defendant called Robinson

names and pulled a shotgun from out of his coat and fired before the door could be closed; and that some shots struck the door and some entered the building.

Defendant offered no evidence except a statement by his counsel. The district attorney stipulated that defendant's counsel could tell the jury what defendant's proposed witness, Timothy Butcher, would have testified to if present. Counsel then made a statement to the effect that Timothy Butcher had told him that defendant did not have a gun and that the shot "came from up on a hill some distance from the building."

The defendant was convicted by a jury and sentenced to 10 years.

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

Cherry, Cherry and Flythe, by Charles Slade, Jr., for the defendant.

MARTIN, Judge.

The defendant contends that the trial court committed error in denying his motion for a continuance on the ground of the absence of a subpoenaed witness. The defendant asserts that in so doing the trial court abused its discretion and denied his constitutional rights to confrontation and to compulsory process.

The trial record reveals that the defendant's witness, Timothy Butcher, did not appear at trial to testify. However, what he would have testified to had he appeared was read to the jury on the basis of a stipulation made by the State. This stipulation appears in the record as follows:

> "No evidence was offered for the defendant except that the district attorney for the State stipulated that the defendant's counsel could state to the jury whatever the defendant's brother Timothy Butcher would have testified to if present in court and the State stipulated that the brother would so testify, but did not stipulate as to the truth of his testimony."

The record reveals that the defendant did not at any time object to this stipulation or to the procedure proposed. In response

to the stipulation, counsel for the defendant then made the following statement to the jury:

> "I have talked with the witness Timothy Butcher and he was here all of last week and when I talked with him, he told me that Lawrence Butcher did not have the gun on this occasion and did not fire a shot into the building and that in his opinion the shot came from up on a hill some distance from the building."

At the close of the evidence, the trial court charged the jury to consider the statement of Timothy Butcher's anticipated testimony as though given orally under oath. This portion of the charge reads as follows:

> "The defendant has on the other hand offered evidence to the effect that his brother was in the car with the Squire girls, who have testified, and that his brother if present would testify, and you would consider it as if he did testify under oath, to the effect that he was there with those girls and that his brother did not have a shotgun and his brother did not shoot at anyone or at the building, and that he heard a shot fired and it seemed to come up from the hill some good distance from there."

It is clear to this Court that the denial of a continuance did not amount to an abuse of discretion or a denial of the defendant's constitutional rights. This case is controlled by the holding in *State v. Utley,* 223 N.C. 39, 25 S.E. 2d 195 (1943) which is similar on its facts to the present case. In *Utley,* which involved a prosecution for murder, the accused moved for a continuance on the basis of the absence of several subpoenaed witnesses. The solicitor stated that he would admit what the absent witnesses would testify to if present. Before the close of the defendant's case, the trial court instructed the jury in accordance with the agreement of the solicitor " . . . that the jury should consider that the witnesses had so testified, and that the jury should consider same as evidence for defendant just as if the witnesses had been present and testified in court." *State v. Utley, supra* at 44, 25 S.E. 2d at 199. The Supreme Court held that, as a matter of law, it could not say that the denial of the motion for a continuance took from the defendant his constitutional right of confrontation.

In a more recent case on this point, the trial court denied a continuance based on the absence of witnesses and allowed

a statement as to what the witnesses would have said in lieu of their testimony. See *State v. Rice*, 23 N.C. App. 182, 208 S.E. 2d 416 (1974). This Court held that the trial judge, in using this procedure, neither abused his discretion nor denied the defendant his constitutional right of confrontation. In addition, this Court also stated the following:

> "While the defendant complains that the use of the stipulation would not be the same as the personal testimony of the witnesses, he did not object to its use. Indeed, he and his attorney implicitly assented thereto." *State v. Rice, supra* at 186, 208 S.E. 2d at 418.

In the instant case, the record reflects that the trial court and the district attorney went out of their way to accommodate the wishes of the defendant by giving the defendant the benefit of what the absent witness would have testified to had he been present. Defendant's counsel was given the opportunity to make a statement of the anticipated testimony from the missing witness and that statement was made to the jury without objection or exception either to the procedure followed or to the subsequent charge to the jury explaining the procedure. It is therefore clear to this Court that the trial court acted well within the bounds of its discretion and did not violate the defendant's constitutional rights.

Defendant had an impartial trial free from prejudicial error.

No error.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. RANDY MICHAEL REESE

No. 7628SC529

(Filed 1 December 1976)

1. Larceny § 8— felonious larceny — instruction on value of goods taken — no expression of opinion

In a prosecution for felonious larceny of an automobile, the trial court's instruction that "all the evidence which we have, that's been submitted, indicates that the property was worth some $550," together

with other instructions of the court, did not amount to an expression of opinion on the evidence.

2. **Larceny § 8— felonious larceny prosecution — failure to instruct on lesser offenses — no error**

In a prosecution for felonious larceny of an automobile where all the evidence indicated that the value of the stolen property exceeded $200, the trial court did not err by failing to instruct as to the lesser included offense of misdemeanor larceny; nor did the court err in failing to submit to the jury a possible verdict under G.S. 14-72.2, unauthorized use of a conveyance.

APPEAL by defendant from *Baley, Judge.* Judgment entered 27 April 1976 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 9 November 1976.

Upon a plea of not guilty, defendant was tried on a bill of indictment charging him with the felonious larceny of a 1967 Mercury Comet automobile owned by James Rivers. The State's evidence tends to show:

On Saturday, 21 February 1976, Mr. Rivers took his car to Howard Sharp's body shop to have a door lock repaired. At closing time that night, Sharp locked the car, put the keys inside his shop and left the car parked at the front of the building. Earlier that afternoon and evening Sharp had seen defendant pass by his shop several times. When Sharp returned to the shop on the following Sunday morning, the automobile was missing.

At approximately 5:00 o'clock on Sunday morning, a green Comet, with license # ABR392, was driven into and turned around in the yard of Harry Sharp, a brother of Howard Sharp. Harry Sharp wrote down the license number, took a rifle and flashlight and walked up to the car where he observed three persons in the car including defendant as the driver. On the following Tuesday, Harry Sharp was at his brother's shop when he recognized the same car. The car had been recovered earlier that day and towed into the shop. It had been sideswiped; the radiator, battery and air filter had been removed; and the ignition wires and seats were torn out. Both James Rivers and Howard Sharp testified that the car had a value of approximately $550 before the incident in question.

Defendant presented no evidence.

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

Attorney General Edmisten, by Associate Attorney Claudette Hardaway, for the State.

Public Defender Peter L. Roda for defendant appellant.

BRITT, Judge.

[1] By his first assignment of error defendant contends that the trial court erred in its charge to the jury by expressing an opinion in violation of G.S. 1-180. This assignment is without merit.

The record discloses that when the trial judge was instructing the jury on the sixth element of felonious larceny, he instructed as follows: "And, sixth, that the property was worth more than $200, and all the evidence which we have, that's been submitted, indicates that the property was worth some $550, but you must find beyond a reasonable doubt that it was worth more than $200 as an element of this offense."

Defendant argues that in telling the jury that "all the evidence which we have, that's been submitted, indicates that the property was worth some $550" that His Honor expressed an opinion on the evidence. We reject this argument.

Almost immediately after the challenged statement was given, the trial judge gave the following instruction:

> "Now, Members of the Jury, the Court has no opinion about the facts in this case or the guilt or innocence of the Defendant. If, in my manner of speaking or by some inflection of my voice or some ruling in this matter, I have conveyed such an impression to you, please dismiss it from your mind because it is a responsibility of yours and yours alone to determine what the facts are in this case and to determine the guilt or innocence of the Defendant."

It is well settled that the charge of the court to the jury will be construed contextually, and segregated portions will not be held prejudicial error where the charge as a whole is free from objection. 4 Strong, N. C. Index 3d, Criminal Law § 168. When the challenged instruction is considered in context, and

considered together with the remainder of the charge, we conclude that it was not prejudicial error.

[2] By his second assignment of error defendant contends the trial court erred in failing to submit to the jury possible verdicts of misdemeanor larceny and unauthorized use of an automobile. This assignment is without merit.

As to a possible verdict of misdemeanor larceny, it is well-established that where there is no evidence from which it can be inferred that the value of the stolen property was less than $200, defendant is not entitled to an instruction with respect to larceny of property of a value less than $200. *State v. Smith,* 6 N.C. App. 580, 170 S.E. 2d 523 (1969); *State v. Dickerson,* 20 N.C. App. 169, 201 S.E. 2d 69 (1973). Since all the evidence in the present case indicated that the value of the stolen property exceeded $200, the trial court did not err by failing to instruct as to the lesser included offense of misdemeanor larceny.

Defendant argues that a possible verdict under G.S. 14-72.2, unauthorized use of a conveyance, should have been submitted to the jury. We disagree. The trial court is not required to submit to the jury the question of a defendant's guilt of a lesser degree of the crime charged in the indictment when the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the crime charged. *State v. Harvey,* 281 N.C. 1, 187 S.E. 2d 706 (1972). In this case, defendant was charged with the felonious larceny of an automobile; the evidence presented by the State, aided by the doctrine of recent possession of stolen property, was positive as to each and every element of felonious larceny, and there was no conflicting evidence relating to any element.

Additionally, the necessity for instructing the jury as to a crime of lesser degree than 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. Lampkins,* 286 N.C. 497, 212 S.E. 2d 106 (1975); *State v. Carnes,* 279 N.C. 549, 184 S.E. 2d 235 (1971). In the present case, there was no evidence that would warrant or support a finding that defendant was guilty of the lesser included offense of unauthorized use of an automobile.

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

No error.

Judges VAUGHN and MARTIN concur.

IN THE MATTER OF CAROL RENEE CHAVIS
IN THE MATTER OF JOHN ROBERT CURRY, JR.
IN THE MATTER OF KERRY LAMAR OUTLAW

Nos. 7626DC537, 7626DC659 and 7626DC691

(Filed 1 December 1976)

1. **Infants § 10— juvenile delinquency hearing — admission by juvenile voluntarily and knowingly made — affirmative showing in record**

Where the record does not affirmatively show that the juvenile respondent voluntarily and knowingly admitted the allegations in the juvenile petition, the trial court erred in adjudicating the juvenile delinquent upon a finding, based on the admission, that the respondent committed the acts alleged in the petition.

2. **Infants § 10— juvenile delinquency hearings — treatment as criminal proceedings — constitutional safeguards required**

Juvenile delinquency hearings, pursuant to G.S. Chap. 7A, Article 23, place juveniles in danger of confinement, and the proceedings are therefore to be treated as criminal proceedings, conducted with due process in accord with constitutional safeguards of the Fifth Amendment.

3. **Criminal Law § 23— guilty plea — voluntariness — affirmative showing required in record**

A plea of guilty in a criminal case amounts to a waiver of the privilege against self-incrimination if the guilty plea is made knowingly and voluntarily, and the requirement that the plea be knowing and voluntary is so important that the record must affirmatively show on its face that the guilty plea was knowing and voluntary.

4. **Criminal Law § 23; Infants § 10— juvenile hearing — admission equivalent to guilty plea — showing of voluntariness required in record**

An "admission" in a juvenile hearing is equivalent to a guilty plea in a criminal case, and the record must therefore affirmatively show on its face that the admission was entered knowingly and voluntarily.

APPEAL by respondent Chavis from *Black, Judge.* Judgment entered 3 February 1976 in District Court, MECKLENBURG

County. APPEAL by respondent Curry from *Lanning, Judge.* Judgment entered 11 March 1976 in District Court, MECKLENBURG County. APPEAL by respondent Outlaw from *Lanning, Judge.* Judgment entered 22 March 1976 in District Court, MECKLENBURG County. Heard in the Court of Appeals 9 November 1976.

Attorney General Edmisten, by Assistant Attorney General Robert R. Reilly in the Matter of Carol Renee Chavis; by Assistant Attorney General Ann Reed in the Matter of John Robert Curry, Jr.; by Associate Attorney Isaac T. Avery, III, in the Matter of Kerry Lamar Outlaw; for the State.

Public Defender Michael S. Scofield, by Assistant Public Defender James Fitzgerald and Assistant Public Defender Mark A. Michael, for respondent appellants.

ARNOLD, Judge.

[1] These appeals were consolidated because they present a single question: where the record does not affirmatively show that the juvenile respondent voluntarily and knowingly admitted the allegations in the juvenile petition, did the court err in adjudicating the juvenile delinquent upon a finding, based on the admission, that the respondent committed the acts alleged in the petition.

[2] Respondents correctly argue that juvenile delinquency hearings, pursuant to G.S. Chap. 7A, Article 23, place them in danger of confinement, and, therefore, the proceedings are to be treated as criminal proceedings, conducted with due process in accord with constitutional safeguards of the Fifth Amendment. *In re Gault,* 387 U.S. 1, 18 L.Ed. 2d 527, 87 S.Ct. 1428 (1967); *In re Burrus,* 275 N.C. 517, 169 S.E. 2d 879 (1969); *In re Arthur,* 27 N.C. App. 227, 218 S.E. 2d 869 (1975). Among the rights of the Fifth Amendment is that "No person shall be compelled in any criminal case to be a witness against himself." This is commonly known as the privilege against self-incrimination, and it may be waived if done so knowingly and voluntarily.

[3] A plea of guilty in a criminal case amounts to a waiver of the privilege against self-incrimination if the guilty plea is made knowingly and voluntarily. The requirement that the plea be knowing and voluntary is so important that the record must

affirmatively show on its face that the guilty plea was knowing and voluntary. *Boykin v. Alabama*, 395 U.S. 238, 23 L.Ed. 2d 274, 89 S.Ct. 1709, (1969) ; *State v. Ford*, 281 N.C. 62, 187 S.E. 2d 741 (1972) ; *State v. Harris*, 10 N.C. App. 553, 180 S.E. 2d 29 (1971). If the record does not affirmatively show on its face that the plea was knowing and voluntary, the defendant must be allowed to replead. *State v. Ford, supra; State v. Harris, supra.*

[4] Respondents' position is that an "admission" in a juvenile hearing is equivalent to a guilty plea in a criminal case, and that the record must therefore affirmatively show on its face that the admission was entered knowingly and voluntarily. We agree.

There are some significant differences between criminal trials and juvenile proceedings. In the juvenile proceeding there is no jury and the district judge rules on the admissibility of the evidence as well as on the weight and credibility of the evidence. See, *In re Simmons*, 24 N.C. App. 28, 210 S.E. 2d 84 (1974). However, if we are to require an affirmative showing from the face of the record that a guilty plea was understandingly and voluntarily entered, and we are so required by *Boykin v. Alabama, supra,* then we see no less reason to require the same affirmative showing in juvenile proceedings. "The fact that the present proceeding is not an ordinary criminal prosecution but is a juvenile proceeding under G.S. Chap. 7A, Article 23, does not lessen but should actually increase the burden upon the State to see that the child's rights were protected." *In re Meyers*, 25 N.C. App. 555, 558, 214 S.E. 2d 268 (1975). "The privilege [against self-incrimination] applies in juvenile proceedings the same as in adult proceedings." *In re Burrus, supra* at 530.

[1] At a juvenile hearing an admission by a juvenile must be made knowingly and voluntarily, and this fact must affirmatively appear on the face of the record, or the juvenile will be allowed to replead. Procedures adopted by this Court in *State v. Harris, supra,* and confirmed in *State v. Ford, supra,* are appropriate in a juvenile hearing. Before accepting the juvenile's admission, the judge can question the juvenile to determine if his admission is understandingly and voluntarily made.

In the matter of Curry, the State contends that even without the respondent's admission there is evidence to support the adjudication of delinquency by way of an extrajudicial

confession to a police officer. However, testimony by the officer concerning the juvenile's extrajudicial admission was not admissible since the record does not show that the juvenile was given any *Miranda* warnings, nor was any finding made by the district judge as to the voluntariness of the statements. *In re Meyers, supra.*

The Court's order, in respondent Outlaw's case, states that evidence was presented. However, the proceedings were not recorded so there is no record or summary of the evidence. The State cites *Christie v. Powell*, 15 N.C. App. 508, 190 S.E. 2d 367 (1972), and argues that when evidence is not contained in the record there is a presumption of sufficient evidence to support judicial findings of fact. That is the rule in civil cases, but we are not inclined to extend the rule to the juvenile proceeding presently before us.

All three of these cases are reversed and remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. FLOYD JACOBS

No. 7617SC550

(Filed 1 December 1976)

Robbery § 4— attempted armed robbery — insufficiency of evidence

The State's evidence was insufficient for submission to the jury in a prosecution for attempted armed robbery where it tended to show only that defendant was present in a hardware store with a pistol in his belt, but there was no evidence of an actual or constructive threat of the use of the pistol or of an express or implied demand for money or other property.

APPEAL by defendant from *McConnell, Judge*. Judgment entered 4 February 1976 in Superior Court, STOKES County. Heard in the Court of Appeals 10 November 1976.

Defendant was convicted of attempted armed robbery. From judgment sentencing him to a term of imprisonment, defendant appeals.

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

Marshall & Hughes, by William F. Marshall and Ronald M. Price, for defendant appellant.

VAUGHN, Judge.

Defendant contends that his motions to dismiss made at the close of the State's evidence and at the close of all the evidence should have been granted. When considering a motion to dismiss, 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. Any evidence of the defendant which is favorable to the State is considered, but his evidence which is in conflict with that of the State is not considered. *State v. Price,* 280 N.C. 154, 184 S.E. 2d 866. The evidence, taken in the light most favorable to the State, is as follows:

On 3 April 1975, Erna Neil was working in Neil Hardware Store located in Walnut Cove, North Carolina. Between 5:30 and 6:00 p.m., defendant entered the store while Miss Neil was at the cash register counting the day's receipts. She asked defendant what he wanted and he stood there staring at her. After about a minute she asked more emphatically if she could help him. At that time defendant pulled his coat either up or back and Miss Neil saw a pistol sticking in his trousers. She screamed for her brother, George, to come to the front of the store. Defendant ran out the front door. When George got to the front of the store, he saw defendant rapidly walking away from the store. Defendant turned and looked at George but did not run. Defendant lived in Walnut Cove and was recognized by George Neil as a "Jacobs," although he did not know his first name. Miss Neil had seen defendant when he was younger but did not recognize him. Defendant was later arrested and identified by both of the Neils as being the person who came in the store at the time in question.

The defendant's testimony, though ambiguous, appears to attempt to show that he went into the Hardware Store to determine whether he could purchase bullets for the pistol. He testified that he walked out of the store, without having heard Miss Neil call for her brother, because he did not have the money to buy the bullets at that time.

In pertinent part, G.S. 14-87 provides:

> "Any person . . . who, having in possession or with the use or threatened use of any firearms . . . whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another . . . person . . . shall be guilty of a felony. . . ."

In this case, therefore, the State was required to show that defendant endangered or threatened the life of Miss Neil by the possession, use or threatened use of a pistol and that he attempted to take money or other personal property from her.

We hold that the State failed to offer substantial evidence of all material elements of the offense.

> "Proof of the defendant's presence in a place of business, his possession therein of a firearm and his intent to commit the offense of robbery is not sufficient to support a conviction of the offense described in G.S. 14-87, for it omits the essential elements of (1) a taking or attempt to take personal property, and (2) the endangering or threatening of the life of a person." *State v. Evans* and *State v. Britton* and *State v. Hairston,* 279 N.C. 447, 183 S.E. 2d 540.

The evidence does no more than place defendant in the hardware store with a pistol in his belt. He had no accomplice. He did not make a gesture indicating an intent to touch, withdraw or otherwise threaten the use of the pistol. There was, therefore, no threat, actual or constructive, of the use of a deadly weapon. He did not make a demand, express or implied, for money or other property. The evidence raises a suspicion that defendant may have intended to commit a robbery or other crime but falls short of showing an overt act in furtherance of an intent to rob. If the evidence is only sufficient to raise a suspicion or conjecture as to whether the offense charged was committed, the motion for nonsuit should be allowed even though the suspicion so aroused is strong. *State v. Evans,* and *State v. Britton* and *State v. Hairston, supra.*

Defendant's motions for nonsuit should have been allowed.

Reversed.

Judges BRITT and MARTIN concur.

STATE OF NORTH CAROLINA v. MICHAEL HENDERSON SMEDBERG AND MARION RAINE PORTER

No. 7618SC532

(Filed 1 December 1976)

Constitutional Law § 18— loudspeaker audible beyond 150 feet — use prohibited — constitutionality of ordinance

Ordinance of the town of Greensboro which prohibits a person from speaking into a loudspeaker which can be heard at a distance in excess of 150 feet does not infringe upon the constitutional right of free speech.

APPEAL by defendants from *Long, Judge.* Judgments entered 22 January 1976 in Superior Court, GUILFORD County. Heard in the Court of Appeals 9 November 1976.

Defendant Smedberg was charged in two magistrate's orders, and defendant Porter was charged in one magistrate's order, with violating § 13-12 of the Code of Ordinances of the City of Greensboro.

While no evidence presented at the trial is set forth in the record on appeal, the record does contain a section entitled "Facts" which is summarized in pertinent part as follows: Defendants were political activists who began campaigning with the aid of amplification equipment in the summer of 1974. In 1975, pursuant to a Greensboro city ordinance, the police first asked defendants to adjust the volume of their amplification system. Subsequently, defendants were arrested and charged with violations of the Greensboro City Code, § 13-12, by operating a loudspeaker which could be heard at a distance in excess of 150 feet.

Defendants were convicted in district court of all three charges. At trial *de novo* in superior court, they were convicted by a jury and from judgments imposing ten-day jail sentences, suspended for one year upon payment of $10 fines and agreements not to violate any Greensboro noise ordinance, they appealed.

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

F. Mickey Andrews for the defendant appellants.

BRITT, Judge.

We note first that in their brief defendants have improperly discussed matters which are not set forth in the record. We will not consider "facts" or other matters not supported by the record on appeal. 4 Strong, N. C. Index 3d, Criminal Law § 158.

The sole question presented for review is whether § 13-12 (14) (b) of the Greensboro City Code violates the First Amendment of the United States Constitution. Section 13-12 provides in pertinent part:

> "(a) Subject to the provisions of this section, the creation of any unreasonably loud, disturbing, and unnecessary noise in the city is prohibited. Noise of such character, intensity, and duration as to be detrimental to the life or health of any individual is prohibited.
>
> "(b) The following acts, among others, are declared to be loud, disturbing, and unnecessary noises in violation of this section, but said enumeration shall not be deemed to be exclusive, namely:
>
> * * *
>
> "(14) Loudspeakers or amplifiers on vehicles. The use of mechanical loudspeakers or amplifiers on trucks, airplanes, or other vehicles for advertising or other purposes. Provided that in the exercise of free speech, loudspeakers or amplifiers may be used for non-commercial purposes under the following conditions:
>
> * * *
>
> "(b) It shall be unlawful for any person to speak into a loudspeaker or amplifier within the corporate limits of the city, when such loudspeaker or amplifier is so adjusted that the voice of the speaker is amplified to the extent that it is audible at a distance in excess of one hundred and fifty (150) feet from the person speaking. Provided that the Guilford County Health Department may, upon obtaining a permit approved by the council, use loudspeakers or amplifiers as part of its educational campaign."

In construing municipal ordinances we recognize, as stated in *Cab Co. v. Shaw*, 232 N.C. 138, 142, 59 S.E. 2d 573, 576 (1950), that " '. . . it is the duty of the municipal authorities in their sound discretion, to determine what ordinances or regu-

lations are reasonably necessary for the protection of the public or the better government of the town; and when such ordinance is adopted it is presumed to be valid; and, the courts will not declare it invalid unless it is clearly shown to be so.' (Citations omitted.) This is true when the constitutionality of an ordinance is attacked, and no law or ordinance will be declared unconstitutional unless clearly so and every reasonable intendment will be made to sustain it."

Defendants contend that the challenged ordinance is an unconstitutional restraint on their freedom of speech in that it contains an "arbitrary distance or zone within which the human voice may be heard" and an "overly restrictive distance within which political ideas may travel." We find the contentions to be without merit.

It is well settled that sound and noise amplification is subject to reasonable regulation as to place, time and volume. *Kovacs v. Cooper*, 336 U.S. 77, 93 L.Ed. 513, 69 S.Ct. 448 (1949). "Opportunity to gain the public's ears by objectionably amplified sound on the streets is no more assured by the right of free speech than is the unlimited opportunity to address gatherings on the streets." *Kovacs v. Cooper, supra.* We think, as stated in *Commonwealth v. Geuss*, 168 Pa. Super. 22, 76 A. 2d 500, 504 (1950), that "[t]he freedom to express one's opinion and to invite others to assemble to hear those opinions does not contain the right to compel others to listen."

The challenged ordinance does not infringe upon the constitutional right of free speech. It is a valid exercise of the police power of the municipality to promote public welfare and safety. Specifically, the ordinance is a reasonable regulation of the noise level designed to protect the tranquility and well-being of the citizens of Greensboro; it is narrowly drawn and properly enforceable.

We hold that the challenged ordinance is constitutional.

No error.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. NATHANIEL WILLIAMS

No. 7619SC554

(Filed 1 December 1976)

Rape § 5— second degree rape — sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for second degree rape where it tended to show that defendant had carnal knowledge of the prosecutrix after defendant had attempted to choke her, told her how easy it would be to kill her, and held an open knife against her stomach.

APPEAL by defendant from *Barbee, Judge.* Judgment entered 10 March 1976 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 10 November 1976.

This was a criminal prosecution on a bill of indictment charging the defendant Nathaniel Williams with the second degree rape of Janet Kay Willard. Upon defendant's plea of not guilty, the State offered evidence tending to show the following:

On 19 July 1975 Janet Willard, 17 years old, single, was sitting on the steps outside a hospital in Asheboro. Defendant came by in a van and asked if she wanted to ride around; she agreed, and they went to Greensboro. Defendant bought her supper and after he visited at two houses they left to return to Asheboro, around 1:00 a.m. Defendant stopped on a dirt road and threatened to rape her if she did not cooperate. She got out of the van and ran across a field and defendant caught her and took her back to the van. Defendant produced a knife and forced her to undress and then raped her. Subsequently, defendant drove on to Asheboro where she ran away and contacted the police. Dr. Query, a physician practicing in Asheboro, examined her during the night of 20 July 1975 and described her as nervous and frightened. He found two small abrasions around the vaginal opening but no sperm or semen in the vagina.

Sergeant Bowman, a Randolph County Deputy Sheriff, testified as to a statement given him by Janet Willard on the night of 20 July 1975, which was substantially the same as her oral testimony. At the end of the State's evidence, and once again at the end of all the evidence, the defendant made motions to dismiss as of nonsuit. The motions were denied.

The jury found the defendant guilty of second degree rape and from a judgment imposing a prison sentence of 25 to 30 years, the defendant appealed.

Attorney General Edmisten, by Special Deputy Attorney General James L. Blackburn, for the State.

Bell and Ogburn, by Deane F. Bell and William H. Heafner, for the defendant.

MARTIN, Judge.

Defendant contends the trial court erred in refusing to grant defendant's motion for judgment as of nonsuit at the close of the State's evidence and at the close of all the evidence. In making this argument, the defendant contends in his brief that he should not have been convicted of the crime of second degree rape based solely upon the testimony of the prosecutrix. However, his basic contention is that the evidence was not sufficient to be submitted to the jury.

In *State v. Hines*, 286 N.C. 377, 381, 211 S.E. 2d 201, 203 (1975), the Court stated:

> "In passing upon a motion for judgment as of nonsuit, the trial judge must consider all the evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence and considering so much of the defendant's evidence as may be favorable to the State. In considering the motion, the Court is not concerned with the weight of the testimony, or with its truth or falsity, but only with the question of whether there is sufficient evidence for the jury to find that the offense charged has been committed and that defendant committed it." (Citations omitted.)

In viewing the evidence in the light most favorable to the State, as we are therefore required to do, it is clear that the evidence was sufficient to withstand the defendant's motions for nonsuit. The evidence clearly indicates that defendant had carnal knowledge of the prosecutrix by force and against her will. The defendant had attempted to choke prosecutrix, told her how easy it would be to kill her, and held an open knife against her stomach prior to the commission of the rape.

As an additional argument, the defendant also contended that the uncorroborated testimony of the woman should be "clear and convincing" in order to justify a conviction for rape. In this respect he points out certain contradictions and weaknesses in testimony of the prosecutrix and argues that the testimony was insufficient. However, it is well established that any contradictions and inconsistencies, when in the State's evidence, are to be disregarded by this Court in considering a trial court's denial of a motion for judgment as of nonsuit. *State v. Price*, 280 N.C. 154, 184 S.E. 2d 866 (1971).

The record contains plenary evidence of each of the essential elements of the offense charged. The defendant's motion for nonsuit was, therefore, properly overruled.

The defendant had a fair and impartial trial free from prejudicial error.

No error.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. ROSCOE B. DAVIS

No. 7621SC387

(Filed 1 December 1976)

1. **Robbery § 5— robbery with firearm — failure to instruct on lesser offense — no error**

In a prosecution for robbery with a firearm, defendant was not entitled to an instruction on the lesser included offense of assault with a deadly weapon on the basis of an incident which occurred 15 minutes prior to the incident on which the indictment was based.

2. **Criminal Law §§ 145, 154— unnecessary record on appeal — cost of printing taxed to attorney**

Where two defendants charged with the same crime appealed and there were two records on appeal, counsel is personally taxed with the costs of printing the unnecessary record on appeal.

APPEAL by defendant from *Rousseau, Judge*. Judgment entered 23 January 1976 in Superior Court, FORSYTH County. Heard in the Court of Appeals 16 September 1976.

Defendant and codefendant John Wilson were indicted for robbery with a firearm. The facts are fully set forth in the companion case, *State v. Wilson*, 31 N.C. App. 323, ___ S.E. 2d ___ (1976).

Defendant was found guilty as charged and appeals.

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

Walter Ray Vernon, Jr., for defendant appellant.

CLARK, Judge.

[1] Defendant first assigns error to the failure of the trial court to charge on the offense of assault with a deadly weapon.

Assault with a deadly weapon is a lesser included offense of the crime of robbery by firearm. *State v. Faulkner*, 5 N.C. App. 113, 168 S.E. 2d 9 (1969). The trial judge is required to charge on a lesser included offense only when there is evidence to support such verdict. *State v. Griffin*, 280 N.C. 142, 185 S.E. 2d 149 (1971). When the State's evidence tends to show an offense, there is no conflicting evidence relating to elements of the offense, and the only offense committed, if any, was the one charged, the court is not required to instruct on lesser included offenses. *State v. Hicks*, 241 N.C. 156, 84 S.E. 2d 545 (1954).

Defendant contends that he was entitled to an instruction on assault with a deadly weapon on the basis of an incident which occurred as he and Porter, the prosecuting witness, were walking to Jones' house. At that time defendant allegedly hit Porter on the shoulders with a shotgun. This incident was separated in time and space from the one for which defendant was indicted. The incident on which the indictment was based occurred at least fifteen minutes after the alleged assault with the gun and occurred inside Porter's house. Porter and Davis had separated, and Porter was alone when Davis and Wilson entered his house and robbed him. We know of no requirement that the State must try a defendant on every possible offense that he has ever committed against the prosecuting witness. Defendant's reliance upon *Hicks* for this proposition is misplaced.

The evidence in the record tends to show a completed armed robbery. There was no conflicting evidence on the ele-

ments of that crime. Under the rule enunciated in *Hicks*, the defendant was not entitled to an instruction on the crime of assault with a deadly weapon. We find no merit in this assignment of error.

Defendant's other assignment of error was not argued in his brief and is deemed abandoned. N. C. R. App. P. 28(a).

[2] We note that although both defendants appealed, there were two records on appeal. This is in violation of Rule 11(d), N. C. Rules of Appellate Procedure, and counsel personally will be taxed with the costs of printing the unnecessary record on appeal.

No error.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. DON MORROW

No. 7629SC485

(Filed 1 December 1976)

Criminal Law § 16— misdemeanor — exclusive original jurisdiction of district court

The superior court did not have original jurisdiction to try defendant for the misdemeanor of receiving stolen goods, and judgment entered by the superior court must be arrested.

APPEAL by defendant from *Baley, Judge*. Judgment entered 19 March 1976 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 20 October 1976.

Defendant was tried in Superior Court on his plea of not guilty to the following indictment:

"THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 20th day of March, 1975, in Rutherford County Don Morrow unlawfully and wilfully did feloniously receive a portable Truetone Television, Maroon and Grey in color, Model #MEA 3812A-86, Stock #2DC3812, Walnut Cabinet, the personal property of Carl Womack, t/a Womacks Body Shop, Huntley Alley, Forest

City, NC having a value of less than two hundred dollars. dollars, knowing the property to have been feloniously stolen, taken, and carried away."

The jury returned verdict finding defendant guilty of feloniously receiving stolen goods. Judgment was entered on the verdict sentencing defendant to prison. Defendant appealed.

Attorney General Edmisten by Special Deputy Attorney General John M. Silverstein for the State.

George R. Morrow for defendant appellant.

PARKER, Judge.

The record shows that this case originated in the superior court upon the bill of indictment. The crime charged therein is a misdemeanor. G.S. 14-72(a). The district court has exclusive original jurisdiction of all misdemeanors except as stated in G.S. 7A-271(a). *State v. Wall,* 271 N.C. 675, 157 S.E. 2d 363 (1967). None of the exceptions apply in this case. The superior court was without jurisdiction to try the defendant for the first time for the offense charged in the bill of indictment, and the judgment entered by the superior court must be arrested.

It should be noted that this jurisdictional question was not raised before the able trial judge, nor was it raised in the briefs filed in this court. Nevertheless, where the lack of jurisdiction is apparent on the record, this court must note it *ex mero motu. State v. Guffey,* 283 N.C. 94, 194 S.E. 2d 827 (1973); *State v. Covington,* 267 N.C. 292, 148 S.E. 2d 138 (1966).

The legal effect of arrest of judgment is to vacate the verdict and judgment. *State v. Covington, supra.* The defendant may still be tried in the district court for the offense charged in the bill of indictment.

Judgment arrested.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. GRADY RAY MOTSINGER

No. 7621SC518

(Filed 1 December 1976)

Criminal Law § 154— record on appeal settled — time for obtaining certification of clerk

Defendant's appeal is dismissed where he waited 69 days after the record on appeal was settled to present the record to the clerk of superior court for certification, rather than presenting it within 10 days as required by Rule 11(e) of the Rules of Appellate Procedure.

APPEAL by defendant from *Crissman, Judge.* Judgment entered 5 February 1976 in Superior Court, FORSYTH County. Heard in the Court of Appeals 8 November 1976.

Defendant was arrested on 2 April 1975 and charged with operating a motor vehicle on a public highway while under the influence of intoxicating liquor. On 1 May 1975 defendant was tried and found guilty in the district court. Defendant appealed and was tried *de novo* before a jury in superior court. The jury returned a verdict of guilty, and judgment was entered suspending an active jail term upon conditions, one of which was that he surrender his driver's license.

Attorney General Edmisten, by Special Deputy Attorney General James L. Blackburn, for the State.

W. Warren Sparrow for the defendant.

BROCK, Chief Judge.

Defendant served upon the district attorney a proposed record on appeal on 31 March 1976. On 14 April 1976 the record on appeal was settled by agreement. The North Carolina Rules of Appellate Procedure, Rule 11(e) provides that "[w]ithin 10 days after the record on appeal has been settled . . . the appellant shall present the items constituting the record on appeal to the clerk of superior court for certification." Appellant in this case waited until 22 June 1976 to obtain the clerk's certification, a total of 69 days.

We state once again what was said in *Ledwell v. County of Randolph,* N. C. App. (filed 17 November 1976); in *State v.*

Gillespie, N.C. App. (filed 17 November 1976); and in *In Re Allen,* N. C. App. (filed 1 December 1976):

"The time schedules set out in the rules are designed to keep the process of perfecting an appeal to the appellate division flowing in an orderly manner. Counsel is not permitted to decide upon his own enterprise how long he will wait to take his next step in the appellate process. There are generous provisions for extensions of time by the trial court if counsel can show good cause for extension.

"The North Carolina Rules of Appellate Procedure are mandatory. 'These rules govern procedure in all appeals from the courts of the trial divisions to the courts of the appellate division; . . . ' App. R. 1(a)."

Appeal dismissed.

Judges PARKER and HEDRICK concur.

THE LUNDY PACKING COMPANY, A CORPORATION v. AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, AN UNINCORPORATED ASSOCIATION; LOCAL 525, MEAT, FOOD, & ALLIED WORKER UNION, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, AN UNINCORPORATED ASSOCIATION

No. 764SC557

(Filed 1 December 1976)

Appeal and Error § 6; Rules of Civil Procedure § 34— denial of motion to allow inspection of documents — premature appeal

Purported appeal from an order denying plaintiff's motion under Rule 34(a) that defendant be required to allow plaintiff to inspect and copy certain documents is an appeal from an interlocutory order not affecting a substantial right and must be dismissed as premature. G.S. 1-277.

APPEAL by plaintiff from *Lanier, Judge.* Order entered 5 April 1976 in Superior Court, SAMPSON County. Heard in the Court of Appeals 18 November 1976.

Poyner, Geraghty, Hartsfield & Townsend, by Marvin D. Musselwhite, Jr., and Cecil W. Harrison, Jr., for plaintiff appellant.

John C. Brooks, for defendant appellee.

VAUGHN, Judge.

On 10 July 1975, plaintiff started this suit for libel. On 5 December 1975, it filed a motion under Rule 34(a) (as it was then written) seeking an order requiring defendant to allow plaintiff to inspect and copy certain documents. By order entered 29 June 1976, Judge Lanier denied plaintiff's motion. The order recites that there was a hearing on the motion but the record fails to disclose what, if anything, was presented in the hearing before Judge Lanier other than the motion and affidavit.

> "Ordinarily, an appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment." *Stanback v. Stanback,* 287 N.C. 448, 215 S.E. 2d 30.

In theory, of course, any error by the trial division at any stage of the proceeding affects some right or injury when the aggrieved party must await appellate review after a final judgment. The statute, however, allows appeals from an interlocutory order only when the order affects a "substantial" right. G.S. 1-277. It has been held that a right is "substantial" only if the appellant would lose it if the order is not reviewed before final judgment. *Funderburk v. Justice,* 25 N.C. App. 655, 214 S.E. 2d 310. The rule and its purpose had been stated earlier by the Supreme Court, speaking through Justice Ervin:

> "Appellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment. To this end, the statute defining the right of appeal prescribes, in substance, that an appeal does not lie to the Supreme Court from an interlocutory order of the Superior Court, unless such interlocutory order deprives the appellant of a *substantial* right *which he might lose if the order is not reviewed before final judgment.*" (Emphasis added.) *Raleigh v. Edwards,* 234 N.C. 528, at pp. 529, 530, 67 S.E. 2d 669.

We also decline to allow discretionary review.

> "Such discretion is not intended to displace the normal procedures of appeal, but inheres to appellate courts under our supervisory power to be used only in those *rare cases*

in which normal rules fail to administer to the exigencies of the situation." (Emphasis added.) *Stanback v. Stanback, supra,* at pp. 453, 454.

The record before us discloses no compelling reason why the interlocutory order should be reviewed prior to final judgment.

Appeal dismissed.

Judges BRITT and MARTIN concur.

IN THE MATTER OF: WILLIAM ARNOLD ALLEN, VICKIE FAY ALLEN, VICTOR ARNOLD ALLEN, JR., FRANKIE SUSAN ALLEN, AND BELINDA GAIL ALLEN

No. 7617DC548

(Filed 1 December 1976)

Appeal and Error § 39— settled record on appeal — failure to file in apt time — absence of clerk's certification

Appeal is dismissed for failure to comply with the Rules of Appellate Procedure where the record on appeal was filed in the appellate court more than 150 days after notice of appeal was given in violation of App. R. 12(a), the settled record on appeal was never presented to the clerk for certification as required by App. R. 11(e), and the record on appeal was not filed in the appellate court within 10 days after certification by the clerk as required by App. R. 12(a).

APPEAL by defendant from *Clark, Judge.* Judgment entered 23 January 1976 in District Court, SURRY County. Heard in Court of Appeals 17 November 1976.

This is a civil proceeding instituted pursuant to G.S. 7A-288 by the Surry County Department of Social Services to permanently terminate the parental rights of respondents, Victor Arnold Allen, Sr., and Helen Josephine Tate Allen to their five minor children, William Arnold Allen, Vickie Fay Allen, Victor Arnold Allen, Jr., Frankie Susan Allen, and Belinda Gail Allen. By an order dated 19 February 1973 the court placed the children in question in the custody of the Surry County Department of Social Services. On 10 November 1975 the Department of Social Services petitioned the court to permanently terminate the parental rights of the respondents to the minor children. After a hearing on 23 January 1976, at which time the re-

spondents were present and represented by counsel, the court made findings and conclusions and entered an order in open court that respondents' parental rights to the minor children be permanently terminated. Respondent, Helen Josephine Tate Allen, appealed.

Folger & Folger by Larry Bowman for petitioner appellee.

William G. Reid for respondent appellant.

HEDRICK, Judge.

The judgment from which respondent appeals was entered in open court on 23 January 1976, and respondent gave notice of appeal in open court on that same day. The record on appeal was filed in this Court on 6 July 1976, more than 150 days from the date of the giving of the notice of appeal in violation of App. R. 12(a). No extension of time within which to file the record on appeal was granted by this Court. App. R. 27(c).

The record before us indicates that the clerk of superior court certified the record on appeal on 6 April 1976, although the record was not settled until 20 June 1976 pursuant to App. R. 11(b). The settled record on appeal was never presented to the clerk for certification in violation of App. R. 11(e), and the record on appeal was not filed in this Court within 10 days after certification by the clerk in violation of App. R. 12(a).

We think it appropriate to repeat what Chief Judge Brock said in *Ledwell v. County of Randolph,* 31 N.C. App. 522, 229 S.E. 2d 836 (1976):

> "The time schedules set out in the rules are designed to keep the process of perfecting an appeal to the appellate division flowing in an orderly manner. Counsel is not permitted to decide upon his own enterprise how long he will wait to take his next step in the appellate process. There are generous provisions for extensions of time by the trial court if counsel can show good cause for extension.
>
> "The North Carolina Rules of Appellate Procedure are mandatory. 'These rules govern procedure in all appeals from the courts of the trial divisions to the courts of the appellate division; . . .' App. R. 1(a)."

For respondents' failure to comply with the Rules of Appellate Procedure, the appeal is

Dismissed.

Chief Judge BROCK and Judge PARKER concur.

NORTH CAROLINA STATE BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS v. INTERNATIONAL BUSINESS MACHINES CORPORATION AND KENNETH M. FURR

No. 7610SC454

(Filed 15 December 1976)

1. **Professions and Occupations— "Customer Engineer" — repairer of business machines — use of term not prohibited**

Use of the term "Customer Engineer" by defendant to refer to its employees who install, maintain and repair its business machines is not a violation of G.S. 89C-2 and G.S. 89C-23 which prohibit the practice or offer to practice engineering without proper registration.

2. **Professions and Occupations — board regulating practice of professional engineering — title of "engineer" — limitation of use**

G.S. 89C-2 and 89C-23, statutes regulating the practice of professional engineering, authorize the plaintiff to prohibit only those uses of the title "engineer" which imply or represent professional engineering status or expertise.

3. **Professions and Occupations— use of title "engineer" — limitation of use improper**

Plaintiff's argument that G.S. 89C authorizes it to prohibit all *external* uses of the word "engineer" as opposed to uses within a business, organization or government is without merit.

4. **Professions and Occupations—"Customer Engineer" — use of title not practicing of engineering**

In an action to enjoin defendant from practicing engineering and from using the title "Customer Engineer" on calling cards and in communications with the general public, the trial court properly granted summary judgment for defendant and correctly concluded as a matter of law that the mere use of the term "Customer Engineer" on business cards and in a newspaper article did not constitute the offering to practice engineering or the representation of professional engineering status or expertise in violation of G.S. 89C-2.

APPEAL by plaintiff from *Bailey, Judge.* Judgment entered 30 December 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 13 October 1976.

Board of Registration v. IBM

The North Carolina State Board of Registration for Professional Engineers and Land Surveyors (hereinafter Board) instituted this civil action in February 1975 under Chapter 89 of the General Statutes of North Carolina to enjoin International Business Machines Corporation (hereinafter IBM) and Kenneth M. Furr, an IBM employee, from practicing engineering and

> "from using the titles 'customer engineer', 'engineer', or 'engineering' on calling cards and in communications with the general public, and from making any other representation that IBM employees, who are not registered or qualified under Chapter 89 of the General Statutes, are engineers."

The Board alleged that the defendant Furr and others, who are employed by IBM to install, maintain, and repair the business machines which it manufactures, are not registered engineers under Chapter 89. The Board further alleged that these employees are designated by IBM as "customer engineers"; that they work on premises other than those of IBM; and that they use calling cards bearing the employee's name and the title "customer engineer." The Board alleged that the use of this card in conjunction with the performance of services at facilities other than those of IBM is a practice which violates Chapter 89 in that it constitutes a representation and holding out that such unlicensed employees perform engineering services. The Board also alleged an additional unlawful representation in violation of Chapter 89 by defendant Furr. The basis for this allegation was an article published in the Greensboro Daily News, a newspaper of general circulation in that area, which reported Furr's candidacy as a Republican for a seat in the General Assembly and which described him as a "computor customer engineer."

In their answer defendants admitted that "customer engineers" installed, maintained, and repaired business machines and systems and that the company furnished these employees with calling cards bearing the name of the employee, the title "customer engineer," and the business address and telephone number of the employee. Defendants contended that Chapter 89 regulated the practice of *professional* engineering and did not

> "prohibit the use of the term 'engineer' or the practice of engineering where the term and the practice does not

involve 'professional' engineering or the practice of 'professional' engineering as defined in the Statute."

Defendants further contended that the use of the term "customer engineer" falls within exceptions in the statute. Defendants have not contended that the State may not constitutionally regulate the practice of professional engineering. They do contend that if the statute were construed to prohibit the use of terms which do not convey a representation of professional engineering expertise, it violated Article I, Sections 1, 19 and 34 of the North Carolina Constitution and Article I, Section 8, Clause 3 and the First and Fourteenth Amendments of the Constitution of the United States. Defendants also counterclaimed for an injunction prohibiting the Board from interfering with their use of the word "engineer" when not modified by the word professional.

After the pleadings were filed, Chapter 89 was amended and rewritten by Session Law 1975, c. 681, s. 1, effective 19 June 1975. Amended pleadings were filed to conform to the new statute, Chapter 89C.

On 19 September 1975, defendants moved for a summary judgment. Memoranda of law, exhibits and affidavits were filed in support of and in opposition to the motion. After hearing, the court entered summary judgment for defendants on both claim and counterclaim concluding that defendants were not engaged in the practice of professional engineering; that their activities and accompanying use of the term "customer engineer" were exempt under the statute; and that the term "engineer" is a generic term with many uses and variations which do not represent a danger to the public and which the Board is not authorized to pre-empt by Chapter 89C. Plaintiff appeals.

Attorney General Edmisten by Assistant Attorney General James E. Magner, Jr.; Bailey, Dixon, Wooten, McDonald & Fountain by Wright T. Dixon, Jr., and Ralph McDonald for plaintiff appellant.

Manning, Fulton & Skinner by Howard E. Manning; International Business Machines Attorneys Howard G. Ziff and Edward T. Buhl for defendant appellees.

CLARK, Judge.

The issue presented upon appeal is whether the designation and use of the term "customer engineer" by defendant IBM

and its employees who install, maintain, and repair its business machines is prohibited by the North Carolina Engineering and Land Surveying Act, Chapter 89C of the General Statutes of North Carolina.

The determination of this issue requires the construction of relevant provisions of the Engineering and Land Surveying Act, now codified as Chapter 89C. The original legislation empowering plaintiff Board to regulate the practice of engineering and land surveying was enacted in 1921. Act of 25 February 1921, Pub. Laws, ch. 1. There was a comprehensive revision of the Act in 1951. Act of 14 April 1951, Session Laws, ch. 1084. There have been several minor amendments since 1953. There were amendments in 1975 which rearranged and rewrote some of the sections for clarity. Act of 19 June 1975, Session Laws, ch. 681. However, the legislative history does not significantly aid us in construing the Act.

The present Act makes it unlawful "for any person to practice or to offer to practice engineering or land surveying in this State, as defined in the provisions of this Chapter, or to use in connection with his name or otherwise assume or advertise any title or description tending to convey the impression that he is either a *professional* engineer or a registered land surveyor, unless such person has been duly registered as such. . . ." (Emphasis added.) G.S. 89C-2.

The term "the practice of engineering" is defined by G.S. 89C-3(6)a, as follows:

> "A person shall be construed to practice or offer to practice engineering, within the meaning and intent of this Chapter . . . who, by verbal claim, sign, advertisement, letterhead, *card,* or in any other way represents himself to be a *professional* engineer, or through the use of some other title implies that he is a *professional* engineer or that he is registered under this Chapter. . . ." (Emphasis added.)

The penal section of the Act, G.S. 89C-23 provides that

> "Any person who shall practice, or offer to practice, engineering or land surveying in this State without first being registered in accordance with the provisions of this Chapter, or any person, firm, partnership, organization, association, corporation, or other entity using or employ-

> ing the words 'engineer' or 'engineering' or 'professional engineer' or 'professional engineering' or 'land surveyor' or 'land surveying,' or any modification or derivative thereof in its name or form of business or activity except as registered under this Chapter or in pursuit of activities exempted by this Chapter . . . in addition to injunctive procedures set out hereinbefore, shall be guilty of a misdemeanor. . . . In no event shall there be representation of or holding out to the public of any *engineering expertise* by unregistered persons. . . ." (Emphasis added.)

The plaintiff Board does not contend that defendant Furr and other IBM employees who install, maintain, and repair IBM business machines are doing the work of professional engineers. It contends that the use of the title "customer engineer" by IBM and its employees (1) is a representation that these employees are professional engineers (G.S. 89C-3(6)a), and (2) is a "holding out to the public" that they possess "engineering expertise" (G.S. 89C-23).

[1] The Board contends that defendants' representations of professional engineering status constitute the unregistered practice of engineering as that term is defined in G.S. 89C-3(6)a. A "professional engineer" is defined by G.S. 89C-3(8) as "a person who has been duly registered and licensed as a professional engineer by the Board." It is clear from this definition that the use of the word "engineer" without being modified by "professional," "registered," or "licensed," or some word of like import does not represent that one is "duly registered and licensed by the Board" and therefore cannot represent that one is a professional engineer as that term is defined in G.S. 89C-3(8). Since such usage does not represent professional engineering status, it cannot constitute the practice of engineering as that term is defined in G.S. 89C-3(6)a. We hold, therefore, that such usage is not a violation of those provisions of G.S. 89C-2 and G.S. 89C-23 which prohibit the practice or offer to practice engineering without proper registration.

We turn now to a consideration of whether the previously quoted provision of G.S. 89C-23 providing penalties for use of the words "engineer" or "engineering" or any modification thereof except as registered or exempted in the Chapter authorizes the Board to prohibit the uses which do not imply or represent professional status or expertise.

The language in this sentence of G.S. 89C-23 appears to be an absolute prohibition, and were it to stand in isolation, might support the Board's construction of the statute. When read in conjunction with other provisions of Chapter 89C, a more narrow meaning appears. G.S. 89C-23 itself further states that

> ". . . In no event shall there be representation of or holding out to the public of any *engineering expertise* by unregistered persons. . . ." (Emphasis added.)

G.S. 89C-2 entitled "Declarations; prohibitions" states that:

> *"In order to safeguard life, health, and property, and to promote the public welfare,* the practice of engineering and the practice of land surveying in this State are hereby declared to be subject to regulation in the public interest. It shall be unlawful for any person to practice or to offer to practice engineering or land surveying in this State, as defined in the provisions of this Chapter, or to use in connection with his name or otherwise assume or advertise any title or description tending to convey the impression that he is either a *professional* engineer or a registered land surveyor, unless such person has been duly registered as such. . . ." (Emphasis added.)

G.S. 89C-3(2) defines an engineer as "a person who, by reason of his special knowledge and use of the mathematical, physical and engineering sciences and the principles and methods of engineering analysis and design, acquired by engineering education and engineering experience, is qualified to practice engineering." Finally, the plaintiff's name, as provided in G.S. 89C-4, is the State Board for the Registration for *Professional* Engineers and Land Surveyors. (Emphasis added.)

We think that a reading of the Chapter as a whole makes it clear that the Legislature was not unmindful of the generic meaning of the term "engineer" and its widespread usage in job titles in our society to describe positions which require no professional training. Judicial notice may be taken of the fact that garbage collectors are now called sanitation engineers and that janitors are called custodial engineers. *Koontz v. City of Winston-Salem,* 280 N.C. 513, 186 S.E. 2d 897 (1972); *Singleton v. Stewart,* 280 N.C. 460, 186 S.E. 2d 400 (1972). Defendants' Exhibit 4 contained a list of several job titles used by the

State itself which contain the word engineer and which are not limited to professional engineers, such as television engineer, environmental engineering technician, engineering design technician and ferry engineer. Defendants offered other evidence which showed that terms such as customer engineer and field engineer have long been used in the computer industry to describe persons engaged in repair and maintenance work.

Regulatory legislation which exists solely to promote the economic interests of a narrow special interest group cannot be sustained. Regulatory legislation will be sustained as a proper exercise of the police power when it has a rational relationship to the public health, safety, morals or general welfare. *State v. Ballance,* 229 N.C. 764, 51 S.E. 2d 731 (1949). If a statute is susceptible to two interpretations, one constitutional and the other unconstitutional, the former will be adopted. *Milk Commission v. Food Stores,* 270 N.C. 323, 154 S.E. 2d 548 (1967); *Randleman v. Hinshaw,* 267 N.C. 136, 147 S.E. 2d 902 (1966). A statute imposing criminal penalties must be strictly construed even in civil proceedings brought thereunder. *Vogel v. Supply Co.* and *Supply Co. v. Developers, Inc.,* 277 N.C. 119, 177 S.E. 2d 273 (1970). A statute restricting the practice of an otherwise lawful occupation to a special class of persons must not be construed to extend to activities and transactions not intended by the Legislature. *McArver v. Gerukos,* 265 N.C. 413, 144 S.E. 2d 277 (1965).

G.S. 89C-2 makes it clear that Chapter 89C has the legitimate purpose to "safeguard life, health, and property." We think that the broad language of G.S. 89C-23 must be read with this purpose in mind. G.S. 89C-23, the part of the statute prescribing penalties, must be read subject to the basic prohibitory section of the statute, G.S. 89C-2, which makes it unlawful "to use in connection with his name or otherwise or advertise any title or description tending to convey the impression that he is . . . a *professional* engineer . . . unless such person has been duly registered as such." (Emphasis added.)

We think the statute when read as a whole makes it clear that the Legislature's intent in the "representation," "conveying," and "holding out" provisions of the chapter was to protect the public from misrepresentations of professional status or expertise. There must be a representation of registration with the Board or of engineering expertise or of special knowledge and ability to use mathematical, physical, and engineering

sciences or of the principles and methods of engineering analysis and design.

[2] We hold, therefore, that G.S. 89C-2 and 89C-23 authorize the Board to prohibit only those uses of the title engineer which imply or represent professional engineering status or expertise.

Since we are construing a statute, the decisions of other jurisdictions with statutes of differing language are of limited use. Nonetheless we note that several jurisdictions have construed their statutes as not applying to ordinary and common uses of the word engineer and engineering. *State v. Durham,* 56 Del. 170, 191 A. 2d 646 (1963); *State ex rel. State Board of Registration for Professional Engineers & Land Surveyors v. Richardson,* 291 N.E. 2d 373 (Ind. Ct. App. 1973); *Iowa State Board of Engineering Examiners v. Electronic Engineering Co.,* 261 Iowa 456, 154 N.W. 2d 737 (1967); *Ohio Society of Professional Engineers v. Hulslander,* 86 O. App. 497, 89 N.E. 2d 119 (1949); *State ex rel. Wisconsin Registration Board of Architects & Professional Engineers v. T. V. Engineers, Inc.,* 30 Wis. 2d 434, 141 N.W. 2d 235 (1966).

[3] The Board argues that Chapter 89C authorizes it to prohibit all *external* uses of the word engineer. The Board concedes that with this power it could not prohibit the State from calling its janitors, in internal uses, a custodial engineer, but it asserts that with this power it could prohibit the State from calling the same employee a custodial engineer in response to a reporter's question. Want ads for custodial engineers could similarly be regulated as "external" uses. We find this distinction between internal and external uses most unpersuasive and cannot conceive that in its weakest moments our Legislature would pass a bill granting such extensive control over the English language to a board of engineers.

With the statute construed in this manner, we think it clear that the trial court correctly applied it to the facts in this case. The Board contends that a summary judgment was inappropriate because the question of whether there has been a "holding out" or "representation" is always a question of fact, or even if not always one, was raised by its pleadings and affidavits.

The Board has cited decisions of other jurisdictions construing statutes regulating professional engineering which con-

tain language to the effect that the determination of "holding out" or "representation" is a question of fact or is to be determined from the facts and circumstances in each case. *T. V. Engineers, Inc. v. District of Columbia,* 166 A. 2d 920 (Mun. Ct. App. 1961); *Iowa State Board of Engineering Examiners v. Electronic Engineering Co., supra,* (dictum). In the Wisconsin *T. V. Engineers, Inc.* case, although the court used ambiguous language of this import, it decided as a matter of law that there had been no "holding out." See *Louisiana State Board of Registration for Professional Engineers & Land Surveyors v. Young,* 223 So. 2d 437 (La. Ct. App. 1969). In none of these cases was the issue raised upon a motion for summary judgment. Even though an issue is generally one of fact, where the facts are not controverted and the rights of the parties upon the facts are questions of law, the court may enter judgment. *Peoples v. Insurance Co.,* 248 N.C. 303, 103 S.E. 2d 381 (1958).

Plaintiff Board argues that even if this question is not always one of fact, its pleadings and affidavits, in particular that of its secretary, Robert Ruffner, raise the issue of fact in this case. The party moving for summary judgment may offer pleadings and affidavits, setting forth facts that would be admissible in evidence to show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law. G.S. 1A-1, Rule 56(c). The nonmovant may not rest upon the bare allegations of his pleadings, but must set forth *specific facts* showing that there is a genuine issue for trial. If he fails to do so, a summary judgment, if otherwise appropriate, shall be rendered against him. G.S. 1A-1, Rule 56(e). To support their motion for summary judgment, defendants offered affidavits from three customers of IBM who stated that they had never understood the term "customer engineer" to imply professional training nor had it ever been so represented to them by IBM personnel. Defendants also introduced copies of the business cards of customer engineers and other personnel.

The Board offered no opposing affidavits of persons who had been misled by defendants' use of the term "customer engineer" or to whom representations of professional status or expertise had been made. The Board's basic contention was that as a matter of law it could prohibit all "external" uses of the word engineer, and therefore it relied primarily upon the admission that customers were given the business cards of the

"customer engineers" and upon a newspaper article announcing defendant Furr's candidacy as a Republican for a seat in the Legislature in which he was described as a "computer customer engineer." The Board now contends that the affidavit of its secretary, Robert Ruffner, sufficiently controverts those of the IBM customers, but all that Ruffner stated was "that the Board's position" is that defendants are in violation of the statute by "representing and holding themselves out to the public as having engineering expertise" and by "offering to practice engineering by using the title 'engineer' in dealings with the public." This affidavit and plaintiff's other material state only conclusions to be drawn and do not raise a genuine issue of fact. A summary judgment is proper where the controversy is not as to the facts disclosed by the evidence, but rather as to the legal significance of those facts. *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E. 2d 35 (1972). A summary judgment may be proper even where based in part upon the affidavits of the movant and witnesses for the movant where there are only latent doubts as to the credibility of the affiants. *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976).

[4] We find that the trial court properly granted a summary judgment and correctly concluded as a matter of law that the mere use of the term "Customer Engineer" on business cards and in a newspaper article does not constitute the offering to practice engineering or the representation of professional engineering status or expertise in violation of Chapter 89C-2.

Given our construction of the scope of the statute, we need not determine whether the usage of the term "customer engineer" falls within any of the exemptions contained in G.S. 89C-25(7)-(9). We think a reading of those sections will reinforce our interpretation of the Legislature's intent to limit the scope of Chapter 89C to representations, whether external or internal, of professional status or expertise, and that were the exempting provisions in issue, all would probably apply to the usage by the defendants.

Given our construction of the statute, we also need not pass on defendants' constitutional objections.

The judgment is

Affirmed.

Judges MORRIS and ARNOLD concur.

CLIFTON E. WARREN v. MARK HODGES PARKS AND FRANKLIN BAKING COMPANY, INC.

No. 763SC503

(Filed 15 December 1976)

1. **Rules of Civil Procedure § 51— duty to apply law to evidence**

G.S. 1A-1, Rule 51, imposes upon the judge a duty to explain the law and to apply it to the evidence on all substantial features of the case, even without a request for special instructions.

2. **Automobiles § 90; Negligence § 10— action against one tort-feasor — failure to instruct on concurring negligence**

In a police officer's action to recover for injuries received when the individual defendant drove a tractor-trailer through the scene of an accident plaintiff was investigating and struck a low hanging cable which caused a pole and transformer to fall on plaintiff, the trial court erred in failing to instruct on joint and concurring negligence, although plaintiff, having sued only one tort-feasor, did not try the case on that theory, where defendants claimed contribution on the ground of concurring negligence by a second police officer who was directing traffic at the accident scene and offered evidence of negligence by the second officer in support of their claim.

3. **Automobiles § 90; Negligence § 10— concurring negligence — insufficiency of instruction**

An instruction that the negligence of defendant must be "a" proximate cause of plaintiff's injury in order for plaintiff to recover is insufficient to inform the jury on the law of concurring negligence and multiple proximate causes.

4. **Automobiles § 90; Negligence § 10— duty to instruct on concurring negligence**

Where there is evidence that the negligence of more than one person may have proximately caused the plaintiff's injuries, the judge has a duty to instruct the jury that there may be multiple proximate causes and that a finding of negligence on the part of one person does not necessarily exculpate the others.

5. **Automobiles §§ 8, 90— instructions — failure to obey traffic officer — duty to keep lookout**

In an action to recover for injuries received when defendant drove a tractor-trailer through the scene of an accident and struck a low hanging cable in the inside eastbound lane which caused a pole and transformer to fall on plaintiff, the trial court should have instructed the jury that defendant was negligent if a police officer directed defendant to move his vehicle forward in the inside westbound lane where the cable was not hanging low enough to be struck and defendant wilfully failed and refused to do so; furthermore, the jury should also have been instructed that, notwithstanding the directions of the police officer, defendant had the duty to keep a reasonable lookout and that he was negligent if he should have seen the

low hanging cable above the inside eastbound lane but failed to do so and moved his vehicle forward in this lane and struck the cable. G.S. 20-114.1.

APPEAL by plaintiff from *Browning, Judge.* Judgment entered 30 January 1976 in Superior Court, PITT County. Heard in the Court of Appeals 21 October 1976.

Plaintiff, a police officer employed by the City of Greenville, sued to recover damages for personal injuries incurred while he was investigating an automobile accident about 1:00 a.m. on 27 April 1974. He alleged that defendant Parks negligently drove a tractor-trailer owned by defendant Franklin Baking Company through the scene of an accident and struck a low hanging cable which caused a pole and transformer to fall on plaintiff.

The unconverted evidence of both parties tended to show that the following had occurred. The first accident occurred shortly after midnight on 27 April 1974. An automobile crashed into a utility pole on the south side of U. S. Highway 264, west of the City of Greenville. At this location, the highway has four lanes running in an east-west direction. There is no median. The automobile severed the utility pole into two sections. A transformer was mounted on what became the upper section. A cable ran from the transformer across the highway to another pole about 40 feet tall on the north side of the highway. The base of the upper section of the pole was resting in the highway near the south curb. The upper section, with the attached transformer, was being supported by cables running from the transformer. The cables were about six feet above the highway surface at the south curb, about 12-14 feet above the inside eastbound lane and increased in height across the westbound lane to the top of the pole on the north side of the highway.

Rescue, police and news personnel arrived at the scene shortly after the automobile accident. Plaintiff was among the investigating police officers. Vehicles were parked in the two outside lanes, leaving the two inner lanes open for traffic. Officer Jones of the Greenville Police Department was directing traffic through the scene of the accident. Defendant Parks was driving eastward into Greenville when he came upon the scene. He stopped his truck about 150 feet west of the scene and waited about ten minutes. With his flashlight, Officer Jones

signaled defendant to proceed eastward. As defendant Parks drove the truck through the scene in the inside eastbound lane, the right front corner of the trailer struck the cable running across the highway, and the impact caused the pole and transformer to fall on a group of people, one of whom was plaintiff.

Plaintiff alleged that defendant Parks negligently failed and refused to follow the directions of Officer Jones, and negligently failed to see the power cable extending across the highway and alleged "that the negligence of the individual defendant, was the sole proximate cause" of the collision.

Defendants alleged several negligent acts and omissions by Officer Jones. They also alleged that plaintiff had received a workmen's compensation award from his employer because of the negligence of Officer Jones, a fellow employee of the City of Greenville. In their amended answer they additionally alleged that the negligence of Officer Jones, imputed to plaintiff's employer, "was also a proximate cause of the accident and *joined and concurred* with the negligence, if any, of defendants in producing any damages allegedly sustained by plaintiff." (Emphasis added.) They stated that under G.S. 97-10.2(e) they were entitled to have a jury determine "whether or not the negligence of plaintiff's employer, the City of Greenville/ Greenville Police Department, *joined and concurred* with the negligence, if any, of defendants in producing any damages allegedly sustained by plaintiff." (Emphasis added.)

Plaintiff and defendants presented conflicting evidence on the lighting at the scene of the accident, on the visibility of the cable, on whether the signaling motions used by Officer Jones directed defendant Parks to proceed in the inside eastbound lane or to cross over into the inside westbound lane where the cable was not hanging as low, and on whether there was traffic proceeding westward in the inside westbound lane when defendant Parks was signaled to proceed eastward.

The judge submitted three issues to the jury: (1) Was the plaintiff injured as a result of the negligence of the defendants? (2) What amount, if any, was the plaintiff entitled to recover from the defendants? (3) Was the plaintiff injured as a result of the negligence of his employer? The third issue, determinative of defendants' right to contribution from plain-

tiff's employer, was to be considered only if the first two were answered in favor of the plaintiff.

The jury deliberated for eight minutes and answered the first issue in favor of the defendants. From judgment for defendants, plaintiff appeals.

James, Hite, Cavendish & Blount by Robert D. Rouse III for plaintiff appellant.

Teague, Johnson, Patterson, Dilthey & Clay by Robert M. Clay and Robert W. Sumner for defendant appellees.

CLARK, Judge.

Plaintiff assigns as error (1) the failure of the trial court to charge on the law of joint and concurring negligence and (2) the inadequacy of the following charge on proximate cause:

> "Proximate cause is a real cause, a cause without which the claimed injury would not have occurred, the one which a reasonable, careful, and prudent person could foresee would probably produce the injury or similar injurious result."

Plaintiff did not request an instruction on joint and concurring negligence or a more thorough charge on proximate cause, but contends that the trial court was required to give them even in the absence of a request.

[1] G.S. 1A-1, Rule 51 imposes upon the judge a duty to explain the law and to apply it to the evidence on all substantial features of the case, even without a request for special instructions. *Investment Properties v. Norburn,* 281 N.C. 191, 188 S.E. 2d 342 (1972). The chief purpose of a charge is to aid the jury in clearly understanding the case and in arriving at a correct verdict. *Turner v. Turner,* 9 N.C. App. 336, 176 S.E. 2d 24 (1970). If this is not done, there can be no assurance that the verdict represents a finding by the jury under the law and upon the evidence presented. *Lewis v. Watson,* 229 N.C. 20, 47 S.E. 2d 484 (1948).

[2] We think that the recital of defendants' allegations and the conflicting evidence presented by the parties make it clear that a substantial feature of the present case was joint and concurring negligence or multiple proximate causes. We think that in the absence of an instruction that the negligence of both

the defendant Parks and Officer Jones could have concurred in producing and in proximately causing plaintiff's injuries, the jury may well have been confused and felt it had to choose between the negligence of Parks and Jones in determining the proximate cause of plaintiff's injuries.

Defendants contend that plaintiff was not entitled to a charge on joint and concurring negligence. We disagree. On at least two occasions our Supreme Court has held that it was error for the judge not to instruct on joint and concurring negligence even though plaintiff, having sued only one tort-feasor, did not try the case on that theory. In *Harvell v. Wilmington,* 214 N.C. 608, 200 S.E. 367 (1939), the plaintiff alleged that he had been injured by the negligence of the defendant City in the construction and marking of a street when a car in which he was a passenger drove through a retaining wall. Plaintiff did not sue the driver. Defendant alleged that the driver had been negligent and that this negligence intervened and was the sole proximate cause of plaintiff's injuries. The negligence of the driver was not attributable to the plaintiff, but the trial court did not charge that if the driver were negligent, plaintiff could recover from defendant under the doctrine of joint and concurring negligence. The Supreme Court held that it was error not to give such an instruction, even though plaintiff had not tried his case on the theory of concurring negligence, since defendant had raised the issue of concurring negligence when it asserted the negligence of plaintiff's driver.

In *Tillman v. Bellamy,* 242 N.C. 201, 87 S.E. 2d 253 (1955), the plaintiff alleged that he had been injured when the automobile in which he was a passenger was struck by an automobile driven by defendant. Plaintiff did not sue the driver of the car in which he had been riding, but defendant alleged that the negligence of plaintiff's driver was the sole proximate cause of plaintiff's injuries. The Supreme Court held that it was error not to charge the jury that it could find that the negligence of both drivers had been concurring proximate causes of plaintiff's injuries.

Defendants rely on *Smith v. Bonney,* 215 N.C. 183, 1 S.E. 2d 371 (1939), for the proposition that a plaintiff cannot on appeal demand an instruction on a theory different from that on which he tried the case. We agree with the soundness of this principle in the context of that case, but think it has no applica-

tion to the present case. In that case plaintiff's intestate was fatally injured as a result of a collision between defendant's automobile and an automobile in which plaintiff's intestate was a passenger. Plaintiff alleged that intestate's driver was not negligent. She further alleged that defendant's negligence was the proximate cause of the death. The jury returned a verdict for defendant, and plaintiff assigned error to the court's failure to charge that defendant's negligence need be only one of the proximate causes of intestate's death. In a *per curiam* opinion, the court noted that the issue of concurring negligence of the two drivers had not been raised at trial, and stated that in that context,

> "To sustain the assignments of error would be to allow the appellant to try the case in the Superior Court upon one theory and to have the Supreme Court to [sic] hear it on a different theory." 215 N.C. at 184-185, 1 S.E. 2d at 371.

In neither *Bonney* nor the present case did the *plaintiff* try the case on a theory of joint and concurring negligence. (The present plaintiff was prevented from joining the City of Greenville, his employer, by virtue of G.S. 97-9.) However, *Bonney* is clearly distinguishable from the present case and from *Harvell* and *Tillman* because in *Bonney* there were no allegations nor any evidence of negligence of more than one party. The issue of concurring negligence was never raised and, therefore, there was no possibility that the jury could be confused or reach an incorrect verdict by the failure to instruct on the doctrine of concurring negligence. In the present case, defendants claimed contribution and offered evidence of the negligence of Officer Jones in support of their claim. The issue of joint and concurring negligence became a substantial feature of the case, and the need for such an instruction to aid the jury in reaching a proper verdict arose.

Harvell and *Tillman* refute the proposition that plaintiff can assign error to the failure to instruct only on those substantial issues raised by the plaintiff. Since a major purpose of the charge is to aid the jury in understanding the case, we think that those cases properly hold that this aid is necessary whenever joint and concurring negligence becomes a substantial issue in a case, whether raised by plaintiff or defendant.

Defendants also contend that the charge on proximate cause in the present case, when read as a whole, states that the

negligence of defendants need to be "a" proximate cause of plaintiff's injuries. The only time the phrase "the sole proximate cause" was used in the charge was in recapitulating plaintiff's contention. We agree with defendant that when the charge is read as a whole, the single use of the phrase "the sole" cannot have affected the jury's understanding of the doctrine of proximate cause. *Price v. Gray,* 246 N.C. 162, 97 S.E. 2d 844 (1957).

[3, 4] We cannot agree with the implication in defendants' contention that the use of the article "a" was sufficient to inform the jury on the law of concurring negligence and multiple proximate causes. The error in the charge lies not in what was stated, but in what was omitted. Where there is evidence that the negligence of more than one person may have proximately caused the plaintiff's injuries, we think the judge has a duty to explain to the jury that there may be multiple proximate causes and that a finding of negligence on the part of one person does not necessarily exculpate the others. *Pugh v. Smith,* 247 N.C. 264, 100 S.E. 2d 503 (1957); *Price v. Gray, supra; Gentile v. Wilson,* 242 N.C. 704, 89 S.E. 2d 403 (1955).

Had there been a proper, thorough instruction on proximate cause, we would have been more reluctant to have found error in the omission of a charge on joint and concurring negligence. See, *Gregory v. Lynch,* 271 N.C. 198, 155 S.E. 2d 488 (1967); *Whiteman v. Transportation Co.,* 231 N.C. 701, 58 S.E. 2d 752 (1950); 57 Am. Jur. 2d, Negligence § 138 (1971).

The failure of the trial judge to charge on the substantial features of the case arising from the evidence is prejudicial error. *Clay v. Garner,* 16 N.C. App. 510, 192 S.E. 2d 672 (1972). The instructions given in this case could have misled the jury and prevented it from reaching a proper verdict.

[5] Plaintiff also assigns error in the court's instructions to the jury relative to the duty of the defendant Parks to follow the directions of Policeman G. I. Jones, who was directing traffic at the scene of the accident. Since the need to give the same instruction may arise at the new trial, we will also address this assignment. The court instructed the jury as follows:

> "I further instruct you that the defendant Parks was under a positive legal duty to proceed forward and through the scene of the accident if Patrolman G. I. Jones, a mem-

ber of the Greenville Police Department, ordered him and directed him to proceed forward and through the scene of the accident. This duty also includes a positive legal duty to follow the directions of the officer and to proceed in such a manner as directed by the officer. This positive legal duty on the part of the defendant Parks to proceed forward and through the scene of the accident existed because of the provisions of the North Carolina General Statute 20-114.1 (a) which in pertinent part provides as follows:

'No person shall wilfully fail or refuse to comply with any law, order or direction of any law enforcement officer invested by law with authority to direct, control or regulate traffic, which order of [sic] direction related to the control of traffic.'

As a general rule, compliance with the directions of a traffic officer does not constitute negligence. While the directions of a traffic officer do not completely relieve the motorist of all obligations, the motorist cannot be charged with negligence in obeying such directions if in doing so the motorist exercised due care and caution. However, the failure of a motorist to follow and comply with the directions of the officer is negligence."

Policeman Jones testified that using his flashlight he directed defendant Parks to drive his tractor-trailer forward into the inside westbound lane, but Parks instead moved forward in the inside eastbound lane; that he continued to use the flashlight to signal Parks to the inside westbound lane, but Parks continued forward in the eastbound lane. On the other hand, Parks testified that Policeman Jones directed him to drive in the inside eastbound lane. Evidence for the plaintiff tended to show that the cables over the highway supporting the severed pole with the attached transformer were plainly visible and obviously were too low for the tractor-trailer to drive under them. Evidence for defendant tended to show that the lighting conditions at the scene were poor and that cables were not visible to anyone operating a motor vehicle on the highway. The defendants' tractor-trailer in moving forward in the inside eastbound lane, struck the overhanging cables which pulled the supported pole or transformer, or both, down on plaintiff who was then in the outside eastbound lane.

G.S. 20-114.1(a) makes it unlawful for a motorist wilfully to fail or refuse to comply with any direction of a traffic officer related to control of traffic. In this case all of the evidence tended to show that Policeman Jones was directing traffic at the scene of the accident, and that defendant Parks moved his tractor-trailer forward in the inside eastbound lane. If Policeman Jones directed the defendant Parks to move his vehicle forward in the inside westbound lane, the defendant would be negligent if he wilfully failed and refused to do so. Of course it would still be necessary to determine whether such negligence was the proximate cause of the plaintiff's injuries. The trial court should have so instructed the jury.

Whether the defendant Parks should have seen the overhanging cables in the exercise of his duty to keep a reasonable lookout was a question for the jury. He could not rely on the directions of the traffic officer to eliminate the exercise of due care on his part; notwithstanding the directions he had the duty of keeping a reasonable lookout. 8 Am. Jur. 2d, Automobile, § 746 (1963); Annot., 2 A.L.R. 3d 12 (1965). The jury should have been instructed that notwithstanding the directions of Policeman Jones the defendant Parks had the duty to keep a reasonable lookout and that if he ought to have seen the cables in their position about 12-14 feet above the inside eastbound traffic lane but failed to do so and moved his vehicle forward in this lane and struck the supporting cables, then it would be their duty to find the defendant negligent.

For error in the instructions of the court and failure to apply the law to the evidence, we order a

New trial.

Judges MORRIS and ARNOLD concur.

STATE OF NORTH CAROLINA v. THOMAS FRANCIS FLANNERY

No. 7615SC433

(Filed 15 December 1976)

1. Automobiles § 117— speeding — sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for speeding in excess of 80 mph where such evidence tended to

show that a patrolman observed a vehicle on an interstate highway traveling at a high rate of speed; the officer gave chase but lost sight of the vehicle's taillights when it went over a hill or around a curve; the officer did not recall seeing any other vehicles in the area at the time; the officer gave his opinion that the vehicle was traveling at 100 mph and higher; the officer apprehended the driver of the vehicle after its motor stalled and cut off; and the officer stated that the chase, which covered about eight miles, lasted for about 10 minutes.

2. **Automobiles § 126— breathalyzer and blood tests — request from arresting officer proper**

G.S. 20-139.1 is not violated when a request for chemical analyses of breath and blood comes from the arresting officer, and such an officer is competent to testify as to defendant's refusal to submit to such tests.

3. **Criminal Law § 158— conclusiveness of record — matters not in record — argument in brief not considered**

Generally speaking, when properly authenticated or certified, the record filed for the purpose of appeal imports absolute verity, and is the sole, conclusive, and unimpeachable evidence of the proceedings in the lower court; moreover, matters discussed in the brief outside the record will not be considered.

4. **Automobiles § 126; Constitutional Law § 33— driving under the influence — refusal to take breathalyzer, dexterity tests — no Miranda warnings**

In a prosecution for speeding and driving under the influence of intoxicating liquor, admission of evidence of defendant's refusal to submit to breathalyzer and physical dexterity tests did not violate defendant's right against self-incrimination, and admission of such evidence was not dependent upon whether Miranda warnings were given defendant.

5. **Criminal Law § 169— objectionable testimony — similar testimony elicited by defendant**

The admission of testimony over objection is harmless where the defendant elicits similar testimony on cross-examination.

6. **Automobiles § 127— driving under the influence — sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for driving under the influence where it tended to show that an officer observed a vehicle traveling at a high rate of speed for approximately eight miles; after the car stopped, the officer approached it; defendant got out of the car, staggered slightly and had a moderate odor of alcoholic beverage about his person; after defendant was taken to the county jail, he continued to stagger, and the officer noticed that defendant's eyes were red; during this time defendant was unsteady on his feet and swayed; and the officer testified at trial that he was of the opinion that defendant was under the influence of some intoxicating beverage.

7. Criminal Law § 163— jury instructions — objection for first time on appeal

Defendant's assignments of error to the trial court's summarization of the evidence are overruled where defendant made no objection at trial, though he was given an opportunity to do so by the trial court.

APPEAL by defendant from *Smith, Special Judge.* Judgment entered 8 January 1976 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 12 October 1976.

Defendant was charged with speeding in excess of 80 miles per hour and driving under the influence of intoxicating liquor. He entered pleas of not guilty and was convicted by a jury on both counts. Defendant was sentenced to imprisonment for six months, suspended for two years upon the condition that he pay a $300 fine, surrender his license and not violate any North Carolina law.

At trial, State's evidence consisted primarily of the testimony of Ernest W. Clemmons, a North Carolina Highway Patrolman. He stated, *inter alia,* that he had been a patrolman for 8½ years and was on duty on the night of 12 December 1974. At approximately 11:00 p.m., while operating a VASCAR unit near the intersection of Huffman Mill Road and I-85 in Alamance County, Clemmons observed a vehicle traveling southward on I-85 "at a high rate of speed." Clemmons pulled onto I-85 and pursued the vehicle beyond two exits before the car took the Mount Hope Church Road exit in Guilford County, approximately eight miles beyond the point at which he first gave chase. Clemmons identified the car he saw at Huffman Mill Road as a Ford, but at various points during the pursuit, he "would lose sight of the taillights when the vehicle would go over a hill or around a curve." He did not recall observing any other vehicles in the area at the time. Clemmons further testified that "[i]ndependent of any speed detection device, it was my opinion that the speed was a hundred and excess." He was unsure as to how long he chased the vehicle but that a 10 minute pursuit "sounds about right."

After exiting from I-85 at the Mount Hope Church Road, the vehicle attempted to make a sharp right turn off the ramp but the motor stalled and cut off. Trooper Clemmons approached the car and told its lone occupant to get out. He recognized the occupant of the car as defendant Flannery with whom he was

acquainted. As he got out of the car, he staggered slightly and Clemmons "noticed a moderate odor of alcoholic beverage about the person of Mr. Flannery." Gas was leaking through a small hole in the tank.

Clemmons advised defendant of his rights, placed him under arrest and drove him to the Alamance County jail in Graham. As defendant walked from the car to the jail, he staggered. Defendant was taken to the breathalyzer room to see Officer Coleman, a certified breathalyzer operator. When defendant left to go to the bathroom, Clemmons noticed that he continued to stagger and "his eyes were red. He was unsteady on his feet and he was swaying." Clemmons "was of the opinion that Mr. Flannery was under the influence of some intoxicating beverage." Defendant was requested to take a breathalyzer test and a series of physical dexterity tests, but "[h]e refused to do any tests." Officer Coleman testified that he had seen defendant on the night of 12 December 1974 and that "[t]here was a moderate odor of alcoholic beverage about him. In my opinion he was under the influence of intoxicating liquor."

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

Max D. Ballinger for defendant appellant.

MORRIS, Judge.

[1] In his first, third, fifth and seventh assignments of error, defendant contends that the trial court erred in denying his motions for judgment as of nonsuit and directed verdict as to the speeding charge, on the grounds that there was insufficient evidence for the case to be submitted to the jury. We disagree.

In considering these assignments of error we are guided by the oft-stated principle that in a motion to dismiss as of nonsuit, the evidence must be taken in the light most favorable to the State. The State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975); *State v. Marze*, 22 N.C. App. 628, 207 S.E. 2d 359 (1974). The court is not concerned with the weight of the testimony, or with its truth or falsity, but only with questions of whether the offense charged has been committed and that defendant committed it. *State v. Hines*, 286 N.C. 377, 211 S.E. 2d 201 (1975); *State v.*

Ledford, 23 N.C. App. 314, 208 S.E. 2d 870 (1974). The standard is the same with regard to defendant's motion for a directed verdict. *State v. Holton,* 284 N.C. 391, 200 S.E. 2d 612 (1973).

Defendant specifically objects to the sufficiency of Trooper Clemmons' testimony relating to the speed of defendant's vehicle. Defendant argues that since Clemmons lost sight of the car as it went over hills and around curves and since the length of the chase would indicate speed of less than 100 miles per hour, the patrolman's testimony was insufficient to show the speed of the vehicle. Defendant did not interpose an objection at trial to any of the opinion evidence he now says was insufficient. Viewing the evidence in the light most favorable to the State and giving the State every reasonable inference, *State v. McKinney, supra,* we hold that the evidence was sufficient to withstand defendant's motions for nonsuit and directed verdict. These assignments of error are overruled.

[2] Defendant also assigns as error certain rulings of the trial court regarding the admissibility of portions of Trooper Clemmons' testimony. Clemmons testified, over objection, that he requested defendant to take a breathalyzer test and various physical dexterity tests. These tests were not performed, according to Clemmons, because defendant "refused to do any tests." In his ninth and eighteenth assignments of error, defendant contends that the admission of defendant's refusal to do *any* tests constituted prejudicial error.

G.S. 20-139.1 provides in pertinent part:

> "(b) Chemical 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. . . . [I]n no case shall the arresting officer or officers administer said test.
>
> . . .
>
> (f) If a person under arrest refuses to submit to a chemical test or tests under the provisions of G.S. 20-16.2, evidence of refusal shall be admissible in any criminal action arising out of acts alleged to have been committed while the person was driving or operating a vehicle while under the influence of intoxicating liquor."

Defendant maintains that since subsection (b) prohibits *administration* of the chemical tests by the arresting officer, any evidence of the *refusal* of such tests must likewise come from a duly licensed breathalyzer operator and may not come, as it did in the present case, from testimony by the arresting officer. We cannot agree with defendant's construction of G.S. 20-139.1. The statutory requirement that chemical analyses of a defendant's breath or blood be conducted according to scientifically approved methods by a person possessing a permit by the Commission for Health Services is clearly to protect an alleged inebriate from the prejudicial effects of inaccurate and unscientific tests. This legislative purpose would not be served in any way by requiring, as defendant urges, that the mere *request* for the tests come from a duly licensed breathalyzer operator other than the arresting officer.

We are reinforced in our interpretation of this statute by G.S. 20-16.2, which involves the mandatory revocation of a driver's license upon refusal to submit to chemical tests. G.S. 20-16.2(a) provides that chemical tests upon a defendant's blood or breath ". . . shall be administered *at the request of a law-enforcement officer having reasonable grounds to believe the person to have been driving or operating a motor vehicle* on a highway or public vehicular area *while under the influence of intoxicating liquor.*" (Emphasis supplied.) Subsection (c) provides that "*[t]he arresting officer,* in the presence of the person authorized to administer a chemical test, *shall request that the person arrested submit to a test* described in subsection (a)." (Emphasis supplied.) Thus, G.S. 20-16.2 specifically authorizes the arresting officer to request that a defendant submit to chemical testing of his blood or breath, and the refusal to such a request can, if the other provisions of G.S. 20-16.2 are met, result in a mandatory revocation of driving privileges. We do not believe that the General Assembly intended to establish a different procedure for requesting chemical tests under G.S. 20-139.1 than it provided in G.S. 20-16.2. Accordingly, we hold that G.S. 20-139.1 is not violated when the request for the chemical analyses comes from the arresting officer, and such an officer is competent to testify as to defendant's refusal to submit to such tests.

[3] Defendant further contends that G.S. 20-139.1(f) requires that *all* provisions of G.S. 20-16.2 must be complied with before his refusal to submit to chemical tests may be admitted against

him. In support of this argument, defendant discusses in his brief examples in which the procedures followed by the Alamance County Sheriff's Department differed from the procedures prescribed by G.S. 20-16.2. However, these alleged irregularities do not appear in the record on appeal. "Generally speaking, when properly authenticated or certified, the record filed for the purpose of appeal imports absolute verity, and is the sole, conclusive, and unimpeachable evidence of the proceedings in the lower court." 4A, C.J.S., Appeal and Error, § 1143, p. 1201. *See also Civil Service Board v. Page,* 2 N.C. App. 34, 162 S.E. 2d 644 (1968); 4 Am. Jur. 2d, Appeal and Error, § 486, p. 928; 1 Strong, N. C. Index 3d, Appeal and Error, § 42, p. 290. ". . . [M]atters discussed in the brief outside the record will not be considered." *In re Sale of Land of Warrick,* 1 N.C. App. 387, 390, 161 S.E. 2d 630 (1968). Consequently, the question of the relationship, if any, between G.S. 20-139.1(f) and G.S. 20-16.2 is not before us, and we find no error in the procedures followed by the police in this case.

[4] A second contention of the defendant regarding the evidence of his refusal to "take any tests" is that any such refusal is improperly admitted except where he has been advised of his rights according to *Miranda v. State of Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966). However, our Supreme Court has stated that:

> " . . . Admission of the breathalyzer test is not dependent upon whether *Miranda* warnings have been given and constitutional right to counsel waived. In *State v. Randolph,* 273 N.C. 120, 159 S.E. 2d 324 (1968), this Court, citing *Schmerber v. California,* 384 U.S. 757, 16 L.Ed. 2d 908, 86 S.Ct. 1826 (1966), held that the taking of a breath sample from an accused for the purpose of the test is not evidence of a testimonial or communicative nature within the privilege against self-incrimination. For that reason, the requirements of *Miranda* are inapplicable to a breathalyzer test administered pursuant to our statutes." *State v. Sykes,* 285 N.C. 202, 207, 203 S.E. 2d 849 (1974).

Similarly, the physical dexterity tests are not "evidence of a testimonial or communicative nature within the privilege against self-incrimination" and are not within the scope of the *Miranda* decision and the Fifth Amendment. Therefore, the admission of evidence of defendant's refusal to submit to such

tests does not violate his constitutional right against self-incrimination. *See State v. Paschal,* 253 N.C. 795, 117 S.E. 2d 749 (1961); *accord, Alldredge v. State,* 239 Ind. 256, 156 N.E. 2d 888 (1959); *State v. Gatton,* 60 Ohio App. 192, 20 N.E. 2d 265 (1938). Therefore, these assignments of error are overruled.

[5] Defendant's tenth assignment of error relates to Trooper Clemmons' testimony regarding the leak in the gasoline tank of defendant's car. Defendant argues that the admission of this testimony, over objection, was prejudicial and should have been excluded. We disagree. The record reveals that on cross-examination of Clemmens, defendant brought out essentially the same testimony to which he now objects. The benefit to an objection is lost when the same evidence has previously or subsequently been admitted without objection. *State v. Carey,* 288 N.C. 254, 218 S.E. 2d 387 (1975); *State v. Pruitt,* 286 N.C. 442, 212 S.E. 2d 92 (1975); 1 Stansbury, N. C. Evidence, § 30, p. 79 (Brandis Rev. 1973). "The admission of testimony over objection is harmless where the defendant elicits similar testimony on cross-examination." *State v. Tudor,* 14 N.C. App. 526, 529, 188 S.E. 2d 583 (1972). Even assuming *arguendo* that the evidence was improperly admitted, defendant has failed to show, and we do not find, how the admission of this evidence could have been prejudicial to the defendant. The reversal of a conviction will not be granted for mere harmless error in the admission of evidence, *State v. Allen* 14 N.C. App. 485, 188 S.E. 2d 568 (1972), and the ruling of the lower court will not be disturbed.

[6] In his second, fourth, sixth and eighth assignments of error, defendant contends that the trial court erred in denying his motions for judgment as of nonsuit and directed verdict as to the charge of driving under the influence. He maintains that there was insufficient evidence of intoxication for the case to go to the jury. Again, we disagree.

State's evidence tended to show that Trooper Clemmons observed a vehicle traveling south on I-85 at a high rate of speed for approximately eight miles; that after the car had stopped, Clemmons approached the car and defendant got out of it, whereupon Clemmons noticed a "slight stagger" as well as a moderate odor of alcoholic beverage about defendant's person; that after defendant was taken to the Alamance County jail, he continued to stagger and Clemmons noticed defendant's eyes

were red; that during this time, defendant was unsteady on his feet and swaying. Finally, Clemmons testified that he "was of the opinion that Mr. Flannery was under the influence of some intoxicating beverage." Defendant, by failing to object at trial to Clemmons' opinion testimony, has waived his right on appeal to contest the jury's consideration of that evidence. *State v. Blackwell,* 276 N.C. 714, 174 S.E. 2d 534, *cert. den.,* 400 U.S. 946, 27 L.Ed. 2d 252, 91 S.Ct. 253 (1970). And while it is true that the odor of alcohol on one's breath, standing alone, is no evidence that he is under the influence of an intoxicant, *Atkins v. Moye,* 277 N.C. 179, 176 S.E. 2d 789 (1970), our Supreme Court has held that " . . . [t]he fact that a motorist has been drinking, when considered in connection with faulty driving . . . or other conduct indicating an impairment of physical or mental faculties, is sufficient *prima facie* to show a violation of G.S. 20-138." *State v. Hewitt,* 263 N.C. 759, 764, 140 S.E. 2d 241 (1965). Taking all this evidence in the light most favorable to the State as we are bound to do, *State v. McKinney, supra,* we hold that the evidence of defendant's driving, when considered in connection with the evidence of his bloodshot eyes and repeated staggering, was sufficient to take the charge of driving under the influence to the jury and to withstand defendant's motion.

[7] During his instructions to the jury, the trial judge recited that State's evidence tended to show that defendant's eyes were red and his feet were unsteady at the time of his arrest. In fact, however, the evidence had tended to show that defendant did not indicate these characteristics until after his arrival at the police station. The trial judge also referred to both the pursued car and defendant's car as Fords, implying that they were one and the same. In his eleventh and twelfth assignments of error, defendant claims that these errors in the summarization of the evidence constituted prejudicial error. "[O]bjections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires to afford the trial judge an opportunity for correction; otherwise they are deemed to have been waived and will not be considered on appeal." *State v. Thomas,* 284 N.C. 212, 218, 200 S.E. 2d 3 (1973). The record reveals that defendant made no such objection at trial, even though the trial judge offered both sides the opportunity to do so. These assignments of error are overruled.

Defendant's seventeenth assignment of error relates to the trial court's failure to instruct the jury to disregard three answers elicited from Clemmons after an objection to the questions had been sustained. In the first two instances objected to by defendant, the record fails to show the question, the objection, the answer or the motion to strike. "Where there is no objection to the admission of evidence, the competency of the evidence is not presented." *Cogdill v. Highway Comm.* and *Westfeldt v. Highway Comm.*, 279 N.C. 313, 318, 182 S.E. 2d 373 (1971). Any irregularities involving these two instances, therefore, are not before us. In the third instance cited by defendant, the record shows that Clemmons was asked "And, if you know, why was Trooper Coleman there?", to which the witness replied "I called him there because he's a certified Breathalyzer Operator." Defendant objected and moved to strike the answer. The court sustained the objection but did not direct the jury to disregard the answer. However, defendant has shown no prejudice which resulted, and we find none. This assignment is without merit.

In his fourteenth and fifteenth assignments of error, defendant contends that the trial court erred in denying his motions for a new trial and to set aside the verdict as to both charges. These motions are addressed to the sound discretion of the trial court and the refusal to grant them is not reviewable in the absence of an abuse of discretion. *State v. McNeil*, 280 N.C. 159, 185 S.E. 2d 156 (1971). Having reviewed the evidence, we can find no abuse of discretion in the trial court's denial of these motions.

No error.

Judges HEDRICK and ARNOLD concur.

HICKORY FURNITURE MART, INC. v. HENRY BURNS, D/B/A HENRY BURNS CONSTRUCTION CO.

No. 7625SC564

(Filed 15 December 1976)

1. Contracts § 6— general contractor defined

A general contractor is one who undertakes to build an entire building.

2. Contracts § 6— contractors' licensing statute — cost of undertaking

The cost of the undertaking by a contractor, not the owner's total cost of the building, determines the status of the contractor for purposes of the licensing statute.

3. Contracts § 6— contractors' licensing statute — control over expenses

If a contractor has no control over the purchase of materials or other expenses which the owner might incur, he cannot insure that the cost limitation of the licensing statute is not exceeded, and he does not fall within the definition of a general contractor.

4. Contracts § 6— contract in excess of contractor's license — summary judgment — genuine issue as to whether defendant was general contractor

The trial court erred in granting summary judgment for plaintiff on defendant's counterclaim for an amount allegedly due for construction of a showroom addition for plaintiff on the ground that defendant was a general contractor who undertook construction exceeding the $75,000 (later increased to $125,000) limitation of his contractor's license where there was a genuine issue of material fact as to whether defendant was the general contractor for the project or whether defendant acted only as a construction supervisor and plaintiff acted as its own general contractor.

5. Contracts § 6— unlicensed contractor — enforcement of contract as set-off

While an unlicensed general contractor cannot affirmatively enforce his contract or recover on the basis of *quantum meruit*, the contractor can enforce his contract defensively, as a set-off, to claims asserted against him, though the set-off cannot exceed his adversary's claims.

APPEAL by defendant from *Kirby, Judge.* Judgment entered 30 April 1976 in Superior Court, CATAWBA County. Heard in the Court of Appeals 18 November 1976.

In the mid-1950's, Henry Burns, the defendant, went to work for Charles Mull, proprietor of Mull's Motel, as a maintenance man. In 1956, Mull's Motel incorporated. Sometime thereafter, it entered the furniture sales business, and in 1974, the plaintiff, Hickory Furniture Mart, Inc., was "spun-off" from the parent, Mull's Motel, Inc. G. Leroy Lail, a longtime associate, became president of the Hickory Furniture Mart, Inc. During this entire period, Henry Burns worked for these men and their businesses, and among his duties was that of repairman and builder. In 1968 or 1969, they helped Burns obtain a limited general contractor's license, permitting him to undertake the construction of buildings worth no more than $75,000 (later increased by statute to $125,000). In addition,

they helped Burns begin to do business as the Henry Burns Construction Company. Their clear purpose was to obtain a licensed "in-house" builder, in accordance with regulations of the City of Hickory. In June 1974, Burns began construction of an addition to the Hickory Furniture Mart showroom, though there was no written contract between the parties. The cost of this addition exceeded $325,000, and the construction did not satisfy the plaintiff. A dispute arose about compensation owed to Burns, and on 19 February 1975, Burns filed a claim of lien against the Hickory Furniture Mart, Inc., for $31,000 compensation outstanding plus $12,551.23 allegedly owed by Hickory to various contractors but charged to Burns' credit.

On 28 March 1975, plaintiff filed a complaint, verified by G. Leroy Lail, alleging two causes of action. In the first cause of action, plaintiff alleged that it had employed defendant for many years; that defendant obtained a contractor's license with its help; that it first paid defendant an hourly wage plus bonuses; that after defendant began doing business as Henry Burns Construction Co., plaintiff and defendant entered a continuing course of business whereby defendant performed construction work for which he was compensated in an amount equal to his labor and material expenses plus a percentage of these expenses; that defendant also occasionally received bonuses; that in June 1974, defendant began the addition in question for which he was to be paid expenses plus 10 percent; that this amounted to only $14,628.96, which he received; that his duties also included supervision of the other workers and contractors on the project; that in recognition of this added duty, defendant received, gratuitously, bonuses amounting to $5,500; that the work was improperly done; and, finally, that the cost of repairs was $16,000. Wherefore, plaintiff prayed for $16,000 actual damages.

In the second cause of action, plaintiff alleged that defendant did not agree to act as general contractor for the showroom addition; that defendant was not the general contractor; that plaintiff, itself, entered into subcontracts with the subcontractors; that defendant entered into no subcontracts; that plaintiff owed defendant nothing for supervising the work of the subcontractors; that plaintiff was unaware of any moneys owed by it to subcontractors but charged to the credit of defendant; and, that, consequently, defendant maliciously interfered with plaintiff's business when he filed his claim of lien against plain-

tiff. Wherefore, plaintiff prayed for $50,000 damages and an order dissolving defendant's lien.

The defendant Henry Burns, in his verified answer filed 8 April 1975, denied the allegations of plaintiff's complaint except as admitted in his counterclaim. In his counterclaim, defendant alleged that he had established a course of dealing with G. Leroy Lail and Mull's Motel, Inc.; that this continued after the Hickory Furniture Mart, Inc., was created and Lail became its president; that the terms of their relation provided that defendant perform some construction work and supervise the rest, for which he would be reimbursed for his expenses plus receive a percentage of the total cost of the project; that in consideration for building the furniture showroom, he was to receive an amount equal to his expenses for material and labor plus ten percent of the total cost of the showroom; that the compensation he received for supervising the subcontractors was not a bonus but a regular part of the contract; that he had been reimbursed for his expenses for labor and materials; that, however, he had not been paid the agreed upon compensation for supervising the work done by subcontractors; that despite negotiations with G. Leroy Lail, plaintiff refused to pay defendant; and, that defendant filed a claim of lien, which was appended to his counterclaim. According to the claim of lien plaintiff owes defendant $31,000 which is ten percent of $325,000, i.e., the total amount of materials and work furnished by subcontractors, plus $4,000 loaned to plaintiff less $5,500 already paid. The lien also indicates that plaintiff owed to subcontractors $12,551.23 which is currently charged to the credit of the defendant.

Plaintiff filed a verified reply and alleged that a course of dealing existed between plaintiff and defendant; that G. Leroy Lail established this course of dealing on behalf of plaintiff; that defendant was to be compensated for his labor and certain miscellaneous materials, plus a percentage thereof, plus bonuses; that plaintiff paid bonuses equal to five percent of some, but not all, of the additional expenditures made by plaintiff, but that this figure was arbitrary and discretionary; that prior to and during the construction of the furniture showroom, defendant worked almost exclusively for plaintiff; that the contract for the addition was no different from their existing course of business; that defendant was not paid a commission equal to ten percent of the cost of the subcontractors' labor and ma-

terials; and, that though plaintiff paid defendant $5,500, this payment was a bonus and entirely discretionary. Wherefore, plaintiff prayed that defendant recover nothing on his counterclaim.

Plaintiff moved for summary judgment on defendant's counterclaim. Plaintiff alleged that the undisputed facts of the case show that defendant at all times was an improperly licensed general contractor; that he was prohibited from building plaintiff's addition; and, that he was barred by law from enforcing his construction contract and claim of lien. Plaintiff attached an affidavit showing that defendant's contractor's license was limited to undertakings of no more than $75,000 and that this limit was increased by statute to $125,000. Another affidavit stated that no money owed by plaintiff was charged to the credit of defendant.

Defendant, Henry Burns, filed a counter-affidavit swearing that he never acted as a general contractor but only as a construction supervisor and labor subcontractor who was paid an amount equal to his own expenses for labor and materials, plus ten percent thereof, plus ten percent of the total cost of labor and materials incurred by other subcontractors. Defendant averred that plaintiff hired all of the subcontractors, and contracted for large quantities of basic materials such as brick and structural steel. Defendant also said that plaintiff exercised that day-to-day control over the project which is the mark of a general contractor. In short, defendant stated that plaintiff acted as its own contractor. Finally, defendant averred that the total cost of his undertaking, including his labor and materials, his percentage thereof, and his percentage of all other costs, equaled only $32,500.

The court entered summary judgment for the plaintiff. It appears from the judgment that the court first considered defendant's answer, counterclaim and claim of lien and, from these papers, determined that defendant undertook to construct a building worth $325,000, in consideration for which he received compensation equal to his expenses for labor and materials plus ten percent of the cost of the entire undertaking. The court determined from affidavits filed that defendant's contractor's license was limited to $75,000 (later increased to $125,000). Accordingly, the court concluded that defendant's claim was barred as a matter of law, since there was no gen-

uine issue of fact material to the question of whether defendant was a general contractor, with a limited license, who undertook a building the value of which exceeded the limit endorsed upon his license. Defendant appeals from summary judgment dismissing his counterclaim.

Thomas W. Warlick and Corne & Pitts, by Larry W. Pitts, for plaintiff appellee.

Tate and Young, by E. Murray Tate, Jr., for defendant appellant.

ARNOLD, Judge.

Summary judgment was entered for plaintiff based on the conclusion that defendant was a general contractor, as defined by G.S. 87-1, and that defendant was not entitled to recover on the construction contract since he held a limited contractor's license. G.S. 87-10 provides that the holder of a limited contractor's license is not entitled to engage in the practice of general contracting "with respect to any single project in excess of one hundred twenty-five thousand dollars . . . . " (Before July 1974 the limitation was seventy-five thousand dollars.)

Error is assigned to the granting of the summary judgment. Defendant contends that there is a genuine issue of material fact as to whether he was a general contractor. A general contractor is defined in G.S. 87-1 as

> " . . . one who for a fixed price, commission, fee or wage, undertakes . . . to construct any building . . . or any improvement or structure where the cost of the undertaking is thirty thousand dollars ($30,000) or more . . . . "

[1] A general contractor is one who undertakes to build an entire building. The fact that a subcontractor erects the walls and roof, puts in the subfloor, installs doors, windows, siding and shelves, and paints the building, does not make him a general contractor. *Vogel v. Supply Co.*, 277 N.C. 119, 177 S.E. 2d 273 (1970). Where one contracts with a landowner to undertake the construction of a house for the landowner at an agreed price of [thirty thousand dollars or more] he is a "general contractor" and subject to the provisions of the licensing statute. *Holland v. Walden*, 11 N.C. App. 281, 181 S.E. 2d 197 (1971).

[2, 3] In *Fulton v. Rice*, 12 N.C. App. 669, 184 S.E. 2d 421 (1971), this Court held that the contractor is a general contrac-

tor within the scope of the statute only where the cost of that contractor's undertaking exceeds [$30,000 or more]. It is the cost of the undertaking by the purported contractor that controls. The contract price, or cost of the contractor's undertaking, is not always the same as the total cost of the building. The owner's total cost of the building is not determinative of the contractor's status. If the situation is such that the contractor has no control over the purchase of materials or other expenses which the owner might incur, he cannot insure that the statutory cost limitation is not exceeded, and he does not fall within the definition of a general contractor. *Fulton v. Rice, supra,* at 672.

Upon plaintiff's motion for summary judgment, the trial court considered the defendant's claim of lien and defendant's Answer and Counterclaim, and found that defendant "undertook to construct a building" which cost at least $325,000. The court found the further fact, disclosed by both parties' affidavits, that defendant had a limited license as a general contractor. (This limit was $75,000 prior to 1 July 1974 and $125,000 after July 1974.) It concluded that, since the value of the building exceeded the limit of defendant's license, his claim was barred by G.S. 87-1 and cases thereunder.

[4] Summary judgment was improper. There is a material issue of fact as to the size and scope of defendant's undertaking and whether defendant was a general contractor. Defendant alleges numerous facts which show he lacked the control of a general contractor over the undertaking. Among these are his assertions that it was plaintiff who selected and purchased building material, and directly employed subcontractors. In addition, defendant's affidavit stated that he never acted as a general contractor, but that he was a "construction supervisor." Defendant further avowed that Mr. Leroy Lail acted as overall manager of the project, and that defendant never knew from day to day whether he was employed for the next day. While there are inconsistent allegations in defendant's pleadings and claim of lien, there is a triable issue as to defendant's status.

Moreover, plaintiff's complaint and reply allege "an employment arrangement" with defendant, and that defendant had duties as a supervisor. The complaint alleges that plaintiff contracted directly with many subcontractors, and plaintiff's second cause of action specifically alleges that there was never

any "discussion or agreement, written or oral, with regard to defendant acting as a general contractor" for the project. In fact, paragraph VII alleges "that the plaintiff had no contract with the defendant . . . . "

All of the pleadings and affidavits present a general issue of material fact as to whether defendant was a general contractor.

[5] Defendant's counterclaim may not be entirely barred even if he is found to be a general contractor who exceeded the limits of his license. Section 87-10 of the North Carolina General Statutes says, "the holder of a limited [general contractor's] license . . . shall not be entitled to engage [in general contracting] with respect to any single project of a value in excess" of $125,000. The statute is criminal. Its purpose is to protect the public from incompetent builders by forbidding them to maintain an action on their contracts, thereby discouraging them from undertaking projects beyond their capabilities. *Builders Supply v. Midyette,* 274 N.C. 264, 162 S.E. 2d 507 (1968). An unlicensed contractor cannot affirmatively enforce his contract; neither can he recover in *quantum meruit,* because this would achieve the result forbidden at law. *Holland v. Walden, supra.* However, a general contractor can enforce his contract defensively, as a set-off, to the claims asserted against him, though the set-off cannot exceed his adversary's claims. *See, Builders Supply v. Midyette, supra,* at 273 (dicta); *Culbertson v. Cizek,* 225 Cal. App. 2d 451, 37 Cal. Rptr. 548 (1964). This exception limits the penalty paid by the unlicensed builder to the amount he actually expended on the contract and no more.

Finally, defendant correctly contends that the $4,000 advanced the plaintiff as a loan, of which $3,500 was repaid, had nothing to do with his status as a contractor. Inasmuch as plaintiff's reply admits that the balance of $500 has not been paid, the defendant is entitled to recover the $500 which plaintiff admittedly owes.

The summary judgment dismissing defendant's counterclaim and claim of lien is reversed and the cause is remanded.

Reversed and remanded.

Judges MORRIS and CLARK concur.

NYTCO LEASING, INC. v. DAN-CLEVE CORPORATION, F. ROLAND DANIELSON, AND BILL CLEVE v. SOUTHEASTERN MOTEL CORPORATION

No. 7610SC306

(Filed 15 December 1976)

1. **Rules of Civil Procedure § 56— summary judgment motion — no findings of fact by court**

In passing upon a motion for summary judgment pursuant to G.S. 1A-1, Rule 56, the trial court does not decide facts but makes a determination whether an issue which is germane to the action exists, and if findings of fact are necessary to resolve an issue as to a material fact, summary judgment is improper.

2. **Appeal and Error § 57— motion for summary judgment — failure to include on appeal all material before trial court**

When the appealing party fails to include in the record on appeal all of the materials that the trial court had before it in ruling on a motion for summary judgment, the Court of Appeals is unable to say that the trial court erred in determining that there was no genuine issue as to any material fact.

3. **Landlord and Tenant § 2— agreement as lease — no conditional sales contract**

A document executed by the parties was a lease and not a conditional sales contract where the document contained all indicia of a lease, including a provision that the property would be returned to plaintiff at the expiration of the lease period, and plaintiff was not engaged in manufacturing or selling the property in question but, pursuant to a list furnished by defendants, went into the market place and purchased the property for defendants.

4. **Guaranty — lease agreement — liability of individual defendants**

In an action to recover on a lease agreement, the trial court did not err in holding the individual defendants personally responsible for the obligations of defendant corporation, since the individual defendants had executed a personal guaranty agreement committing themselves personally to pay all obligations of defendant corporation.

5. **Courts § 21— construction of contract — law of place where made governs**

The validity and construction of a contract are to be determined by the law of the place where the contract was made, and the place at which the last act was done by either of the parties essential to a meeting of the minds determines the place where the contract was made.

6. **Courts § 21— making of contract — place of last act — action remanded for finding**

This action to recover on a lease agreement is remanded for the trial court to make a finding as to whether the agreement was

made in California or N. C., such finding being required in order to determine whether the law of California or N. C. should be followed in awarding plaintiff attorney fees.

APPEAL by defendants from *McKinnon, Judge,* and *Bailey, Judge.* Judgments entered 28 June 1974 and 9 December 1975, Superior Court, WAKE County. Heard in the Court of Appeals 26 August 1976.

Plaintiff alleged in its complaint that it had leased certain motel furniture, equipment, and fixtures to defendant Dan-Cleve for a period of 84 months at a rental of $3,594.04 per month; that defendants Danielson and Cleve had each individually executed and delivered to plaintiff his personal guaranty of Dan-Cleve's performance of the lease agreement; that Dan-Cleve failed to make the monthly rental payments as required by the lease; and that pursuant to the terms of the lease agreement, plaintiff declared all rental payments for the entire term of the lease immediately due and payable. In a second claim, plaintiff alleged that it had agreed to sell certain expendable items to defendants for $4,396.83 and defendants had failed to pay for them.

Defendants denied that Dan-Cleve had breached the lease agreement. They admitted that Dan-Cleve was liable for the price of the expendable items, but denied that Danielson and Cleve were liable. In a third-party complaint against additional defendant Southeastern, defendants alleged that the leased property was located in a motel in Selma owned by Southeastern and that if plaintiff obtained a judgment against defendants, the judgment should be a lien on the leased property, and the leased property should be sold for credit on the judgment. Southeastern alleged that it had a right to retain the leased property and denied that the property should be sold to satisfy any judgment plaintiff might obtain against defendants.

Plaintiff moved for summary judgment. Certain materials submitted in support of and in opposition to the motion do not appear in the record. On 28 June 1974 the court (through Judge McKinnon) granted partial summary judgment for plaintiff. It held that Dan-Cleve was in default under the lease agreement and was liable to plaintiff for unpaid rent in the amount of $281,541.20, plus interest and attorney's fees; that Dan-Cleve was also liable to plaintiff for $4,396.83 for the expendable items; that Danielson and Cleve were likewise liable for these

amounts under their guaranty agreements. Plaintiff had sold some of the leased property to Southeastern for $33,500, and the court held that this amount should be credited on defendants' indebtedness to plaintiff. In addition, plaintiff had agreed to a public sale of the rest of the leased property, and the court said that the proceeds of this sale should also be credited on defendants' indebtedness. The defendants were also held liable to plaintiff for the costs it incurred in repossessing the leased property, but the amount of these costs was a genuine issue of material fact for trial. Defendants appealed from this judgment, and their appeal was dismissed pursuant to N.C.R.C.P. 54(b) in *Leasing, Inc. v. Dan-Cleve Corp.*, 25 N.C. App. 18, 212 S.E. 2d 41 (1975).

On 24 July 1974 execution was issued against defendants. Pursuant to this execution, certain motor vehicles were sold on 1 November 1974, and certain stock certificates and promissory notes were sold on 15 November 1974. On 22 November 1974 defendant Danielson and his wife moved to set aside these sales. They alleged that the sale of the automobiles "was at least the third sale, which sale was held without an additional order for sale as provided by statute"; that the automobiles were sold for much less than their market value; and that no report of the sale had been made to the clerk. As to the sale of the stocks and notes, they alleged that they were not given personal notice of the sale, and that Mrs. Danielson had owned an interest in some of the stock certificates and notes that were sold. The court denied the Danielsons' motion. It held that "[e]ven though the first scheduled sale of the automobiles was not held and no re-sale was ordered by the Clerk, the posting of a new notice of sale and compliance with all other statutory requirements was effective as a new sale which did not require an order of the Clerk"; that the sale price of the automobiles was not substantially below their fair market value; that the sheriff's failure to file a report of the sale was immaterial; that Danielson had received notice of the execution sale; and that Mrs. Danielson's interest in the stocks and notes was not sold.

On 5 September 1975 plaintiff dismissed its claim against defendants for reimbursement for expenses incurred in repossessing the leased property. On 12 September 1975 defendants moved to set aside this dismissal.

On 19 September 1975 Danielson moved to set aside the execution issued against him on the ground that the judgment

on which it was based was interlocutory. On 6 October 1975 Cleve filed a similar motion.

On 10 October 1975 plaintiff moved to dismiss defendants' claim against Southeastern on the ground that the relief sought therein had been granted and to dismiss Southeastern's counterclaims against defendants for failure to prosecute or in the alternative to amend the 28 June 1974 judgment by adding a provision that there was no just reason for delay.

On 27 October 1975 defendants moved to set aside the 28 June 1974 judgment on the ground that it was based on misrepresentation.

On 9 December 1975 the court (through Judge Bailey) granted plaintiff's motions of 10 October 1975 and denied defendants' motions of 12 September 1975, 19 September 1975, 6 October 1975, and 27 October 1975. It ordered that if plaintiff received any amount in payment of its Craven County judgment against Southeastern, this amount should be credited on its judgment against defendants in the present case.

Defendants appealed.

Sanford, Cannon, Adams & McCullough, by E. D. Gaskins, Jr. and John Q. Beard, for the plaintiff.

James, Hite, Cavendish & Blount, by Marvin K. Blount, Jr., Ellis Nassif, and Vaughan S. Winborne, for the defendants.

MARTIN, Judge.

Defendants assign as error the failure of the trial court to grant their motion to dismiss pursuant to G.S. 1A-1, Rule 12(b), contending that any action against defendants was premature for the reason that there had been no breach of contract at the time the action was instituted. We find no merit in this assignment and it is overruled.

[1] A large number of defendants' assignments of error are based on exceptions to "findings of fact" made by the trial court and its failure to make other "findings of fact." We repeat again what we have said many times, that, in passing upon a motion for summary judgument pursuant to G.S. 1A-1, Rule 56, the court does not decide facts but makes a determination whether an issue which is germane to the action exists. *Furst v. Loftin,* 29 N.C. App. 248, 224 S.E. 2d 641 (1976). If find-

ings of fact are necessary to resolve an issue as to a material fact, summary judgment is improper. *Insurance Agency v. Leasing Corp.*, 26 N.C. App. 138, 215 S.E. 2d 162 (1975).

Following the hearing on its motion for summary judgment before Judge McKinnon, plaintiff was entitled to have its motion granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, showed that there was no genuine issue as to any material fact and that plaintiff was entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c). While it was unnecessary for the trial court to make "findings of fact," the recitals in the judgment bearing that appellation do provide an aid in understanding how the trial court reached its determination that there was no genuine issue as to any material fact and that a party was entitled to judgment as a matter of law.

[2] Nevertheless, when the appealing party fails to include in the record on appeal all of the materials that the trial court had before it in ruling on the motion for summary judgment, this Court is unable to say that the trial court erred in determining that there was no genuine issue as to any material fact. The rule is well established that when the evidence is not included in the record, it will be assumed that there was sufficient evidence to support the findings by the trial court. 1 Strong, N. C. Index 3d, *Appeal and Error* § 57.1 (1976). See also *Telephone Co. v. Communications, Inc.*, 27 N.C. App. 673, 219 S.E. 2d 800 (1975); *Mt. Olive v. Price*, 20 N.C. App. 302, 201 S.E. 2d 362 (1973); *Cobb v. Cobb*, 10 N.C. App. 739, 179 S.E. 2d 870 (1971). We think that principle applies here. Plaintiff's motion for summary judgment states that it is based on the complaint and the depositions of defendants Danielson and Cleve and the judgment of Judge McKinnon recites that depositions were considered. However, those depositions are not a part of the record on appeal.

That being true, all of defendants' assignments of error based on contentions that the trial court's findings are not supported by the evidence, and that the court should have made other findings, are overruled. We hold that defendants have failed to show that Judge McKinnon erred in determining that there was no genuine issue as to any material fact. We now proceed to consider whether plaintiff was entitled to judgment as a matter of law.

[3] Defendants contend that the purported "lease agreement" executed by the parties is in reality a conditional sale contract. We reject this contention. Not only does the document contain all indicia of a lease, including a provision that the property would be returned to plaintiff at the expiration of the lease period, but the record also shows that plaintiff was not engaged in manufacturing or selling the property in question but, pursuant to a list furnished by defendants, went into the market place and purchased the property for defendants. We hold that the document is a lease and not a conditional sale contract.

[4] Defendants Danielson and Cleve contend that the trial court erred in holding them personally responsible for the obligations of defendant corporation, and particularly for payment for the "expendable items." We find no merit in this contention. The personal guaranty agreement signed by each of the individual defendants provides that

> " . . . each of us as a primary obligor jointly and severally and unconditionally guarantees to you that Company [defendant corporation] will fully and promptly and faithfully perform, pay and discharge all its present and future obligations to you, irrespective of any . . . security therefor; and agrees, without your first having to proceed against Company or to liquidate paper or any security therefor, to pay on demand all sums due and to become due to you from Company and all losses, costs, attorneys' fees or expenses which may be suffered by you by reason of the Company's default or default of any of the undersigned hereunder; and agrees to be bound by and on demand to pay any deficiency established by a sale of paper and/or security held, with or without notice to us."

[6] Defendants contend that Judge McKinnon erred in concluding that plaintiff was entitled to recover attorney fees pursuant to G.S. 6-21.2 and awarding attorney fees in the sum of $42,231.18. Defendants argue that the lease agreement provides that it should be regarded as a California contract and governed by and construed according to the laws of that state and that under California law the trial court awards a "reasonable" fee rather than a fee based on a percentage of the outstanding balance as provided by G.S. 6-21.2. We think his contention has merit.

[5] This jurisdiction follows the general rule that the validity and construction of a contract are to be determined by the law of the place where the contract is made. *Davis v. Davis,* 269 N.C. 120, 152 S.E. 2d 306 (1967); *Construction Company v. Bank,* 30 N.C. App. 155, 226 S.E. 2d 408 (1976). Our courts have also held that the place at which the last act was done by either of the parties essential to a meeting of the minds determines the place where the contract was made. *Fast v. Gulley,* 271 N.C. 208, 155 S.E. 2d 507 (1967); *Construction Company v. Bank, supra.*

[6] While the contract involved here indicates that it was executed by defendant corporation in North Carolina on 6 December 1972, and was thereafter executed and accepted by plaintiff in California on 11 December 1972, we think the trial court should make a finding on that question. Whereupon, that part of Judge McKinnon's judgment awarding attorney fees is vacated and this cause will be remanded to the superior court for further determination with respect to attorney fees.

Should the trial court determine that the lease agreement was executed and accepted by plaintiff in California after it was executed by defendant corporation in North Carolina, the court will proceed to award attorney fees in accordance with California law. See *Credit Corporation v. Ricks,* 16 N.C. App. 491, 192 S.E. 2d 707 (1972).

Section 1717 of West Annotated California Codes, Volume 9, *Civil,* provides:

> "In any action on a contract, where such contract specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements."

The California courts in construing this law have said:

> " . . . [T]he major factors to be considered in determining the reasonableness of attorneys' fees [include]: 'the nature of the litigation, its difficulty, the amount involved, the skill required and the skill employed in handling the litigation, the attention given, the success of the attorney's efforts, his learning, his age, and his experience in the

particular type of work demanded; the intricacies and importance of the litigation, the labor and the necessity for skilled legal training and ability in trying the cause, and the time consumed.'" (Citation omitted.) *Clejan v. Reisman* (1970), 84 Cal. Rptr. 897, 908, 5 C.A. 3d 224, 241.

The California courts have further held that the award of fees is addressed to the sound discretion of the trial judge. *Kanner v. Globe Bottling Co.* (1969), 78 Cal. Rptr. 25, 273 C.A. 2d 559; *Shannon v. Northern Counties Title Ins. Co.* (1969), 76 Cal. Rptr. 7, 270 C.A. 2d 686.

Should the trial court determine that the lease agreement was executed by defendant corporation in North Carolina after it was executed by plaintiff in California, the court will reinstate the provisions of Judge McKinnon's judgment relating to attorney fees.

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

For the reasons stated, except for the provisions awarding attorney fees, the judgments appealed from are affirmed.

Affirmed in part; remanded with instructions.

Judges BRITT and HEDRICK concur.

JEWELL J. CHURCH v. MADISON COUNTY BOARD OF EDUCATION; ROBERT L. EDWARDS, INDIVIDUALLY AND AS SUPERINTENDENT OF MADISON COUNTY BOARD OF EDUCATION; EMERY WALLIN, DONALD N. ANDERSON, DEDRICK C. CODY, BOBBY PONDER, WILLIAM M. ROBERTS, INDIVIDUALLY AND AS MEMBERS OF THE MADISON COUNTY BOARD OF EDUCATION

No. 7624SC502

(Filed 15 December 1976)

1. Administrative Law § 2— exhaustion of administrative remedies

When the Legislature has provided an effective administrative remedy by statute, that remedy is exclusive and a party must pursue and exhaust such remedy before resorting to the courts.

2. Administrative Law § 2; Schools § 13— dismissal of school principal — action for damages and injunction — failure to exhaust administrative remedies

A school principal's complaint seeking damages and an injunction prohibiting defendant board of education from acting further with respect to her dismissal as principal was properly dismissed because of her failure to exhaust administrative remedies where (1) the plaintiff requested a hearing before the board of education pursuant to G.S. 115-142(i)(6) but the hearing had not yet been held, and (2) an appeal to the superior court would be available to plaintiff under G.S. 115-142(n) after the board holds the hearing and acts on her dismissal.

APPEAL by plaintiff from *Lewis, Judge.* Judgment entered 8 March 1976 in Superior Court, MADISON County. Heard in the Court of Appeals 21 September 1976.

Pursuant to G.S. 115-142, the Tenure Act, the Superintendent of the Madison County Board of Education, Robert L. Edwards, notified the plaintiff on 27 June 1975 of his intent to recommend her dismissal as a school principal in Madison County. Essentially, it was comp'ained that the plaintiff had been "padding" school attendance records. Pursuant to G.S. 115-142(h)(3), the plaintiff then requested and was given a review before a Professional Review Committee, which recommended that she be reprimanded but not dismissed. At that time the superintendent, notwithstanding the committee's report, notified the plaintiff and the board that he still wanted to press for her dismissal and shortly thereafter the board notified the plaintiff that it was going to act on the superintendent's recommendation. The plaintiff then, pursuant to G.S. 115-142(i)(6), requested a hearing before the board on 25 September 1975. Before this hearing could ever take place, plaintiff filed a complaint with the superior court setting forth the above proceedings, alleging denial of due process and violation of her civil rights, and seeking damages and injunctive relief to prevent the school board from taking any further action with respect to plaintiff's dismissal. Judge Briggs then heard plaintiff's motion for a preliminary injunction and, by order of 24 October 1975, enjoined defendants' proceedings. Defendants at first gave notice of appeal from this injunction but then withdrew the appeal and moved to dismiss plaintiff's complaint pursuant to G.S. 1A-1, Rule 12(b)(6). Defendants' motion to dismiss was heard by Judge Lewis who granted the motion and dismissed the complaint and dissolved Judge Briggs' prelimi-

nary injunction by a judgment filed 8 March 1976. Judge Lewis found facts and concluded that plaintiff had failed to exhaust her administrative remedies under the Tenure Act. Plaintiff has now appealed from the 8 March judgment.

Chambers, Stein, Ferguson & Becton, by James C. Fuller, Jr., for plaintiff.

Ronald W. Howell, for defendants.

MARTIN, Judge.

The plaintiff's complaint was dismissed, pursuant to G.S. 1A-1, Rule 12(b)(6), for failure to state a claim upon which relief could be granted. The sole issue before this Court is whether the trial court erred in dismissing the case under this rule. The defendants contend that dismissal was proper because the trial court did not have jurisdiction to entertain the case until the plaintiff had exhausted all the administrative remedies provided by G.S. 115-142. We agree with this contention.

The General Assembly has enacted an exhaustive statute concerning the employment and dismissal of public school teachers in North Carolina. This statute, G.S. 115-142, creates detailed procedures for settling contracts, dismissals, and demotions and is commonly referred to as the Tenure Act.

The pertinent sections of G.S. 115-142 are summarized as follows:

"(h) Procedure for Dismissal or Demotion of Career Teacher. —

"(1) A career teacher may not be dismissed, demoted, or reduced to part-time employment except upon the superintendent's recommendation.

"(2) Before recommending to a board the dismissal or demotion of the career teacher, the superintendent shall give written notice to the career teacher by certified mail of his intention to make such recommendation. . . .

"(3) Within the 15-day period after receipt of the notice, the career teacher may file with the superintendent a written request for . . . (i) a review of the superintendent's proposed recom-

mendation by a panel of the Professional Review Committee. . . .

"(4) If a request for review is made, the superintendent, within five days of filing such request for review, shall notify the Superintendent of Public Instruction who, within seven days from the time of receipt of such notice, shall designate a panel of five members of the Committee (at least two of whom shall be lay persons) who shall not be employed in or be residents of the county in which the request for review is made, to review the proposed recommendations of the superintendent. . . .

"(i) Investigation by Panel of Professional Review Committee; Report; Action of Superintendent; Review by Board. —"

* * *

"(4) When the panel has completed its investigation, it shall prepare a written report and send it to the superintendent and teacher. The report shall contain an outline of the scope of its investigation and its finding as to whether or not the grounds for the recommendation of the superintendent are true and substantiated. . . .

"(5) Within five days after the superintendent receives the report of the panel, he shall submit his written recommendation for dismissal to the board with a copy to the teacher. . . .

"(6) Within seven days after receiving the superintendent's recommendation and before taking any formal action, the board shall notify the teacher by certified mail that it has received the superintendent's recommendation and the report of the panel. The notice shall state that if the teacher requests a hearing before the board on the superintendent's recommendation, a hearing will be provided at the time and place specified in the notice."

* * *

"(n) Appeal. — Any teacher who has been terminated by action of the board after a hearing pursuant to

subsections (k) or (l) shall have the right to appeal from the decision of the board to the superior court for the judicial district in which the teacher is employed. The appeal shall be filed within a period of 30 days after notification of the decision of the board. The cost of preparing the transcript shall be borne by the board."

[2] Plaintiff's complaint clearly reveals that, until the time this lawsuit was instituted, she had proceeded under the Tenure Act. However, at the time the plaintiff's complaint was filed, there still remained certain administrative remedies provided by G.S. 115-142 to which the plaintiff had not resorted. For example, although the plaintiff had requested a hearing pursuant to G.S. 115-142(i)(6), she failed to resort to this hearing to present her side of the dismissal issue. In fact, she even prevented this hearing from ever taking place by bringing the present action for damages and obtaining a preliminary injunction. In addition, the plaintiff failed to appeal her dismissal as provided in G.S. 115-142(n). Instead of filing an appeal with the superior court *after* the board hearing and *after* dismissal, she brought the instant action in the superior court *before* either of these events took place.

[1] In North Carolina, our courts have held that when the Legislature has provided an effective administrative remedy by statute, then that remedy is exclusive. *Wake County Hospital v. Industrial Commission,* 8 N.C. App. 259, 174 S.E. 2d 292 (1970). See also 1 Strong, N. C. Index 3d, *Administrative Law,* § 2 (1976). In addition, our courts have held that not only is the administrative remedy exclusive but also a party must pursue it and exhaust it before resorting to the courts. See *King v. Baldwin,* 276 N.C. 316, 172 S.E. 2d 12 (1970); *Garner v. Weston,* 263 N.C. 487, 139 S.E. 2d 642 (1965); *Sinodis v. Board of Alcoholic Control,* 258 N.C. 282, 128 S.E. 2d 587 (1962); *Employment Security Commission v. Kermon,* 232 N.C. 342, 60 S.E. 2d 580 (1950); *Stevenson v. N. C. Department of Insurance,* 31 N.C. App. 299, 229 S.E. 2d 209 (1976). See also 1 Strong, N. C. Index 3d, *supra.*

Our Supreme Court, in the case of *Elmore v. Lanier,* 270 N.C. 674, 155 S.E. 2d 114 (1967), has made the doctrine of the exhaustion of administrative remedies quite clear. In *Elmore,* the Commissioner of Insurance suspended the plaintiff's insur-

ance license after a six-month investigation and charged him with some twenty-two violations. As in the instant case, a time was set for an administrative hearing on the charges against the plaintiff to determine what final action should be taken. Before this hearing could be concluded, the insurance agent, like the teacher in this appeal, went to the superior court and obtained an order restraining the Commissioner from proceeding under the legislative enacted administrative hearing and from doing any other act on the charges against the plaintiff. As in G.S. 115-142, the insurance agent, just like the appellant teacher before us, had the right to have any license revocation reviewed by filing a petition in the superior court within 30 days after the time of any final order of revocation. This case was appealed to the North Carolina Supreme Court and in an opinion by Justice Pless, it was held that the cause of action to restrain the Commissioner of Insurance from proceeding in accordance with the administrative procedure was not proper because there had been a failure to exhaust the administrative remedies provided.

This doctrine of exhausting administrative remedies has long been applied by the Supreme Court of this State. The doctrine, for example, has often been employed in taxpayer cases where the statutes provide administrative channels through which a taxpayer may question the appraisal of his property. Such cases have held that

> " . . . it is the accepted position that a taxpayer is not allowed to resort to the Courts in cases of this character until he has pursued and exhausted the remedies provided before the duly constituted administrative boards having such matters in charge." (Citations omitted.) *Manufacturing Co. v. Commissioners,* 189 N.C. 99, 103, 126 S.E. 114, 116 (1925). See also 1 Strong, N. C. Index 3d, *supra.*

The doctrine is also not new to this Court and has frequently been used in the past. See *Wake County Hospital v. Industrial Commission, supra.*

Justice Pless, in speaking for the Court in *Elmore v. Lanier, supra,* on the collateral attack of the administrative procedure enacted by the Legislature stated:

> "To permit the interruption and cessation of proceedings before a commission by untimely and premature interven-

> tion by the courts would completely destroy the efficiency, effectiveness, and purpose of the administrative agencies. To allow it would mean that in some instances a case might pend in the courts until a jury trial could be held, which would frequently cause unjustified delay, and result in thwarting the purpose for which the administrative investigation was established. . . . " *Elmore v. Lanier, supra* at 678, 155 S.E. 2d at 116.

We agree with Justice Pless's concern. Legislation of the type outlined by G.S. 115-142 has become necessary in many fields where matters of regulation and control may, and must, be handled by appropriate commissions and agencies that are particularly qualified for this purpose. Our Legislature has concluded that many areas of concern are more efficiently and more practically disposed of if handled initially by the administrative process rather than the courts. This has been particularly true in matters such as workmen's compensation, utility rates, insurance rates, and the dismissal and demotion of teachers. In order to expedite matters in these areas of concern, the Legisture has created administrative agencies, commissions, and elaborate proceedings for hearings and appeals. To allow the courts to prematurely interrupt or stop these administrative proceedings would completely negate the effectiveness and purpose for which they were statutorily created.

G.S. 115-142 provides the administrative channels through which an individual public school teacher may question and obtain review of his or her dismissal or demotion. By virtue of this statute, the Legislature has provided adequate administrative means whereby a teacher may contest the actions taken against him or her without first having to resort to the courts, and ample safeguards have been provided by appeals to the courts, at the proper time, to protect a teacher from any improper or illegal results.

[2] In the instant case, the plaintiff had not exhausted her administrative remedies before resorting to the courts. We therefore conclude that the trial court's dismissal pursuant to G.S. 1A-1, Rule 12(b)(6) was proper and the judgment appealed from is

Affirmed.

Chief Judge BROCK and Judge VAUGHN concur.

George v. Town of Edenton

N. J. GEORGE AND WIFE, MARY B. GEORGE; LORAINE BURNS; JOHN A. MITCHENER III; JAMES G. BLOUNT; AND BYRON P. KEHAYES v. TOWN OF EDENTON; ROY L. HARRELL, MAYOR AND MEMBER OF THE TOWN COUNCIL OF THE TOWN OF EDENTON; JAMES C. DAIL, JESSIE L. HARRELL, W. H. HOLLOWELL, JR., HARRY A. SPRUILL, JR., LEO F. KATKAVECK, ERROL FLYNN, JAMES DARNELL, AND J. H. CONGER, JR., MEMBERS OF THE TOWN COUNCIL OF THE TOWN OF EDENTON; W. B. GARDNER, ADMINISTRATOR; AND W. G. MATTHEWS, BUILDING INSPECTOR

No. 761SC683

(Filed 15 December 1976)

1. **Municipal Corporations § 30— zoning matters — timeliness of notice mandatory**

Timeliness of notice in zoning matters is a mandatory requirement that is strictly construed even where prejudice to a property owner is not shown; therefore, the rezoning of a particular tract of land within the one-mile zoning jurisdiction of defendant town was rendered invalid where notice was published 12 days before hearing on the rezoning application rather than 15 days before as required by the town's zoning ordinance.

2. **Municipal Corporations § 30— rezoning land — incorporation in map — part of new ordinance — no amendment**

The rezoning of a tract of land by incorporating the change into a new zoning map was a part of a new comprehensive zoning ordinance adopted by defendant Town Council, not an amendment to the new ordinance subject to the procedures of the ordinance governing amendments.

3. **Municipal Corporations § 6— minutes of town council — impeachment impermissible in collateral attack — parol evidence impermissible to explain**

The minutes of a governing board of a town, city, or county cannot be impeached or contradicted in a collateral attack, nor is parol evidence admissible to explain, extend or supplement the record of proceedings of a municipal council.

4. **Municipal Corporations § 30— initial exercise of zoning authority — designation of planning agency required**

Before a municipality can ever exercise the zoning powers granted by the State under the enabling provisions of G.S., Chap. 160A, Part 3, the municipality must designate a planning agency to develop and certify a zoning ordinance; however, those requirements, as set forth in G.S. 160A-387, are prerequisites only to the municipality's initial exercise of zoning power, and thereafter the planning agency, which was created at the initial stage, remains present to assist the legislative body in further zoning activity.

5. Municipal Corporations § 30— new zoning ordinance — proper exercise of town's authority

Defendant Town Council properly exercised its legislative authority, mindful of the fundamental concepts of zoning and in conjunction with the advice of the town's planning board, in enacting a new comprehensive zoning ordinance.

APPEAL by plaintiffs from *Peel, Judge.* Judgment entered 2 April 1976 in Superior Court, CHOWAN County. Heard in the Court of Appeals 17 November 1976.

This appeal involves an action brought by several citizens seeking a declaratory judgment to hold invalid two rezoning changes by the Town of Edenton. At issue is the rezoning of two tracts of land of approximately ten acres each. One tract (South Tract) is located on the south side of North Carolina Highway 32 at the proposed intersection and interchange of Highway 32 and U. S. Highway 17 Bypass. The second tract (North Tract) is on the north side of Highway 32 at the same proposed interchange. Both tracts are outside of the town limits of Edenton but are within the one-mile zoning jurisdiction of the town.

On 2 January 1975 Rosa F. Ward conveyed to Bernard P. Burroughs and Wiley J. P. Earnhardt, Jr., certain real property including the two tracts in question. At the time of the conveyance there was pending before the Edenton Town Council a rezoning application to amend the zoning ordinance to change the South Tract zoning from R-20 (Residential-Agricultural) to CS (Shopping Center). The application had been unanimously approved by the Planning and Zoning Commission (Planning Board) of Edenton. On 11 February 1975 the application was denied by vote of the town council.

Earnhardt and Burroughs applied for an amendment to the zoning ordinance to rezone the North Tract from R-20 to CH (Highway-Commercial) on 14 March 1975. The Planning Board approved the request and submitted it to the town council. After public hearing the application was denied by vote of the town council on 13 May 1975.

At the same meeting the town administrator presented a proposed new zoning ordinance for the town council's consideration. The council then scheduled a joint meeting of the council and Planning Board for 26 May 1975 to consider the new zoning ordinance. At that meeting some changes were proposed,

and the Planning Board recommended the ordinance with changes to the council. Public hearing was set for 8 July 1975.

On 12 June 1975 Earnhardt and Burroughs again requested zoning changes. They applied for a change in the zoning ordiance changing both the North and South Tracts from R-20 to CS. The Planning Board unanimously approved the requests and submitted them to the council. On 8 July at the public hearing on the new zoning ordinance, a motion was made to include as part of the new zoning ordinance a change in the zoning map, whereby the North Tract would be zoned CH rather than R-20. Further public hearings on this proposed change in the proposed ordinance were deemed necessary and scheduled for 12 August 1975. It was also decided that in conjunction with the hearings on the new ordinance, the application of Earnhardt and Burroughs to change the North Tract to CS should also be publicly aired. Public hearing on their rezoning application for the South Tract was scheduled for 26 August 1975.

On 12 August after public hearing the council adopted the new zoning ordinance and zoning map on which the North Tract was zoned CH. Thereafter, Earnhardt and Burroughs withdrew their request for a CS zoning as to the North Tract.

On 26 August 1975 the South Tract rezoning was considered at public hearing. The council postponed decision on the application indicating further hearings would be needed and that notice would be issued prior to those hearings. On 14 October 1975, without further notice or hearings, the council approved the application rezoning the South Tract from R-20 to CS. The first public notice of any public hearing with respect to the South Tract rezoning was published on 14 August 1975.

At all of the public hearings concerning both tracts, the plaintiffs were present or knew of the meetings and were given full opportunity to voice their objections. Plaintiffs filed their declaratory judgment action on 10 November 1975. Answer was filed by the Town of Edenton on 12 January 1976. Thereafter, both defendants and plaintiffs moved for summary judgment. The trial judge held a pretrial conference, after which both sides presented their evidence. At the close of evidence defendants' motion for summary judgment was granted and plaintiffs' was denied. Plaintiffs appealed.

Twiford, Seawell, Trimpi & Thompson, by John G. Trimpi; and O. C. Abbott for plaintiffs.

White, Hall, Mullen & Brumsey, by Gerald F. White and John H. Hall, Jr., for defendants.

BROCK, Chief Judge.

Summary judgment in favor of defendants in effect affirms two legislative acts—the rezoning of two separate tracts of land. Plaintiffs challenge the validity of both legislative acts, but since each rezoning was accomplished by a distinct method, plaintiffs' challenges present different issues as to each rezoning. Because each rezoning presents a distinct question, each will be considered separately.

As to the South Tract, plaintiffs contend that the rezoning was invalid because the public hearings thereon were held without proper notice. Edenton's Zoning Ordinance, adopted 27 May 1969, required notice of public hearings to be published in a newspaper "not less than fifteen (15) days prior to the date established for the hearing." § 14-6. The new Zoning Ordinance, adopted 12 August 1975, reenacted the fifteen-day published notice requirement.

[1] The public hearing to consider the South Tract rezoning application was set for and held on 26 August 1975. Notice of this hearing was published for the first time on 14 August 1975, only twelve days before the hearing date. Timeliness of notice in zoning matters is a mandatory requirement that is strictly construed even where prejudice to a property owner is not shown. 1 Anderson, American Law of Zoning, § 4.12, 171. Failure to comply with the notice requirement invalidates the amendment to the Zoning Ordinance. In the case at bar the record and stipulations of the parties show that the fifteen-day period of § 14-6 of the zoning ordinance was not followed. The zoning of the South Tract to a CS classification is thus rendered invalid.

[2] As to the North Tract, plaintiffs argue that rezoning the tract from R-20 to CH by incorporating the change into a new zoning map is invalid for either of two reasons. First, the zoning change was accomplished by the town council at the meeting on 12 August 1975 after the adoption of the new comprehensive Zoning Ordinance. Since the rezoning occurred after the adop-

tion, it amounted to an amendment of the Zoning Ordinance and was thus subject to the procedures of the ordinance governing amendments. Under § 14-5 an amendment must be submitted to the Planning Board for its recommendation, which did not occur. Further § 14-8 mandates that no application for the "same change of zoning amendment" shall be accepted by the council where a similar application had been denied within the next preceding six months. Here Earnhardt and Burroughs had been denied a CH zoning request on 13 May 1975, some two months prior to the rezoning at issue.

Plaintiffs' argument is unconvincing. The record shows, through the minutes of the Town Council of Edenton, that at the public hearing and meeting of the council on 12 August 1975, the new comprehensive Zoning Ordinance was adopted by the council and that "as a part of the adoption of a new Zoning Ordinance, a new official zoning map be adopted, incorporating the change from R-20 to Highway Commercial" as to the North Tract. The change in the zoning map was not an amendment to the new ordinance. It was part of the new ordinance.

[3] Plaintiffs argue that the testimony of their witnesses who were present at the public hearing shows that the minutes are incorrect. At trial the court listened to the parol evidence of plaintiffs over the objection of defendants, reserving its ruling until the close of evidence. At that time the court ruled the testimony inadmissible. We agree. The minutes of the governing board of a town, city, or county cannot be impeached or contradicted in a collateral attack, nor is parol evidence admissible to explain, extend or supplement the record of proceedings of a municipal council. *State v. Baynes,* 222 N.C. 425, 23 S.E. 2d 344 (1942). The adoption of the zoning map including the rezoning of the North Tract was a part of the adoption of the new comprehensive Zoning Ordinance.

As their second reason, plaintiffs argue that if the actions of the council on the new ordinance were "adoptive," then the council violated the requirement of G.S. 160A-387 in that the new ordinance had not been certified by the Planning Board of Edenton. We disagree. The provisions of G.S. 160A-387 read as follows:

> "In order to exercise the powers conferred by this Part, a city council shall create or designate a planning

agency under the provisions of this Article or of a special act of the General Assembly. The planning agency shall prepare a zoning plan, including both the full text of a zoning ordinance and maps showing proposed district boundaries. The planning agency may hold public hearings in the course of preparing the plan. Upon completion, the planning agency shall certify the plan to the city council. The city council shall not hold its required public hearing or take action until it has received a certified plan from the planning agency. Following its required public hearing, the city council may refer the plan back to the planning agency for any further recommendations that the agency may wish to make prior to final action by the city council in adopting, modifying and adopting, or rejecting the ordinance."

[4] It is clear that before a municipality can ever exercise the zoning powers granted by the State under the enabling provisions of G.S., Chap. 160A, Part 3, the municipality must designate a planning agency to develop and certify a zoning ordinance. The procedure in G.S. 160A-387 is, however, a prerequisite only to the municipality's initial exercise of zoning power. Thereafter, the planning agency, which was created at the initial stage, remains present to assist the legislative body in further zoning activity.

The planning agency, here the Planning Board of Edenton, is not a legislative body. In relation to the town council, it functions only in an advisory capacity, and its recommendations are in no way binding on the council. *In re Markham,* 259 N.C. 566, 131 S.E. 2d 329 (1963); *Allred v. City of Raleigh,* 277 N.C. 530, 178 S.E. 2d 432 (1971). In any zoning legislation the burden is on the city or town council to properly follow the fundamental concepts of zoning. *Allred v. City of Raleigh, supra.*

[5] In the case at bar the Town Council of Edenton properly exercised its legislative authority, mindful of the fundamental concepts of zoning and in conjunction with the advice of the Planning Board. The new Zoning Ordinance adopted on 12 August 1976 was a comprehensive reworking of the old Zoning Ordinance. It was not merely concerned with reclassifying particular parcels of land. The new act also rewrote the procedures applicable to zoning matters and redesigned the land use classifications.

The new ordinance had been under careful consideration by the Planning Board of Edenton since October of 1974. The town had entered a $6,000 contract with the North Carolina Department of Natural and Economic Resources to study and develop the new ordinance. The proposed ordinance, thus developed by the Planning Board, was presented to the council on 13 May 1975. A joint session of the council and Planning Board was thereafter called to consider the new ordinance and possible changes. The changes discussed at the 26 May 1975 meeting were recommended to the council by the Planning Board. Before adoption, there were two properly called and conducted public hearings. The entire process of enacting the new Zoning Ordinance including its reclassification of the North Tract reflects a careful, deliberate course taken by the town council to provide for the planning and development needs of the town in line with the spirit and purposes of G.S., Chap. 160A, Part 3.

Plaintiffs' remaining assignments of error have been carefully considered. As to them, no prejudicial error has been shown.

The judgment of the superior court upholding the validity of the rezoning of the North Tract is affirmed. The judgment upholding the validity of the rezoning of the South Tract is reversed, and the case is remanded to the Superior Court of Chowan County with the direction that the rezoning of the South Tract be declared invalid for failure of proper notice.

Affirmed in part, reversed in part, and remanded.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. LEONARD EARL MORROW

No. 7629SC544

(Filed 15 December 1976)

1. Bill of Discovery § 6— discovery in criminal cases — failure to furnish statement until day before trial

In this prosecution of defendant for the murder of his wife wherein the district attorney agreed to comply with defendant's written request for discovery of any oral statements made by defendant which the State intended to offer at trial, failure of the district attorney

to furnish to defense counsel until the day before trial statements made by defendant when he first went to the sheriff's office to report that his wife was missing did not constitute a violation of G.S. Ch. 15A, Article 48, and the statements were properly admitted in evidence, where the district attorney promptly notified defendant's attorneys of the statements as soon as he decided to use them at trial in compliance with G.S. 15A-907, the district attorney in the notification granted permission to defendant's attorneys to interview the witnesses who would testify as to the statements, and the notification given allowed defendant's attorneys ample time to investigate the matter in view of the brevity and simplicity of the testimony concerning the statements.

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

The State's evidence was sufficient for the jury in a prosecution of defendant for second degree murder of his wife where it tended to show: defendant did not report that his wife was missing until after her daughter insisted he do so, and even then he expressed a lack of concern as to her whereabouts; to explain his delay in reporting and his lack of concern defendant showed officers a note written by his wife six weeks earlier which he professed to have found only on the morning after she disappeared; defendant's car was similar to one seen late at night parked beside a mountain road where a man was seen holding a "slumped-over" woman dressed in a gown; his wife's body was found covered by a gown approximately 15 feet from where the car was parked; her death was caused by strangulation; and defendant claimed to have been home asleep from 10:45 on the night the car was seen on the mountain, but a neighbor saw defendant return home alone in his car at about 1:15 the same night.

3. Criminal Law § 15— improper venue — motion to dismiss not timely — conclusiveness of venue allegation

Defendant was not entitled to dismissal of a murder charge on the ground the indictment charged that the killing occurred in Rutherford County but proof indicated it occurred in McDowell County since (1) the evidence would equally support a jury finding that the killing occurred in Rutherford County and (2) defendant's motion to dismiss made at the close of the evidence was not timely and the allegation of venue became conclusive by virtue of G.S. 15A-135.

APPEAL by defendant from *Baley, Judge*. Judgment entered 11 March 1976 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 10 November 1976.

Defendant was indicted for the first degree murder of his wife, Martha Newton Morrow. The State elected to try him for second degree murder or for manslaughter as the evidence would warrant. Defendant pled not guilty.

Evidence presented by the State showed the following:

On 15 September 1975 the body of defendant's wife, Martha Newton Morrow, was found lying in the weeds at the top of a cliff about 15 feet off of N.C. Highway 80 in McDowell County. An autopsy revealed she died from strangulation. On the same day the daughter of the deceased went to visit her mother at the mobile home occupied by defendant and his wife in Rutherford County. Defendant told her he did not know where her mother was, that he had last seen her when he went to bed about 10:45 p.m. on 11 September 1975, that she was gone when he awoke the next morning, and that she left him a note which he found at the side of the bed. The daughter recognized the note as one she had seen her mother write about six weeks previously when her mother had left defendant to go stay with her daughter. At the daughter's insistence, defendant reported to the officers on 15 September 1975 that his wife had been missing since the night of 11 September 1975.

Three witnesses testified that while on their way home from work between 11:45 p.m. and midnight on 11 September 1975, they saw a yellow Mercury GT Comet automobile with black stripes parked along the side of N. C. Highway 80 at a point near where the deceased's body was subsequently found. A man was standing next to the car holding a woman under the arms. The woman was "kind of slumped over." A neighbor, who lived directly across the street from the defendant's mobile home, testified that when she went outside of her house about 12:30 a.m. on 12 September 1975, she noticed defendant's Comet automobile was gone. About 45 minutes later, she saw defendant return alone in his automobile and go inside his mobile home. A deputy sheriff testified that traveling 5 miles over the speed limit it took 52 minutes to drive from the mobile home occupied by defendant in Rutherford County to the point on N. C. Highway 80 in McDowell County where the body was found.

Defendant was arrested on 16 September 1975. His yellow GT Comet with black stripes was taken to the parking lot beside the Rutherford County jail. Later that day, the three witnesses who had seen an automobile parked along the side of N. C. Highway 80 on the night of 11 September 1975 came to the jail and identified defendant's Comet as "one just like the one (they) saw on the mountain."

Defendant did not present evidence. The jury found him guilty of second degree murder. From judgment imposing a prison sentence, defendant appealed.

Attorney General Edmisten by Associate Attorney Nonnie F. Midgette for the State.

Hollis M. Owens, Jr., and J. H. Burwell, Jr., for defendant appellant.

PARKER, Judge.

[1] Defendant first assigns error to the court's overruling his objections to testimony by deputy sheriff L. W. Nichols as to statements made by the defendant prior to his arrest concerning the disappearance of his wife. On 6 October 1976, being in apt time pursuant to G.S. 15A-902, defendant's court appointed counsel served a written discovery request on the district attorney, asking, among other things, that he divulge and furnish the substance of any oral statement made by the defendant which the State intended to offer in evidence at the trial. On 11 October 1975 the district attorney responded in writing and agreed to submit the evidence requested. On 8 March 1976, the day before defendant's trial, the district attorney notified defense counsel in writing that defendant had made certain statements, that on the first request for discovery the State had not anticipated using these since all were self-serving, but that upon reflection the State intended to offer these statements to show that they were inconsistent. At the trial, defendant's counsel objected when the district attorney, on direct examination of deputy sheriff Nichols, asked about the statements made by defendant when he first came to the sheriff's office to report that his wife was missing. Before ruling on the objection, the court conducted a voir dire examination. At the conclusion of this examination, the court ruled the evidence admissible. In this ruling, we find no error.

At the outset we observe that the record fully supports, and defendant does not challenge, the court's determination made at the conclusion of the voir dire hearing that the defendant's statements were voluntarily made at the instance of the defendant himself when he was not in custody or under arrest. Defendant challenges the court's ruling solely on the ground that the district attorney failed to comply with the provisions of G.S. Chap. 15A, Article 48, entitled "Discovery in the Superior

Court." We do not agree with the defendant's contention. G.S. 15A-907 provides:

> "If a party, subject to compliance with an order issued pursuant to this Article, discovers prior to or during trial additional evidence *or decides to use additional evidence,* and the evidence is or may be subject to discovery or inspection under this Article, he must promptly notify the attorney for the other party of the existence of the additional evidence." (Emphasis added.)

Here, the district attorney did promptly notify the attorneys for the defendant as soon as he decided to use the evidence concerning defendant's statements. No suggestion of bad faith on the part of the State appears in the record in this case. The district attorney, in the same written notification, granted permission to the attorneys for the defendant to interview the State witnesses who would testify concerning the statements made by the defendant. This was done on the day before defendant's trial commenced. In view of the brevity and simplicity of the testimony concerning defendant's statements, the notification given allowed defendant's attorneys ample time to investigate the matter. They did not move for a continuance or otherwise indicate that they needed additional time. Even if there had been a failure to comply with G.S., Ch. 15A, Article 48, and we find none, the trial court, although empowered to do so by G.S. 15A-910(a)(3), was not required to prohibit the introduction of the evidence. Which of the several remedies available under that statute should be applied in a particular case is a matter within the trial court's sound discretion, not reviewable on appeal in the absence of a showing of an abuse of discretion. *See State v. Carter,* 289 N.C. 35, 220 S.E. 2d 313 (1975). No abuse of discretion has been here shown. Defendant's first assignment of error is overruled.

[2] Defendant next assigns error to the denial of his motions for nonsuit. We find no error in this regard. The State's evidence showed that defendant did not report that his wife was missing until after her daughter insisted he do so, that even then he expressed a total lack of concern as to her whereabouts, that to explain his delay in reporting and his lack of concern he showed the officers a note written by his wife six weeks earlier which he professed to have found only on the morning after she disappeared, that defendant's automobile was similar to the car

seen late at night parked beside the mountain road where a man was seen holding up a "slumped-over" woman dressed in a gown, that his wife's body was found covered by a gown at a point approximately 15 feet from where the car was parked, that her death was caused by strangulation, that defendant claimed to have been at home asleep from 10:45 p.m. on the night the car was seen on the mountain, and that a neighbor saw defendant return home alone in his car at approximately 1:15 a.m. that same night. Viewing this evidence in the light most favorable to the State and giving the State the benefit of every reasonable inference to be drawn therefrom, we find it sufficient to support a jury finding that defendant strangled his wife and left her body on the side of the mountain. We find the evidence amply sufficient to take the case to the jury. Defendant's motions for dismissal as of nonsuit were properly denied.

[3] We also find no merit in defendant's contention that he was entitled to dismissal because the indictment charged that the killing occurred in Rutherford County but the proof indicated it occurred in McDowell County. The evidence would equally support a jury finding that the killing occurred in Rutherford County. Moreover, the question of venue was not properly raised by defendant's motion to dismiss made at the close of the evidence. G.S. 15A-135, which became effective 1 September 1975, provides:

> "G.S. 15A-135. *Allegation of venue conclusive in absence of timely motion.* Allegations of venue in any criminal pleading become conclusive in the absence of a timely motion to dismiss for improper venue under G.S. 15A-952. . . ."

Under G.S. 15A-952 a motion to dismiss for improper venue must be made at or before the time of arraignment if arraignment is held prior to the session of court for which the trial is calendared. If arraignment is held at the session for which trial is calendared, the motion must be filed on or before five o'clock p.m. on the Wednesday prior to the session when trial of the case begins. No such timely motion was made in the present case, and the allegations of venue in the indictment became conclusive by virtue of G.S. 15A-135. The same result would have occurred under prior statutes in the absence of a timely plea in abatement. *State v. Dozier,* 277 N.C. 615, 178 S.E. 2d 412 (1971); *State v. Outerbridge,* 82 N.C. 617 (1880); *State v. Puryear,* 30 N.C. App. 719, 228 S.E. 2d 536 (1976).

In his final assignment of error the defendant contends the court erred in failing to instruct the jury that in order to find the defendant guilty they must find the killing occurred in Rutherford County. No such instruction was required. As above noted, the allegation of venue contained in the indictment became conclusive.

In defendant's trial and in the judgment appealed from we find

No error.

Chief Judge BROCK and Judge HEDRICK concur.

CHARLOTTE B. ATKINS, UNMARRIED, AND RACHEL E. SMALLWOOD, AND HUSBAND, W. L. SMALLWOOD, PETITIONERS v. KATIE P. BURDEN, WIDOW; MARGARET K. WHITEHURST AND HUSBAND, WARREN WHITEHURST; MARIAN MARSH ROBERTS, WIDOW; CLARENCE TALMADGE MARSH, JR. AND WIFE, JUNE R. MARSH; FRANCES P. BURDEN, WIDOW; MARTHA VIOLA BROOKS AND HUSBAND, JOHN BROOKS; ESTATE OF ALVAH A. BURDEN, DECEASED; R. S. BURDEN AND WIFE, CASTINE BURDEN; MARY H. BURDEN, UNMARRIED; ETHEL P. TAYLOE AND HUSBAND, W. A. TAYLOE; W. G. BURDEN AND WIFE, MABEL BURDEN; JESSIE B. PLEASANTS, WIDOW; JUNE P. BURDEN, WIDOW; WILLIAM CLIFFORD BURDEN, JR. AND WIFE, BETTY W. BURDEN; PAUL B. PHILLIPS AND WIFE, BETTY PHILLIPS; ROBERT M. PHILLIPS AND WIFE, JOYCE PHILLIPS; ELIZABETH ANN PHILLIPS, UNMARRIED; EMMA RUTH BURDEN BARNES AND HUSBAND, WILLIAM G. BARNES; BETTY BURDEN, WIDOW OF GEORGE ALLEN BURDEN (NOW MARRIED TO WILLIAM CLIFTON BURDEN, JR.); GEORGE ALLEN BURDEN, JR., UNMARRIED, INFANT; JOHN SMITH, WIDOWER; GEORGE A. SMITH, UNMARRIED; BETTY SMITH SHERROD AND HUSBAND, THOMAS SHERROD; RUTH P. JONES, WIDOW; MARY H. CHEEK BALL AND HUSBAND, EDWARD LYON BALL; HELEN CHEEK, WIDOW; W. C. CHEEK, JR. AND WIFE, LORRAINE CHEEK; PAUL ARMSTRONG CHEEK AND WIFE, MARY KAY CHEEK; MARY C. GUSTAFSON AND HUSBAND, TED GUSTAFSON; ADA HOLLOWAY CHEEK, WIDOW; FRANCES C. CLARK AND HUSBAND, GARY J. CLARK; VERNON R. CHEEK, WIDOWER; VICTOR F. CHEEK AND WIFE, MARGARET P. CHEEK; JOSEPH S. CHEEK AND WIFE, MARY L. CHEEK; WILLARD BURDEN CHEEK AND WIFE, HELEN K. CHEEK; CARY M. EARLY AND WIFE, ELIZABETH H. EARLY; REVAH H. MITCHELL, WIDOW; MARY H. EARLY, WIDOW; W. ENNIS TAYLOE, UNMARRIED; AND A. WOODROW TAYLOE AND WIFE, MARIE TAYLOE; W. C. BURDEN, JR.,

GUARDIAN AD LITEM FOR GEORGE ALLEN BURDEN, JR. AND BETTY SMITH SHERROD, RESPONDENTS

No. 766SC553

(Filed 15 December 1976)

1. **Wills §§ 35, 36— vested reversion — conveyance prior to death of life tenant**

Where testator devised land to his son for life with remainder in the son's children, there was no residuary devise of real estate in the will, and the son died without children, the testator's will created in testator's heirs a vested and alienable reversion, though indeterminable as to size and subject to being divested, and testator's heirs could convey their reversionary interests by deeds executed prior to the death of the life tenant.

2. **Wills §§ 34, 36— life estate in timber with power of disposition — reversionary interest**

Where testator's will devised a life estate to his son with the right to sell or dispose of timber and created a reversion in testator's heirs, testator's son did not receive a determinable fee in the timber but received only a life estate with a power of disposition, and a deed executed by one of testator's heirs prior to the death of the life tenant conveyed the heir's reversionary interest in the unsold timber.

3. **Wills § 43— devise to son for life — reversion in heirs — exclusion of son as heir**

Where testator's will devised land to his son for life with remainder in the son's children and created a reversion in testator's heirs, the will indicated an intent to exclude the son from an interest in the reversion.

APPEAL by respondents, the heirs of W. Clifford Burden, from *Fountain, Judge.* Judgment entered 18 May 1976 in Superior Court, BERTIE County. Heard in the Court of Appeals 18 November 1976.

This is a special proceeding for a partition sale of certain lands of William G. Burden who died in 1923, pursuant to the terms of his will. The will provides the following concerning the land in question:

> "Fourth: I desire my son Worth Burden to have the use, subject to his mothers dower, of all of my home tract of land not devised my son H. Vernon Burden in the third section of this will during his natural life, together with the right if he so desires to sell off any or all of the timber thereon and use the proceeds as he sees fit. . . . Fifth: After

> the death of my son Worth Burden I give and bequeath to his children, this to include all then living and the issue of any that may have died, in fee simple, the land left to his use in the Fourth section of this will."

There was no residuary devise of real estate in the will. There were eight children of William G. Burden, among them, Worth Burden, who died 26 January 1975 having never had any children, J. A. Burden, and William J. Burden. J. A. Burden died intestate prior to April 20, 1959, being survived by six children, one of whom was W. G. Burden, a grandson of William G. Burden, the testator. W. G. Burden (the son of J. A. Burden) executed a deed dated April 20, 1959, by which he conveyed to Arthur Woodrow Tayloe and W. Ennis Tayloe all of his undivided interest, share, and estate in the land known as the "Sheriff W. G. Burden Home Place," referring to it as the same land as that devised in the will of William G. Burden "to Worth Burden during his natural life and after his death to his children." The said W. G. Burden has filed no answer and made no appearance.

William J. Burden, a son of the testator, died prior to 1959. No contention is made that he disposed of any interest in the William G. Burden home tract by will. He was survived by two children, a daughter, Jessie Burden Pleasants, and a son, W. Clifford Burden.

Jessie Burden Pleasants executed a deed dated June 1, 1959, by which she conveyed to A. Woodrow Tayloe and W. Ennis Tayloe all of her interest in the "Sheriff W. G. Burden Home Place" devised to Worth Burden for his life in the will of William G. Burden. She has neither filed an answer nor made an appearance in this proceeding.

W. Clifford Burden, the son of William J. Burden and a grandson of William G. Burden, the testator, executed a deed dated June 1, 1959, by which he conveyed to A. Woodrow Tayloe and W. Ennis Tayloe all of his interest in the tract of land known as the "Sheriff W. G. Burden Home Place," devised to Worth Burden for life in the will of William G. Burden.

The respondents A. Woodrow Tayloe and W. Ennis Tayloe claim ownership together of a 1/6 undivided interest (1/12 each) in the property, consisting of a 1/14 interest acquired under their deed from W. Clifford Burden, a 1/14 interest

acquired under their deed from Jessie B. Pleasants, and a 1/42 interest acquired under their deed from W. G. Burden. The appellants, heirs of W. Clifford Burden, claim that their ancestor's deed was void and conveyed no interest in the property and that they are, collectively, the owners of a 1/14 undivided interest therein.

Pursuant to orders of the court in this proceeding the lands have been sold.

The sales of this property have been confirmed, and the commissioner has received the purchase price. Under orders of the court, he has made certain disbursements for costs and has made a partial distribution to parties whose shares are not in dispute. He has on hand $109,189.49 out of which to pay costs and commissions and from which to make distribution in full to the owners of the disputed shares, when determined, and to complete distribution to the parties whose shares are not in dispute.

Judge Fountain heard the proceeding at the May 1976 Session of Bertie County Superior Court upon the separate motions of the appellants and appellees for summary judgment, concluded that there were no genuine issues as to any facts upon which ownership of the disputed shares depends, and signed a judgment in favor of the respondents Tayloe. This is an appeal from his judgment by the heirs of W. Clfford Burden.

Narron, Holdford, Babb & Harrison, by Talmadge L. Narron and R. Woody Harrison, Jr., for appellants.

Pritchett, Cooke & Burch, by W. W. Pritchett, Jr., and W. L. Cooke, for the appellee, Commissioner W. L. Cooke.

Gillam & Gillam, by M. B. Gillam, Jr., Sarah Starr Gillam, and Lloyd C. Smith, Jr., for appellees Tayloe.

MARTIN, Judge.

[1] Appellants contend that the interest held by the heirs of testator during the life estate of Worth Burden was a contingent interest in that it was a mere possibility of a reverter or a reversionary right subject to a condition precedent which would not and did not vest until Worth Burden died leaving no descendants. Thus, they say that even if Clifford Burden could have conveyed his mere expectancy, such expectancy never

vested in him and was extinguished upon his death prior to the date of the life tenant, so that his deed to the Tayloes conveyed nothing. By the fourth item of his will, William G. Burden gave his son, Worth Burden, the use of the land during his natural life. By the fifth item, he gave the land, after the death of Worth Burden, "to his children, this to include all then living and the issue of any that may have died, in fee simple." Worth Burden died intestate and never had any children.

The effect of the will was to give Worth Burden an estate for his life in the land with a remainder to his children, contingent upon there being children. As the contingency never occurred, the remainder was defeated. The will contained no residuary clause as to real estate and made no disposition of the land in question. The residue of the fee simple estate, of which no disposition was made, was a reversion.

Justice Connor, in *Brown v. Guthery,* 190 N.C. 822, 824, 130 S.E. 836, 837 (1925) gave the following definition of a reversion:

> "A reversion is defined as the residue of an estate left by operation of law in the grantor of his heirs or in the heirs of a testator, commencing in possession on the determination of a particular estate granted or devised." (Citations omitted.)

Simes & Smith gives this definition:

> "Under modern law, a reversion arises whenever a person having a vested estate transfers to another a lesser vested estate. The interest thus left the transferor is called a reversion." Simes & Smith, Future Interests, *Reversions,* § 82 (2d ed).

Another way of expressing the same thought is that:

> "Whenever one owning an estate in lands grants a lesser estate to another there remains in the grantor an interest which is in legal parlance 'reversionary.' " 4A Thompson, Real Property, *Future Interests,* § 1975 (1961 Replacement).

The last mentioned author adds the explanation that:

> "A reversion grows out of the legal maxim that whatever a man does not dispose of remains to him and his heirs." 4A Thompson, Real Property, *supra.*

A typical reversion results when a will creates a life estate but does not dispose of the fee in land. There is also a reversion where a will creates a life estate followed by a contingent remainder in fee. Thompson lists as one of the instances in which a reversion occurs "where the grantor creates a life estate." 4A Thompson, Real Property, *supra.* He further says that where a reversion arises under a will and no disposition of the reversion is made, title vests in the testator's heirs. See 4A Thompson, Real Property, *supra.*

In North Carolina, according to the statement of Justice Connor in *Brown v. Guthery,* previously quoted, a reversion may be "left by operation of law in the grantor or his heirs or in the heirs of a testator."

[1] Under the authorities discussed, when William G. Burden failed to make disposition of the lands in the event that Worth Burden died without children, a reversion was created, which vested in the heirs of William G. Burden. Upon the death intestate of heirs of William G. Burden their interests were transmitted, in turn, to their heirs. Upon the death of Worth Burden without having had children the reversion became possessory.

Testator's will created a life estate followed by a contingent remainder, thereby creating by operation of law a reversion in the testator's heirs of the undisposed portion of the fee, which reversion was capable of being transferred by deed.

> "Vested interests in reversion . . . are everywhere alienable *inter vivos.* . . . No statute has been regarded as necessary to reach this result. The fact that the interest is likely to terminate before it becomes possessory is immaterial, if it is vested. . . . So, too, the fact that the reversion may never take effect . . . does not prevent alienation of the reversion." Simes & Smith, Future Interests, *Inter Vivos Alienation,* § 1856 (2d ed). See also *Jenkins v. Bobbitt,* 77 N.C. 385 (1877).

G.S. 41-4 does not operate to postpone vesting of the reversion until the death of Worth Burden without children because a reversion is not an estate created by limitation in a deed or will but in an estate created by operation of law.

We hold, therefore, that testator's will created in each of testator's heirs living at his death a vested and alienable reversionary interest, though indeterminable as to size and subject

to being divested, and that appellees acquired the reversionary interests of the three grantors of the 1959 deeds and are entitled to their share of the proceeds of the sale.

[2] Appellants next contend that Worth Burden was given a fee simple in all timber on the lands, determinable at his death as to any timber not sold, with only a possibility of reverter left for the remaindermen or reversioners. Thus, they contend that appellees have no right to a share of the proceeds from the sale of the timber because Clifford Burden had no alienable interest in the timber to convey at the time he executed his deed to appellees. We disagree.

A devise of a life estate with a power to sell or dispose of the property devised does not give the devisee a fee simple determinable but gives him a life estate coupled with a power of disposition. See *Chewning v. Mason*, 158 N.C. 578, 74 S.E. 357 (1912). The existence of a power to sell timber is not inconsistent with the vesting in testator's heirs at the time of his death of a reversion with respect to the undisposed portion of the fee simple estate, including the timber. Thus, appellees did receive an interest in the unsold timber through their deed from Clifford Burden.

[3] Appellants contend that if the court was correct in its conclusion that a reversionary interest vested in the heirs of testator at testator's death, then the court should also have concluded that Worth Burden was vested with a share of said reversion, whatever it later turned out to be. They contend that since Worth Burden died intestate and without children, his reversionary share should be divided among his heirs, to the exclusion of appellees.

In *White v. Alexander*, 290 N.C. 75, 224 S.E. 2d 617 (1976), the Supreme Court held that the devise of a life estate to a son with the ultimate remainder, taking effect after his death, to the heirs of the testator, demonstrated an intent to exclude the son from any interest in the remainder to his heirs. In the case at bar we hold that the will indicates an intent to exclude Worth Burden from an interest in the reversion.

We have carefully reviewed appellants' other assignments of error and find them to be without merit.

The summary judgment in favor of respondents Tayloe is affirmed.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. WILBUR LEE BANKS

No. 761SC569

(Filed 15 December 1976)

1. **Constitutional Law § 37; Criminal Law § 75— waiver of right to counsel — admissibility of confession**

Evidence was sufficient to support the trial court's findings and conclusion that defendant knowingly and intelligently waived his right to have counsel present during interrogation, and freely and understandingly made inculpatory statements admissible in a prosecution against him for rape.

2. **Rape § 5— sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for rape where it tended to show that defendant broke and entered the home of the victim and found her sleeping; defendant forcibly raped the victim using his hands and threats to accomplish the rape; the victim testified that defendant penetrated her twice and that she attempted to resist him throughout the encounter, never consenting to have intercourse with defendant; the victim positively identified defendant as the rapist; and defendant confessed that he had raped the victim.

APPEAL by defendant from *Peel, Judge.* Judgment entered 13 February 1976 in Superior Court, PERQUIMANS County. Heard in the Court of Appeals 16 November 1976.

Defendant was indicted for second degree rape and breaking and entering with intent to rape. The jury returned a verdict of guilty on the second degree rape charge and not guilty of felonious breaking and entering. From judgment sentencing him to a prison term of not less than 22 nor more than 26 years, defendant appealed.

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

John V. Matthews, Jr., for defendant appellant.

VAUGHN, Judge.

[1] Defendant brings forward 4 assignments of error which have been grouped into 3 arguments. In the first argument, he contends that the court erred in finding that he knowingly and intelligently waived his right to have counsel present during interrogation, thus making any statements made by him inadmissible at trial. It is a well-settled rule that one may waive counsel if he does so freely and voluntarily and with full understanding that he has the right to be represented by an attorney. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694; *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561.

> "A minor who has arrived at the age of accountability for crime may waive counsel in the manner provided by law and make a voluntary confession without the presence of either counsel or an adult member of his family provided he fully understands his constitutional rights and the meaning and consequences of his statement." *State v. Lynch, supra.*

After the *voir dire* hearing to determine the admissibility of defendant's confession, which was made during an in-custody interrogation, the trial judge made the following pertinent findings of fact:

> "(5) That the defendant thoroughly understood his rights, as explained by Mr. Brinson, and he affirmatively waived his right to have counsel present for the interrogation, and freely, voluntarily, and without promise, fear, or compulsion began to answer questions.
>
> * * *
>
> (9) That after the defendant was confronted with this information, [portions of Gina Lightfoot's statement], the defendant began to cry; that he did not cry as a result of anything done to him or said to him by the sheriff, or Mr. Brinson, or any other officer, that this occurred about 7:45 or 8:00; that Sheriff Broughton told him to cry all that he wanted to, and after he had stopped offered him a drink of some sort; that after the defendant stopped crying, in response to questioning by the sheriff, the defendant said that he had raped Gina Lightfoot; that several times during the questioning the defendant was advised that he could quit answering questions any time he wanted to. That the

defendant was not threatened in any manner to coerce him to make any statement, and that he was given no reward or promise or hope of reward to make any statement. That the defendant testified that he had understood his rights, and that no threat or promise had been made to him to cause him to give the statements. Any fear that the defendant may have testified to, did not result from anything the officers said or did to him. That the officers were nice to him and cooperated with him both times that he was questioned. That the defendant did not ask Sheriff Broughton, or Mr. Brinson, or any officer or anyone, to see his parents or a friend. That at the time the defendant's father came to the jail the defendant had already made the statement that he had raped her, and at that time the officers were winding up the questions. That as soon as the father came to the jail, Sheriff Broughton went to see him and immediately returned and told the defendant that his father was there, and that the defendant told the sheriff he did not desire to see his father.

(10) That the following morning, Mr. Brinson, about 9:30 a.m. again advised the defendant of his Constitutional rights, as set out in the Miranda decision; that the defendant thoroughly understood his rights and again specifically and affirmatively waived his right to have counsel present with him for the interrogation; that he had talked to his father during the night; that Mr. Brinson wanted to clear up certain other details in his investigation, particularly about how the defendant had gotten in the window; that no force or threats or promise of any sort were made to the defendant to cause him to make his said statements as he may have made the following morning to Mr. Brinson were freely, understandingly and voluntarily made without any force or coercion of any sort being practiced upon the defendant, and without any reward or the hope of any reward to the defendant to cause him to make said statements.

(11) That on both occasions the defendant's statements were freely, understandingly and voluntarily given without any threat or promise of any sort on the part of the officers; that no mental coercion was practiced on the defendant in any respect."

Based upon these and other findings of fact, the court concluded that defendant freely and voluntarily waived his right

to have counsel present at both of the in-custody interrogations and that he, during those interrogations freely, voluntarily, understandingly and without fear or compulsion of any sort and without reward or hope of reward, made statements which were admissible into evidence. Since the findings of facts and the conclusions of law of the trial court are supported by competent evidence, they are conclusive on appeal. Defendant's statements were, therefore, properly admitted as evidence. The assignment of error is overruled.

[2] Defendant's next argument is that the court should have granted his motion for nonsuit at the conclusion of all the evidence. When reviewing a denial of a motion to dismiss, 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. Any evidence of the defendant which is favorable to the State is considered, but his evidence which is 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. The evidence taken in the light most favorable to the State is as follows:

On the morning of 20 August 1975, defendant broke and entered the residence of Leroy Lightfoot by way of a bedroom window and found Gina Lightfoot, Lightfoot's 13-year-old daughter, asleep in her bed. Defendant forcibly raped her, using his hands and threats to accomplish the rape. Gina testified that defendant penetrated her twice and that she attempted to resist him throughout the encounter. At no time did she consent to have intercourse with the defendant and repeatedly tried to get him to desist and leave the house. Defendant finally left through the kitchen door and went around to the window and attempted to put the screen back in place. Once Gina determined that the defendant was a good distance from her house, she called her father.

When Mr. Lightfoot and Deputy Harrison arrived, she told them what had happened and they went around the house to look at the bedroom window. They found the grass and a piece of an old antenna mashed down under the window. They also found the screen in the window to be out of its frame.

When SBI agent Brinson came to the Lightfoot residence, he took the sheets that were on Miss Lightfoot's bed into his custody. The sheet covering the mattress had mud and dirt on

the bottom. Brinson also took the pajamas Gina was wearing on the morning of the attack. The pajama bottoms were torn along the waistband seam.

Sheriff Broughton and Brinson interrogated the defendant in the evening of the day the alleged rape took place. Defendant was informed that Gina had identified him as the rapist, had described what he was wearing at the time of the rape and that he probably left his fingerprints in several places in the Lightfoot residence. Defendant then confessed that he had raped the girl earlier that day.

A doctor testified that he examined the child and found some white secretion in the vagina but could not determine whether there was sperm present. There were red places on Gina's face and left arm.

Defendant offered evidence tending to show the following: He had received phone calls from Gina on numerous occasions. Around 7:00 a.m. on 20 August 1975, he received a call from her asking him to come down to her house because her parents were not at home. She told him not to come to the front or kitchen doors but to come to the side window. He went to the Lightfoot house that morning after having gone to Chappell's Grocery for some nabs and a soda. He entered the residence through a bedroom window after seeing Miss Lightfoot standing in her parents' bedroom dressed in pajamas. She offered to have sexual intercourse with him for $5.00. He agreed to pay her $5.00 but it was not until they were on the bed that she demanded the money immediately. When he told her that he did not have it she got mad and when she threatened to call her father, defendant left.

Another physician, who examined the prosecuting witness between 1:00 p.m. and 2:00 p.m. on the day of the alleged rape, testified that he was unable to testify that Miss Lightfoot had been raped.

There were other witnesses who testified that the defendant had a good reputation in the community and his mother testified that the defendant had received a phone call between 7:00 a.m. and 7:30 a.m. on the morning of the alleged rape, but that she did not know the identity of the caller.

The State's rebuttal evidence was the testimony of one of defendant's friends to the effect that during a lunch break on

19 August 1975, the defendant told him that he was going to Gina Lightfoot's house and try to have sexual intercourse with her and that if she was unwilling he "was going to take it." This person further testified that on the morning of 20 August 1975, he saw the defendant walking from the direction of the Lightfoot residence towards Windfall between 8:00 a.m. and 9:00 a.m. He also testified that the prosecuting witness was not a "fresh type" with the boys.

It is manifest from the foregoing summary that the evidence required that the case be submitted to the jury. Defendant's assignments of error based on the alleged insufficiency of the evidence are overruled.

Defendant's final contention is that a portion of the trial court's instructions to the jury contains an inadequate statement of the law applicable to the offense of second degree rape and that the court erred when it failed to give an instruction set out by the defendant. Defendant did not request the trial judge to give the instruction he now, on appeal, says should have been given and concedes that he can cite no authority for the proposition that it should have been given.

In pertinent part, the judge instructed the jury as follows:

> "Now I charge, Members of the Jury, that for you to find the defendant guilty of second degree rape, or in that case guilty as charged, the State must prove three things beyond a reaonable doubt: (1) That the defendant had sexual intercourse with Gina Veroneka Lightfoot, and members of the Jury I instruct you that the slightest penetration is enough to constitute the sexual intercourse; (2) that the defendant used or threatened to use force sufficient to overcome any resistance that she might make; and (3) that Gina Veroneka Lightfoot did not consent and it was against her will.
>
> * * *
>
> And so, Members of the Jury, first as to the charge of second degree rape, I charge you, Members of the Jury, that if you find from the evidence beyond a reasonable doubt, that on or about August 20, 1975, Wilber Lee Banks came into Gina Lightfoot's room, and got on top of her, held her down on her bed, pulled her pants down, while she was resisting him and trying to keep him off of her, and

inserted his penis into her vagina, and forcibly had sexual intercourse with Gina Lightfoot, without her consent and against her will, it would be your duty to return a verdict of guilty of second degree rape, or guilty as charged."

The foregoing constitutes a proper declaration and explanation of the law arising on the evidence. Defendant's assignments of error to the charge are overruled.

We find no prejudicial error in defendant's trial.

No error.

Judges BRITT and MARTIN concur.

STATE OF NORTH CAROLINA v. RONNIE KEITH COLE

No. 7625SC589

(Filed 15 December 1976)

1. **Homicide § 19— evidence of deceased's violent nature — exclusion proper**

The trial court in a homicide prosecution did not err in allowing the State's motion to strike testimony by defendant's wife concerning a specific act of violence by deceased one year before the homicide, since there was no other evidence tending to show that the killing was in self-defense at the time the testimony was offered, there was no evidence to indicate that defendant knew of the incident about which his wife testified, and the State's evidence was not wholly circumstantial and did not leave the nature of the transaction in doubt; moreover, defendant was not prejudiced by the exclusion of such evidence since his wife subsequently testified without objection concerning deceased's violent threats and defendant's knowledge of them.

2. **Criminal Law § 85— character witness — defendant's prior misconduct — questions improper**

As a general rule, a character witness in a criminal trial may not be asked on cross-examination whether he has heard of particular acts of misconduct by the defendant, nor may he be asked whether he would consider someone guilty of such specific acts of misconduct to be a person of good character.

3. **Criminal Law § 169— character witness — questions about defendant's prior convictions — harmless error**

Where defendant had previously taken the stand in his own behalf and the evidence of his prior convictions was already properly before the jury, the subsequent use of such convictions for impeach-

ment purposes of defendant's character witness constituted harmless error.

4. **Homicide § 28— requested instruction on deceased's violent nature — failure to give not reversible error**

In a homicide prosecution the trial court's failure to instruct the jury as requested on the bearing that the violent character of deceased known to defendant might have had on defendant's conduct did not, standing alone, constitute reversible error, especially since the trial judge otherwise fully charged on the issue of self-defense.

APPEAL by defendant from *Briggs, Judge.* Judgment entered 11 December 1975 in Superior Court, CATAWBA County. Heard in the Court of Appeals 7 December 1976.

Defendant was indicted for first-degree murder, but the State elected to try him for murder in the second degree. Defendant entered a plea of not guilty and was convicted by a jury of voluntary manslaughter. He was sentenced to imprisonment for a term of 16 years.

At trial, the State introduced evidence which tended to show that defendant and his wife lived in an apartment next to that of deceased Virgil Holdren and his wife. On 17 May 1975, defendant's wife and Holdren began to quarrel and continued to do so for approximately ten minutes. Defendant instructed his wife to stop the dispute, but his wife and Holdren carried on their argument. Defendant then got into a fist fight with Holdren, after which defendant left to go to his nearby car. Defendant entered his car, but Holdren followed him and the controversy continued. Defendant jumped out of the car and began striking Holdren. Holdren fell to the ground and defendant straddled him while stabbing him at least six or seven times. Medical testimony indicated that Holdren suffered from five stab wounds plus three cuts on his neck and one on his face. He died from a puncture wound in the left side of his chest which pierced the heart. Other testimony revealed that no weapons used by either defendant or Holdren were located at the scene of the incident, although the investigating policeman found a small pocketknife among the personal effects of the deceased.

Defendant testified in his own behalf, *inter alia,* that he and Holdren argued on 17 May 1975 concerning defendant's rent payments; that when Holdren followed defendant to his car, he threatened to kill defendant and his wife; that Holdren

grabbed defendant by his hair and started the altercation by the street; that Holdren first pulled out a knife, whereupon defendant responded by producing his own knife; that he did not remember stabbing Holdren, but did not deny doing so; and that after the fight he took both knives but does not remember what he did with them.

Other relevant facts are set out in the opinion below.

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

Tate and Young, by Dwight Bartlett, for defendant appellant.

MORRIS, Judge.

[1] Defendant called his wife to the stand to testify in his behalf and attempted to question her regarding the deceased's allegedly violent tendencies. The State interposed several objections, some of which were sustained. Defendant's exceptions in the record, however, relate solely to one question. Defense counsel asked the witness, "What specific action of violence did you observe at this time, approximately one year ago?", to which the witness responded, "The night the man held a knife against his girl friend's throat and threatened to kill her and wouldn't let her . . . " At this point, the State objected and moved to strike, whereupon the court sustained the objection and allowed the motion. Defendant contends that he should have been able to show the violent character of the deceased and that the exclusion of this testimony constitutes prejudicial error. We disagree.

The rule in North Carolina regarding admission of character evidence of the deceased in a homicide case has been stated as follows:

> " . . . In a prosecution for homicide, where there is other evidence tending to show that the killing was in self-defense, evidence of the character of the deceased as a violent and dangerous fighting man is admissible if (1) such character was known to the accused *or* (2) the evidence is wholly circumstantial or the nature of the transaction is in doubt." 1 Stansbury, N. C. Evidence, § 106, p. 330 (Brandis Rev. 1973).

We fail to see how the rule applies in this case to permit the stricken testimony. At the time the question was asked, there was no "other evidence tending to show that the killing was in self-defense." Furthermore, there was no evidence to indicate that defendant knew of the incident, and the State's evidence is not "wholly circumstantial" and does not leave the nature of the transaction in doubt.

Even assuming, *arguendo,* that the evidence should not have been excluded, the record reveals that defendant's wife subsequently testified on redirect examination that deceased had "threatened to kill my husband and come after me and my baby. . . . [M]y husband heard this threat." This testimony was allowed without objection by the State. Thus, it appears that defendant was nevertheless able to introduce evidence regarding the deceased's violent threats and defendant's knowledge of them. The exclusion of testimony is not prejudicial when the information sought is provided in other parts of the testimony. *State v. Goodson,* 18 N.C. App. 330, 196 S.E. 2d 531 (1973). This assignment of error is overruled.

Defendant later called his father to testify as a character witness in his behalf. His father stated he knew defendant's "general character and reputation in the community in which he lived, and it was good." On cross-examination, the district attorney asked defendant's father, over objection, whether he knew that defendant had pled guilty to previous criminal offenses. Defendant contends that the trial court erred in allowing cross-examination of defendant's father regarding defendant's specific acts of misconduct. We disagree.

[2] As a general rule, a character witness in a criminal trial may not be asked on cross-examination whether he has heard of particular acts of misconduct by the defendant. *State v. Hunt,* 287 N.C. 360, 215 S.E. 2d 40 (1975) ; *State v. Smith,* 5 N.C. App. 635, 169 S.E. 2d 4 (1969). Also, such a witness may not be asked whether he would consider someone guilty of such specific acts of misconduct to be a person of good character. *State v. Hunt, supra; Woodie v. North Wilkesboro,* 159 N.C. 353, 74 S.E. 924 (1912). The reason for the rules is that such questions are likely to be taken by the jury, not for the purpose of testing the witness' estimate of character, but rather as evidence of the misconduct itself. See 1 Stansbury, N. C. Evidence, § 115, p. 351 (Brandis Rev. 1973).

Here, the record reveals that immediately before defendant's father was called to testify, defendant took the stand in his own behalf. In the State's cross-examination of defendant, he admitted that he had pled guilty to the list of offenses about which his father was questioned. These prior offenses were, of course, appropriate areas for cross-examination of the defendant for impeachment purposes. *State v. Goodson,* 273 N.C. 128, 159 S.E. 2d 310 (1968). Therefore, evidence of defendant's criminal record was already before the jury when defendant's father testified. This varies materially from the situation in *State v. Hunt, supra,* in which the Court noted that:

> "Both counsel and defendant in a criminal case are always faced with a difficult task in deciding whether the accused should testify and be subjected to cross-examination. *Here defendant did not testify.* If defendant had a previous criminal record, that fact, in all probability, strongly influenced his decision to forego his right to testify. *The effect of the prosecutor's questions was to inform the jury that defendant had previously been convicted of other separate and distinct criminal offenses . . .* " 287 N.C. at 376, 215 S.E. 2d at 50. (Emphasis supplied.)

[3] In the case *sub judice,* since defendant had previously chosen to take the stand in his own behalf and the evidence of his prior convictions was already properly before the jury, we believe that the subsequent use of such convictions for impeachment purposes of defendant's character witness constituted harmless error. This assignment is overruled.

[4] Defendant submitted to the judge a list of requested special instructions to the jury. His fifth request was that the court instruct the jury " . . . as to the bearing that the violent character of the deceased known to the Defendant might have had on the Defendant's apprehension, fear and subsequent conduct towards the [deceased]." Defendant now contends that the court erred in failing to submit such instructions, citing *State v. Riddle,* 228 N.C. 251, 45 S.E. 2d 366 (1947). In *Riddle,* the North Carolina Supreme Court held that, in a homicide action in which there is evidence that the deceased was a man of violent character, the failure of the judge to instruct the jury as to the effect that such violent reputation could have on defendant's reasonable apprehension of death or bodily harm constitutes prejudicial error. Here, the trial judge did not spe-

cifically charge as to the effect which Holdren's violent characteristics might have had on defendant's reasonable apprehension of death or substantial bodily injury. However, the judge did otherwise fully charge the jury on the question of self-defense and added that the jury " . . . should consider the circumstances as you find them to have existed from the evidence, *including . . . the reputation, if any, of Virgil Holdren for danger and violence.*" (Emphasis supplied.) We do not believe that the judge's failure to instruct the jury as requested, standing alone, constitutes reversible error, especially since the trial judge otherwise fully charged on the issue of self-defense. *State v. Rummage,* 280 N.C. 51, 185 S.E. 2d 221 (1971).

We have reviewed defendant's other assignment of error and find it to be without merit.

No error.

Judges CLARK and ARNOLD 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 EIGHTH OF THE WILL OF ANDREW M. KISTLER v. RODERICK M. MACDOUGALL, TRUSTEE UNDER THE WILL OF ANDREW M. 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, MARY K. STAHL; ELIZABETH M. STAHL, JAMES B. CRAVEN IV, JOSEPH H. CRAVEN, AND CHRISTA COVINGTON CRAVEN, INFANTS; HATTIE HARWOOD, HENRY HARWOOD, ALBERT LESLIE HARWOOD III, KENNETH M. HARWOOD, ELIZABETH HARWOOD ELDREDGE, DAVID KISTLER HARWOOD, WILLIAM B. HARWOOD, GORDON D. HARWOOD, PRISCILLA S. HARWOOD, JANE W. HARWOOD, HUGH HARWOOD, RICHARD KISTLER HARWOOD, PETER BOWKER HARWOOD, ANN ELIZABETH HARWOOD, JOHN CHAMBERLAIN HARWOOD, MARGARET E. HARWOOD, ALBERT LESLIE HARWOOD IV, HENRY HARWOOD II, LAWRENCE C. HARWOOD, JAMES B. HARWOOD, ROBIN ELIZABETH HARWOOD, ANDREW CHARLES HARWOOD, TANIA LEE HARWOOD, KENDRICK N. ELDREDGE, JR., ANDREW H. ELDRIDGE, KRISTEN DAVIS HARWOOD, KIMBERLY

S. HARWOOD, AND ROBERT DONALD HARWOOD, INFANTS; AND ALL UNBORN AND UNKNOWN PERSONS WHO MAY NOW OR HEREAFTER AT ANY TIME HAVE OR CLAIM TO HAVE ANY INTEREST UNDER ARTICLE EIGHTH OF THE WILL OF ANDREW M. KISTLER AND ARE NOT REPRESENTED BY MARGARET J. KISTLER, GUARDIAN AD LITEM FOR THE INFANT PLAINTIFFS; AND WAYNE W. MARTIN, GUARDIAN AD LITEM FOR THE INFANT DEFENDANTS ELIZABETH M. STAHL, JAMES B. CRAVEN IV, JOSEPH H. CRAVEN, CHRISTA COVINGTON CRAVEN, MARGARET E. HARWOOD, ALBERT LESLIE HARWOOD IV, HENRY HARWOOD II, LAWRENCE C. HARWOOD, JAMES R. HARWOOD, ROBIN ELIZABETH HARWOOD, ANDREW CHARLES HARWOOD, TANIA LEE HARWOOD, KENDRICK N. ELDREDGE, JR., ANDREW H. ELDREDGE, KRISTEN DAVIS HARWOOD, KIMBERLY S. HARWOOD, AND ROBERT DONALD HARWOOD, AND ALL UNBORN AND UNKNOWN PERSONS WHO MAY NOW OR HEREAFTER AT ANY TIME HAVE OR CLAIM TO HAVE ANY INTEREST UNDER ARTICLE EIGHTH OF THE WILL OF ANDREW M. KISTLER

No. 7625SC495

(Filed 15 December 1976)

1. **Wills § 48— whether adopted children take under will**

The mere use of the word "issue" in a will drafted prior to the enactment of G.S. 48-23(3) did not reveal an intent to exclude adoptives from provisions of the will.

2. **Wills § 48— whether adopted children take under will**

Provision in a will alluding to the fact that a sister provided for in the will was adopted did not disclose an intent by testator to exclude other adoptives from taking under the will.

3. **Declaratory Judgment Act § 1; Wills § 48— status of adopted children under will**

The determination of the status of adopted children under the terms of a will is within the purpose of the Declaratory Judgment Act.

APPEAL by defendants from *Ervin, Judge.* Judgment entered 25 March 1976 in Superior Court, BURKE County. Heard in the Court of Appeals 19 October 1976.

This declaratory judgment action was instituted to obtain construction of Article Eight of the will of Andrew M. Kistler, who died in 1931. The plaintiffs and defendants comprise all persons, born and unborn, with an interest in the income and principal of the residuary trust created in that article. The assets of the trust had a fair market value on 9 February 1976 of $1,668,954.25. The complaint seeks a declaration as to the rights of three minor plaintiffs who are the adopted children of testator's grandchild, Andrew M. Kistler, II.

Article Eight provides certain distributions to the "issue of Charles E. Kistler," who is now deceased. Charles E. Kistler, by virtue of the adoptions by his son, Andrew M. Kistler II, was the grandfather of the three adopted minors whose rights under his will are at issue in this action. The remaining terms of Article Eight are not relevant to this appeal and will not be recited.

The complaint requested a declaration that the three adopted children of Andrew M. Kistler II and their issue, whether natural or adopted, are entitled to take under Article Eight of the will of Andrew M. Kistler in the same manner and extent as natural issue. All adult defendants joined in the request in their answers. A guardian *ad litem* was appointed for all minor, unborn, and unknown defendants.

A declaratory judgment as requested by plaintiffs and adult defendants was granted. From this judgment the guardian *ad litem* appeals.

Hudson, Petree, Stockton, Stockton & Robinson by H. G. Hudson for plaintiff appellees; Everett, Everett, Creech & Craven by James B. Craven III for defendant appellees, Mary Kistler Stahl and all other adult defendants who are members of the family of Andrew M. Kistler and Hattie Harwood and all other adult members of the Harwood family.

Wayne W. Martin for the guardian ad litem *for infant, unborn and unknown, defendant appellants.*

CLARK, Judge.

G.S. 48-23(3) states that

> "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 section."

[1] Appellant argues that in two terms of the will the contrary intent of the testator plainly appears. Appellant first argues that at the time the will was drafted and at testator's death, the word issue did not include adopted children, and therefore merely by its use at that time an intent contrary to the provisions of G.S. 48-23(3) plainly appears in Article Eight. Were this argument to be adopted it would vitiate the effect of G.S. 48-23(3) on all instruments drafted before its enactment, contrary to the clearly expressed intent of the legislature. It is well established that the cardinal principle in the construction of a will is to give effect to the intent of the testator as it appears from the language used in the instrument itself, subject to the limits imposed by statute or decision. *Olive v. Biggs,* 276 N.C. 445, 173 S.E. 2d 301 (1970). G.S. 48-23(3) has not changed this principle, but merely has provided the courts with a clear and certain rule of construction to be applied unless a contrary intent plainly appears from the terms of the instrument. *Peele v. Finch,* 284 N.C. 375, 200 S.E. 2d 635 (1973). We hold that the mere use of the word issue in an instrument drafted prior to the enactment of G.S. 48-23(3) does not plainly reveal the contrary intent required by the statute. *Peele v. Finch, supra; Stoney v. MacDougall,* 28 N.C. App. 178, 220 S.E. 2d 368 (1975), *cert. denied,* 289 N.C. 302, 222 S.E. 2d 702 (1976).

[2] Appellant also relies upon Article Fourteen of the will, which states that

> "My sister, Hattie Harwood, for whom I have made provision if certain contingencies shall occur is not my sister by blood but by adoption and I mention this fact in order that no complication may arise on account of this relationship."

We fail to see how this provision plainly reveals an intent to exclude all adoptives from the will. Quite to the contrary, this provision reveals a heartfelt desire that there be no discrimination against testator's adopted sister. To deduce an intent to exclude all adoptives from a provision expressing a clear desire to include one adoptive is a step in logic this court is not prepared to take.

[3] The recent case of *Crumpton v. Crumpton,* 290 N.C. 651, 227 S.E. 2d 587 (1976), held that in a proceeding for a private sale of land under G.S. 41-11, it would be premature to deter-

mine the ultimate disposition of the sale proceeds in the hands of the Clerk by deciding whether a contingent interest of children of a deceased son of the life tenant had been destroyed by virtue of their adoption from the deceased son.

> "A close examination of *the statute* reveals that *its purpose* is not to obtain predictive declarations of future rights of the parties *inter se,* but rather to promote the interest of all the parties by allowing the sale of desirable land free from the restrictions imposed by the presence of uncertainties as to whom the land will ultimately belong. . . . " 290 N.C. at 655, 227 S.E. 2d at 591. (Emphasis added.)

The decision in *Crumpton* has no application to the case before us. This action was brought under the Uniform Declaratory Judgment Act, G.S., Chap. 1, Art. 26. G.S. 1-254 provides that: "Any person interested under a . . . will . . . or whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the instrument, statute . . . and obtain a declaration of rights, status or other legal relations thereunder. . . . " The determination of the status of the adopted children is clearly within the purpose of the Act. *Trust Co. v. Green,* 238 N.C. 339, 78 S.E. 2d 174 (1953) ; *Little v. Trust Co.,* 252 N.C. 229, 113 S.E. 2d 689 (1960) ; *Gregory v. Godfrey,* 254 N.C. 215, 118 S.E. 2d 538 (1961).

The judgment is

Affirmed.

Judges MORRIS and ARNOLD concur.

STATE OF NORTH CAROLINA v. VINCENT RAY RIVES

No. 7615SC505

(Filed 15 December 1976)

Constitutional Law § 37; Criminal Law § 75— waiver of constitutional rights — sufficiency of evidence

Evidence supported the findings and conclusion of the trial court that defendant was fully warned of and waived his right to remain

silent and his right to counsel where such evidence consisted of testimony by a deputy sheriff that he told defendant that he had a right to stop answering the sheriff's questions at any time and, if defendant wished to have an attorney present before he answered any questions, he could do so; and the deputy sheriff testified that defendant stated he understood his rights, did not want an attorney present, and wanted to make a statement.

APPEAL by defendant from *Preston, Judge.* Judgment entered 16 February 1976 in Superior Court, CHATHAM County. Heard in the Court of Appeals 21 October 1976.

Defendant pled not guilty to the charge of feloniously discharging a firearm into an occupied building on the night of 17 January 1975. The State's evidence tended to show that defendant became angry when he lost money in a poker game at a poolroom near Goldston. He cursed Otis Headen, who hit him. Defendant was escorted from the poolroom. Several minutes later a shotgun was fired through the window, and Headen was hit in the legs. Defendant was heard to say: "Hold it, goddamn it, don't nobody move." Deputy Sheriff Whitt interrogated the defendant on 19 January 1975, two days after the shooting, and testified to a confession made at that time.

Defendant offered no evidence. The jury found defendant guilty as charged. From judgment imposing imprisonment, defendant appeals.

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

Gunn & Messick by Robert L. Gunn for defendant appellant.

CLARK, Judge.

Defendant assigns as error the admission of the confession made to Deputy Whitt on 19 January 1975 at the Chatham County Jail. Defendant contends that there is no indication that Deputy Whitt advised him of his right to stop answering questions if he began answering them and his right to stop answering questions at any time until talking with a lawyer. He concludes that since there was no showing of an express waiver of these rights, the confession was improperly admitted into evidence.

In *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), the Supreme Court placed a heavy burden

on the prosecution to show that there had been a knowing and intelligent waiver of the Fifth Amendment privilege against self-incrimination. *Miranda* did not further define the requisite standard of proof nor did it or subsequent United States Supreme Court decisions establish guidelines for the prosecution in meeting its heavy burden.

More recent Supreme Court decisions have seemed to ease this burden in various contexts. *Michigan v. Mosley,* 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed. 2d 313 (1975) (dissenting opinion). In *Mosley,* the Court held that the defendant had waived the privilege, even though he had asserted his right to remain silent at a prior interrogation, when subsequently the warnings were given again, and the confession obtained was about a crime unrelated to the one for which he was initially interrogated. There is nothing in *Mosley* to indicate that the waiver had been made by affirmative statements. The defendant signed a "notification form," but otherwise the court merely noted that he failed to request the presence of counsel during the interrogation. In *Lego v. Twomey,* 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed. 2d 618 (1972), the court held that the privilege does not require that the voluntariness of a confession be determined by more than a preponderance of the evidence. In *Harris v. New York,* 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed. 2d 1 (1971), the court held that a confession could be admitted for purposes of impeachment, if otherwise trustworthy, even though it would not be admissible to establish the case in chief because the *Miranda* warnings had not been given.

The lower federal courts have also seemed to ease the prosecution's heavy burden to demonstrate a knowing and intelligent waiver. In *United States v. Frazier,* 476 F. 2d 891 (D.C. Cir. 1973), an objective test was adopted. The court held that there had been a knowing and intelligent waiver even when the defendant, after having been given the full *Miranda* warnings and having stated that he understood his rights, made a statement but instructed his interrogator not to write anything down. In holding that this instruction was not an alerting circumstance militating against an effective waiver, the court ruled that the heavy burden imposed upon the prosecution in *Miranda* was satisfied by proof that (1) the warnings were given properly, and (2) the person warned had the capacity to understand the warnings. Note, *Miranda Rights,* 52 N.C. L. Rev. 454 (1973). It is accurate to conclude that the lower federal courts have

not required an affirmative statement that expressly waives the privilege, but have applied an objective test from which an effective waiver may be inferred. See also *United States v. McNeil,* 433 F. 2d 1109 (D.C. Cir. 1969); *Pettyjohn v. United States,* 419 F. 2d 651 (D.C. Cir. 1969); *United States v. Hayes,* 385 F. 2d 375 (4th Cir. 1967).

In *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123 (1971), the North Carolina Supreme Court adopted a more stringent standard than the federal courts have. The court ruled that an intelligent waiver of the right to counsel could not be inferred when the defendant was given the *Miranda* warnings, stated that he knew and understood his rights, and failed to request counsel. *But see Blackmon v. Blackledge,* 541 F. 2d 1070 (1976) where the court held, in a federal habeas corpus proceeding brought by the same defendant after conviction at a subsequent trial, that a waiver of the right to counsel could be inferred in these circumstances. The stringent requirement of an express and affirmative waiver of the right to counsel has been followed in subsequent cases. *State v. Carter,* 289 N.C. 35, 220 S.E. 2d 313 (1975); *State v. Patterson,* 288 N.C. 553, 220 S.E. 2d 600 (1975); *State v. White,* 288 N.C. 44, 215 S.E. 2d 557 (1975); *State v. Lawson,* 285 N.C. 320, 204 S.E. 2d 843 (1974); *State v. Thacker,* 281 N.C. 447, 189 S.E. 2d 145 (1972); and *State v. Turner,* 281 N.C. 118, 187 S.E. 2d 750 (1972).

Another extension of *Miranda* appears in *State v. White, supra,* where the court again refused to find an effective waiver of the right to counsel in the absence of an affirmative statement by the defendant that he did not desire the presence of counsel. The defendant had been interrogated twice. The court found that his waiver during the first interrogation was effective since it was affirmative. During the second interrogation some hours later, the warnings were again given; defendant again stated that he understood them, but on this occasion failed to make an affirmative waiver of the right to counsel. Even in these circumstances the court held that a showing that the defendant was properly warned of his rights and stated that he understood them could not be sufficient to constitute an effective waiver of the right to counsel. But see *Michigan v. Mosley, supra; People v. Sievers,* 255 Cal. App. 2d 34, 62 Cal. Rptr. 841 (1967).

The recent case of *State v. Swift,* 290 N.C. 383, 226 S.E. 2d 652 (1976), may herald a relaxation of the strict requirement

of *Blackmon.* In that case the defendant had been given the full *Miranda* warnings and had stated that he understood them. Although he had affirmatively waived his right to counsel, he contended that there had been no express waiver of his right to remain silent. He had been asked whether he wished to answer a question, and rather than answering in the affirmative, had merely stated he knew nothing about the charge against him. The court adopted a test for waiver which seems to stand in contrast to that of *Blackmon.* "[I]n order to determine whether defendant waived his right to remain silent, it is also necessary to *look at the other circumstances.*" (Emphasis added.) The court then found sufficient evidence to support the trial court's finding that " 'such response . . . taken together with the other circumstances . . . represented a specific indication that he was willing to answer the questions . . . and be interrogated; that he did nothing to indicate that he did not want to talk to them. . . . ' " 290 N.C. at 398, 226 S.E. 2d at 664. The circumstances surrounding the waiver are sparsely stated in *Swift* and the decision offers little to guide the wary trial judge. However, the logic of *Swift* leads to the conclusion that the State is not required to show that a defendant expressly waived each *Miranda* right with an affirmative statement. Once there has been a showing that the *Miranda* warnings were properly given and understood by the defendant, *Swift* seems to hold that a waiver may be inferred from the statements and conduct of the defendant and other relevant circumstances.

In the case before us, Deputy Whitt testified in court just prior to the *voir dire* that he told the defendant "that he had the right to stop answering my questions at any time; that if he wished an attorney present before any questions, he had the right to do so." At *voir dire* Deputy Whitt further testfied that defendant stated he understood his rights, did not want an attorney present, and wanted to make a statement.

We find that the evidence supports the findings and conclusion of the trial court that, either under the standard of *Blackmon* or the seemingly more liberal one of *Swift*, the defendant was fully warned of and waived his right to remain silent and his right to counsel.

We have carefully examined defendant's other assignment of error and find it to be without merit.

No error.

Judges MORRIS and ARNOLD concur.

CHRISTINE K. SMITH, EMPLOYEE v. DACOTAH COTTON MILLS, INC., EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER

No. 7622IC516

(Filed 15 December 1976)

Master and Servant § 56— workmen's compensation — injury on public street during break

Claimant's injury by accident did not arise out of her employment where claimant left her employer's premises during a fatigue break and walked down a public street to where oil tanks for the use of defendant employer were being buried in the street, and claimant there stumbled over a cement block and fell in the street, injuring her hip and back.

APPEAL by plaintiff from opinion of the North Carolina Industrial Commission filed 9 April 1976. Heard in the Court of Appeals 16 November 1976.

Plaintiff seeks compensation from her employer, Dacotah Cotton Mills, Inc., and Liberty Mutual Insurance Company, the employer's compensation carrier, for an injury by accident allegedly arising out of and in the course of her employment.

The parties stipulated that plaintiff sustained an injury by accident and that the employer-employee relationship existed between plaintiff and defendant employer at the time of the accident. The facts found by the hearing commissioner to which there is no exception are summarized in pertinent part as follows:

On 27 October 1973 plaintiff was employed by defendant employer as a baling clerk. Her job was to check rolls of cloth and make out tickets on each roll. She worked the first shift which was from 7:00 a.m. to 3:00 p.m. She had three fatigue breaks: from 9:00 a.m. to 9:15 a.m.; from 11:00 a.m. to 11:20 a.m.; and from 1:00 p.m. to 1:15 p.m. She did not have a lunch break and was free to eat on one of the fatigue breaks.

When the buzzer sounded for a break, the entire cloth room, where plaintiff worked, shut down and the employees were free

to go where they wanted with minor restrictions. The employees were expected to be back at their place of work when the buzzer sounded to signal the end of a break period. Plaintiff generally did not go to the canteen area because of the "smokers" who frequented the room. To get fresh air and break the monotony, she would often go out of doors and stroll down the public street which dead-ended into the employer's premises.

On the date in question, oil tanks for the use of defendant employer were being buried in the street. During her 9:00 a.m. break, plaintiff walked approximately 250 feet down the street to the site where the tanks were being buried. There she talked briefly with an elderly man and decided it was time to return to work. As she started back to the mill, she stumbled over a cement block causing her to fall on the street, injuring her hip and back.

The final fact found, and the only fact excepted to by plaintiff, was that "the hazard of the construction work on Dacotah Street was not on defendant employer's premises and was a hazard to which the public generally was exposed."

The hearing commissioner concluded that the injury sustained by plaintiff did not arise out of her employment and, therefore, denied the claim. Plaintiff appealed to the full commission pursuant to G.S. 97-85. In a two-one decision the commission affirmed and adopted as its own the opinion and award of the hearing commissioner. From this determination, plaintiff appealed.

Wilson & Biesecker, by Joe E. Biesecker and Roger S. Tripp, for plaintiff appellant.

Walser, Brinkley, Walser & McGirt, by G. Thompson Miller, for defendant appellees.

BRITT, Judge.

Plaintiff assigns as error the commission's conclusion that her injury by accident did not arise out of her employment. We find no merit in the assignment.

To be compensable under the Workmen's Compensation Act an injury must arise out of and in the course of employment. G.S. 97-2(6). The determinative question in this case is whether plaintiff's injury arose out of her employment. "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, 726, 131 S.E. 2d 308, 310 (1963).

"An accident occurring during the course of employment, however, does not *ipso facto* arise out of it. The term 'arising out of the employment' is not susceptible of any all-inclusive definition, but it is generally said that an injury arises out of the employment 'when it is a natural and probable consequence or incident of the employment and a natural result of one of its risks, so that there is some causal relation between the injury and the performance of some service of the employment. . . .'" *Robbins v. Nicholson,* 281 N.C. 234, 238-239, 188 S.E. 2d 350, 354 (1972).

As stated by our Supreme Court in *Lockey v. Cohen, Goldman & Co.,* 213 N.C. 356, 359, 196 S.E. 342, 344-345 (1938):

> "The injury must come from a risk which might have been contemplated by a reasonable person as incidental to the service when he entered the employment. It may be said to be incidental when it is either an ordinary risk directly connected with the employment, or an extraordinary risk which is only indirectly connected with the service owing to the special nature of the employment. The Workmen's Compensation Act does not contemplate an award for every injury an employee may receive during the course of his employment. It provides only for compensation for injuries which result from accident arising out of and in the course of his employment."

In this case, the accident occurred during the course of plaintiff's employment. The break was of mutual benefit to both parties. As stated in *Harless v. Flynn,* 1 N.C. App. 448, 456-457, 162 S.E. 2d 47, 53 (1968): "In tending to his personal physical needs, an employee is indirectly benefiting his employer. Therefore, the course of employment continues when the employee goes to the washroom . . . takes a smoke break . . . takes a break to partake of refreshment . . . ." While enjoying fresh air and relaxation during her break, plaintiff was acting in the course of her employment. For her injury to be compensable, however, it must also have arisen *out of* her employment.

The burden is on plaintiff to show affirmatively that the accident arose out of her employment. *Matthews v. Carolina Standard Corp.*, 232 N.C. 229, 60 S.E. 2d 93 (1950). We think plaintiff failed to carry her burden. We are unable to perceive a direct causal connection between plaintiff's accident and her employment.

Each workmen's compensation case must depend on its own individual set of facts and circumstances. In this case, plaintiff was injured while off of her employer's premises. During her break she was free to go and come as she pleased. Plaintiff chose to stroll down a public street and subject herself to the dangers arising therefrom. We do not think the fact that the construction work was being performed on behalf of her employer is sufficient to cause this to be a compensable injury. Plaintiff had no work to do nor was she performing any service at the time of her accident. Her time was her own and she was without any orders or directions from her employer.

The fact that plaintiff was being paid during the break is not sufficient to cause this accident to arise out of her employment. As stated by Professor Larson:

> "The fact that the coffee break or rest period is a paid one, or for any other reason might be presumptively within the course of employment, does not of course mean that anything that happens during that span of time is compensable." 1 Larson, Workmen's Compensation Law § 15.54 (1972).

Nor do we think that this accident occurred because of any risk incident to plaintiff's employment. Our Supreme Court has stated in *Bryan v. T. A. Loving Co.*, 222 N.C. 724, 728, 24 S.E. 2d 751, 754 (1943), that:

> "Where an injury cannot fairly be traced to the employment as a contributing proximate cause, or comes from a hazard to which the workman would have been equally exposed apart from the employment or from a hazard common to others, it does not arise out of the employment. (Citations omitted.) The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. . . ."

Plaintiff chose to expose herself to a danger that was present in a public street. She argues that the fact that the street dead-ends at defendant's mill and that it was used primarily by mill employees negates the public nature of the street. Nevertheless, the commission's findings that it was a public street and that it was a hazard to which the public generally was exposed are supported by competent evidence and are therefore conclusive on appeal. *Blalock v. Roberts Co.*, 12 N.C. App. 499, 183 S.E. 2d 827 (1971).

The hazard to which the plaintiff was exposed was in no way peculiar to her employment. The cement block was a hazard to which all persons who used the street were exposed. The risk was not shown to be a natural incident of plaintiff's employment nor was a sufficient causal connection between the accident and employment shown for the accident to arise out of the employment. We think the commission properly concluded that the injury by accident sustained by plaintiff did not arise out of her employment.

The order appealed from is

Affirmed.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. DEBORAH SPEIGHT WEBB

No. 7610SC441

(Filed 15 December 1976)

1. **Criminal Law § 143— revocation of probation — absence of preliminary hearing**

Defendant was not denied due process by the State's failure to give her a preliminary hearing prior to her probation revocation hearing where defendant was released on her own recognizance and thus was not deprived of her conditional liberty pending the probation revocation hearing.

2. **Criminal Law § 143— probation revocation — misinterpretation of statutes — harmless error**

Even if the trial court misinterpreted G.S. 15-200 and 15-200.1 by assuming that they gave the court no authority to continue defendant's probation when the court finds a violation of the terms of probation, defendant was not prejudiced by such interpretation where the record shows defendant violated one of the conditions of her probation and the trial judge made it clear that he intended to revoke her probation upon the finding of the violation.

3. Criminal Law § 143— sentence — no credit for time spent on probation

The trial court did not err in failing to credit defendant with time spent on probation when it activated defendant's suspended sentence.

APPEAL by defendant from *Godwin, Judge.* Judgment entered 23 January 1976 in Superior Court, WAKE County. Heard in Court of Appeals 12 October 1976.

On 27 June 1974 defendant, Deborah Speight Webb, pleaded guilty to two charges of possession of marijuana with intent to distribute and was sentenced to a prison term of four years for the first charge and a consecutive term of one to five years for the second charge. The sentence was suspended, and defendant was placed on probation for five years. On 25 August 1975 the State moved to revoke defendant's probation and activate her suspended sentence, alleging that on 29 January 1975 she had been in possession of various controlled substances in violation of the terms of her probation. At the hearing on the motion, the State offered evidence tending to show the following:

On the night of 29 January 1975 Alfred C. Stewart, Jr., a Greensboro policeman, was assigned to work as a security officer at a rock concert at the Greensboro Coliseum. As defendant entered the coliseum for the concert, Stewart noticed a bulge in her right jacket pocket and asked her what was in the pocket. She handed him a bottle containing a liquid which looked and smelled like liquor, and he arrested her for possession of alcoholic beverages in the coliseum. He reached into her left pocket and removed two plastic bags containing pills and a white powder. Shortly thereafter he observed her dropping two hand-rolled cigarettes from her left hand, and he seized these cigarettes. The pills and powder were analyzed by the SBI and were found to contain ethchlorvynol, pentobarbital and phencyclidine, all of which are controlled substances. The cigarettes were found to contain marijuana.

From the order of the court revoking her probation and activating her prison sentence, defendant appealed.

Attorney General Edmisten by Special Deputy John R. B. Matthis for the State.

Tharrington, Smith & Hargrove by Wade M. Smith for defendant appellant.

HEDRICK, Judge.

[1] Defendant first contends the North Carolina procedure for the revocation of probation as applied to the defendant in this case does not comply with the due process requirements mandated by *Morrisey v. Brewer*, 408 U.S. 471, 33 L.Ed. 2d 484, 92 S.Ct. 2593 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778, 36 L.Ed. 2d 656, 93 S.Ct. 1756 (1973). For a succinct analysis of the cited cases see the decision of this Court in *State v. O'Connor*, 31 N.C. App. 518, 229 S.E. 2d 705 (1976). In *O'Connor* Chief Judge Brock wrote:

> "Both cases, in mandating the preliminary hearing stage, were concerned with the possible unjustified incarceration of a parolee or probationer for a substantial period of time before a fact-finding hearing could be held.
>
> The possible unjustified deprivation of the conditional liberty of a parolee or probationer is not involved in this case. The defendant was served with a bill of particulars, arrested, and released on bond, all in the same day. He was free until the time of the fact-finding hearing from which stemmed the revocation of his probation.
>
> Defendant received every benefit he could have received from a preliminary hearing. Under such circumstances due process did not require that defendant be accorded a preliminary hearing." *Id.* at 519-20, 229 S.E. 2d at 707.

In this case, while defendant was on probation, she was arrested and charged with possession of controlled substances in Guilford County. When the latter case came up for trial in Guilford County Superior Court, the State decided not to prosecute the defendant, but instead filed a motion to have her probation revoked, and defendant was released upon her own recognizance to appear in the Wake County Superior Court for a hearing in the present case on the State's motion to have her probation revoked. Thus it is clear that the defendant was not deprived of her conditional liberty pending the revocation-of-probation hearing. This assignment of error is without merit.

[2] Next defendant contends the court erred to her prejudice by misinterpreting G.S. 15-200 and 15-200.1, "by assuming they give the court no authority to continue appellant's probation where the court finds a violation of the terms of probation."

Before revoking defendant's probation and activating her prison sentence, Judge Godwin made a statement to counsel regarding his authority to revoke defendant's probation upon a finding that the terms and conditions of her probation had been violated. This statement, which is reproduced in the record, is the basis of this assignment of error. The statement lends itself to a variety of interpretations. Assuming *arguendo* that the court was in error in its interpretation of its authority under G.S. 15-200 and 15-200.1, defendant has failed to show that she was prejudiced in any way by the court's interpretation of the statutes. The record makes it quite clear that defendant had violated one of the conditions of her probation, and the judge in his statement made it equally clear that he intended to revoke her probation upon the finding of the violation. This assignment of error is without merit.

[3] Finally, citing *Hall v. Bostic,* 391 F. Supp. 1297 (W.D.N.C. 1974), defendant contends the court erred in failing to credit her with time served on probation when it activated her suspended sentence. The case relied upon by defendant was reversed by the Fourth Circuit Court of Appeals in *Hall v. Bostic,* 529 F. 2d 990 (4th Cir. 1975). In reversing the case relied upon by defendant the Court said, "There is nothing unusual in the denial by North Carolina law of credit for probation or parole time against a prison sentence. It is common to both state and federal probation and parole systems. The validity of such denial has been universally recognized both in federal and state decisions." *Id.* at 991. This assignment of error is not sustained.

The order appealed from is

Affirmed.

Judges MORRIS and ARNOLD concur.

STATE OF NORTH CAROLINA v. DENNIS MAYES

No. 7617SC590

(Filed 15 December 1976)

Constitutional Law § 30; Criminal Law § 18— conviction of misdemeanor in district court — trial for felony in superior court — due process

A defendant convicted in the district court of the misdemeanor of assault on a child under the age of 12 years was denied due process

when, upon his appeal for a trial *de novo* in the superior court, he was tried for the same conduct upon an indictment charging the felony of assault with a deadly weapon inflicting serious injury.

APPEAL by defendant from *McConnell, Judge.* Judgment entered 4 March 1976 in Superior Court, SURRY County. Heard in the Court of Appeals 7 December 1976.

On 7 November 1974, a warrant issued for the arrest of Dennis Mayes, defendant. The warrant says, in pertinent part:

> ". . . the defendant named above did unlawfully, wilfully, and feloniously assault Mellisa Whitaker a child under the age of 12 years inflicting serious injury; by beating the child about the head and body, choking and bitting (sic) the child severely. Child being 13 months old and having to seek hospitalization.
>
> The offense charged here was committed against the peace and dignity of the State and in violation of law G.S. 14-33(b)(3)."

Pursuant to this warrant defendant was tried in district court. The Judgment and Commitment, dated 13 February 1975, says "defendant appeared for trial upon the charge . . . of Assault on Child and thereupon entered a plea of Not Guilty." The Judgment continued:

> "Having been found guilty of Assault on Child which is a violation of _____ and of the grade of Misdemeanor
>
> It is Adjudged that the defendant be imprisoned for the term of two years. . . ."

Defendant perfected his appeal for a trial *de novo* in the superior court.

On 6 May 1975, the grand jury in Surry County issued an indictment in pertinent part as follows:

> "DENNIS MAYES unlawfully and wilfully did feloniously assault Mellisa Whitaker, a female child of the age 13 months, with a deadly weapon, to wit: his hands, feet and teeth, with intent then and there to kill and murder the said Mellisa Whitaker, then and there kicking with his feet, beating with his hands and biting with his teeth, inflicting serious injuries not resulting in death upon said

Mellisa Whitaker, to wit: Cuts, lacerations, abrasions and contusions about the head, face, body and limbs of Mellisa Whitaker, requiring extensive and prolonged medical and hospital treatment, the said Dennis Mayes being a strong and mature man."

Defendant moved to quash this felony indictment. His motion was denied, and he was tried and convicted of felonious assault with a deadly weapon inflicting serious injury and sentenced to five years imprisonment. Defendant appeals.

Attorney General Edmisten, by Associate Attorney Elizabeth C. Bunting, for the State.

Oliver and Royster, by Stephen G. Royster, for defendant appellant.

ARNOLD, Judge.

Defendant contends that at the trial *de novo* in superior court his motion to quash the felony indictment, which arose out of the same conduct for which he received the misdemeanor conviction in district court, should have been allowed. He is correct.

In *Blackledge v. Perry,* 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed. 2d 628 (1974), it was held that the prosecutor could not "up the ante" and try a person for a felony in the *de novo* trial where the person was charged and convicted of a misdemeanor in district court. *Blackledge,* which arose in North Carolina, was decided on the theory of denial of due process. It controls in this case.

Justice Stewart, writing for the Court in *Blackledge,* emphasized that due process is not offended by the possibility of increased punishment upon retrial, but by the opportunities for "vindictiveness" on the part of the prosecutor. The prosecutor is the central figure in this situation, and not the judge or the jury. According to Justice Stewart's rationale, a convicted misdemeanant is entitled to pursue his right to a *de novo* trial without apprehension that the prosecutor "will retaliate by substituting a more serious charge." *Supra* at 28. It is this potential vindictiveness which offends defendant's right to due process. The possibility of increased punishment at the *de novo* trial does not offend the right to due process. *Colton v. Kentucky,* 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed. 2d 584 (1972); *North*

Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969); also *see Ludwig v. Massachusetts,* ..... U.S. .., 96 S.Ct. .., 49 L.Ed. 2d 732 (filed 30 June 1976). There is no suggestion in this record that the District Attorney in fact acted vindictively in obtaining the felony indictment.

We are not convinced by the State's argument that this case can be distinguished from *Blackledge* because the defendant was originally charged with a felony. It is immaterial whether defendant was originally charged with a felony, since he was tried and convicted in district court of a misdemeanor. In fact, the original warrant charged a violation of G.S. 14-33(b)(3), a misdemeanor. The statute was referred to specifically, and the elements of that misdemeanor offense were listed on the warrant. The use of the word "feloniously" in the warrant was surplusage. *State v. Higgins,* 266 N.C. 589, 146 S.E. 2d 681 (1966); *State v. Wesson,* 16 N.C. App. 683, 193 S.E. 2d 425 (1972), *cert. den.* 282 N.C. 675, 194 S.E. 2d 155 (1973).

Judgment is vacated and the cause is remanded for *de novo* trial on the misdemeanor charge of violating G.S. 14-33(b)(3).

Vacated and remanded.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. WILLIAM EARL SUTTON

No. 768SC481

(Filed 15 December 1976)

1. **Criminal Law § 21— defendant charged by indictment — preliminary hearing not required**

G.S. 15A-606(a), which became effective 1 September 1975 and which provides that the judge must schedule a probable cause hearing unless defendant waives in writing his right to such hearing, does not alter the preexisting rule which dispensed with the requirement for a preliminary, or probable cause, hearing when the defendant has been charged by indictment.

2. **Criminal Law § 122— jury unable to agree — further instructions to deliberate proper**

As a general rule, when a jury is unable to reach a verdict, the trial judge may send them back for further deliberations and urge

them to reach a verdict, although he may not instruct in such a way as to give his opinion or to coerce them into making a decision; moreover, the judge should admonish the jurors to adhere to their conviction and free will in making their decision.

3. **Criminal Law §§ 122, 126— inability of jury to agree — instruction as to unanimous verdict — coercing jury**

The trial court erred in coercing and rushing the jury to reach a verdict where: the court sent the jury back for additional deliberations on three occasions; the third occasion was on the morning after the case was first given to the jury; the judge asked the jury foreman if their verdict of the previous day had been unanimous; the foreman responded that he could not answer that question without further deliberations; the court gave additional instructions on possession and directed the jury ". . . to take no more than five minutes to ascertain whether or not the verdict which you reported yesterday was unanimous"; and the jury returned 15 minutes later reporting that they unanimously found defendant guilty of all three charges.

APPEAL by defendant from *Browning, Special Judge.* Judgment entered 12 February 1976 in LENOIR County Superior Court. Heard in the Court of Appeals 19 October 1976.

Defendant was charged by indictments in proper form with possession of a controlled substance, possession of a controlled substance with the intent to sell, and sale and delivery of a controlled substance. The controlled substance involved in each indictment was heroin. Defendant entered a plea of not guilty to each charge but was convicted by a jury on all counts. He was sentenced to imprisonment for a term of ten years for the sale of heroin, five years for the possession charge to run consecutively, and ten years for possession of heroin with intent to sell to run concurrently with the other sentences.

Other relevant facts are set out in the opinion below.

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

Gerrans and Spence, P.A., by William D. Spence, for defendant appellant.

MORRIS, Judge.

[1] When these cases were called to trial, defendant moved to quash the indictments in No. 75CR10425 and No. 75CR10424 on the grounds that he had not been given a probable-cause hearing on those charges. In his first assignment of error, de-

fendant contends that the trial judge erred in failing to quash the indictments.

Prior to the adoption of the Pretrial Criminal Procedure Act (Chapter 15A of the General Statutes), the State could properly try a defendant on a bill of indictment without the benefit of a preliminary hearing. *State v. Vick,* 287 N.C. 37, 213 S.E. 2d 335 (1975); *State v. Foster,* 282 N.C. 189, 192 S.E. 2d 320 (1972). However, G.S. 15A-606(a), effective 1 September 1975, provides:

> "The judge must schedule a probable-cause hearing unless the defendant waives in writing his right to such hearing. A defendant represented by counsel, or who desires to be represented by counsel, may not before the date of the scheduled hearing waive his right to a probable-cause hearing without the written consent of the defendant and his counsel."

Defendant maintains that this section changes the former rule allowing trial on indictment without a preliminary, or probable-cause, hearing. We disagree.

G.S. 15A-611 sets forth the procedure to be followed in a probable-cause hearing. Subsection (d) provides that the hearing may not be held if an information in superior court is filed upon waiver of the indictment prior to the date set for the hearing. The "Official Commentary" to subsection (d) states:

> "Subsection (d) as introduced expressed the theory embraced by a majority of the Commission that the district court loses jurisdiction if an indictment or information is filed in superior court—therefore rendering null any further proceedings in the district court. At one stage, however, a legislative committee amended the proposal to restrict the power of a solicitor to bypass the probable-cause hearing and deleted reference to the indictment. Subsequently this restriction on the power to submit indictments was itself deleted, but there was a failure to restore mention of the indictment in subsection (d). In view of the preexisting jurisdictional law and the fairly clear legislative intent, however, *it seems certain that no probable-cause hearing may be held in district court once the superior court has gained jurisdiction through the return of a true bill of indictment.*" (Emphasis supplied.)

While we, of course, are not bound by the interpretations found in the "Official Commentary," we believe that the portion cited herein represents an accurate reflection of the present status of the law in this area. We find nothing in Chapter 15A or its legislative history which demonstrates the legislature's intention to alter the preexisting rule which dispensed with the requirement for a preliminary, or probable-cause, hearing when the defendant has been charged by indictment. This assignment of error is overruled.

Defendant has raised 22 additional assignments of error grouped into eight other arguments, but only one argument merits further discussion. The jury began its deliberation at 12:10 p.m. on 11 February 1976. They reported that they were unable to reach a decision, whereupon the judge called the jurors into court and urged them to ". . . reconcile your differences as much as possible without the surrender of your conscientious convictions and to reach a verdict." Forty minutes later, the jury returned and found defendant guilty on all three charges.

Defendant requested a poll of the jury. After being asked by the clerk if the verdict was her own and whether she still assented thereto, one juror twice responded, "I guess so." The judge asked her if she could answer the clerk's question in the affirmative or the negative, and she replied "I am not too sure." The judge then instructed the jury:

> "Ladies and gentlemen of the jury, the Court cannot accept the verdict as returned by the Jury in the fashion which you have returned it. I am going to ask you to return to your jury room for a few minutes at which time I will call you back again in ten or fifteen minutes to ask you again what your verdict is in the case. Please go to the jury room, and let me know again what your verdict is when you return."

Approximately 15 minutes later, the jury returned to the courtroom without having reached a unanimous decision. The trial judge adjourned court, sent the jury home for the evening, and instructed them to return at 9:30 the following morning to continue their deliberations.

When court convened the next morning, the jury through its foreman requested additional instructions, and the judge

restated the portion of his previous charge concerning legal possession. He then said:

> ". . . Now ladies and gentlemen of the Jury, I am going to send you back to the jury room for one purpose, and one purpose only; I would like for you to take no more than five minutes to ascertain whether or not the verdict which you reported yesterday was unanimous. When you come back I will ask you whether or not your verdict was unanimous or was not unanimous, at which time the defendant will have the privilege, if you report that it was unanimous, of polling the Jury again. Mr. Foreman, would you take the Jury back."

Approximately 15 minutes later, the jury returned to report that they had reached a unanimous verdict and pronounced defendant guilty of all charges. Defendant again requested a poll of the jury, whereupon all jurors stated that the verdict was theirs and that they still assented thereto.

[3] Defendant contends that the trial court erred in coercing and rushing the jury to reach a verdict. We agree.

[2] As a general rule, when a jury is unable to reach a verdict, the trial judge may send them back for further deliberations and urge them to reach a verdict, although he may not instruct in such a way as to give his opinion or to coerce them into making a decision. When such coercion is found, a new trial must be awarded. *State v. Bowers,* 273 N.C. 652, 161 S.E. 2d 11 (1968) (judge instructed jury "You have to reach a verdict."); *State v. Roberts,* 270 N.C. 449, 154 S.E. 2d 536 (1967) (judge told jury to retire ". . . and consider the case until you reach a unanimous verdict."); *State v. McKissick,* 268 N.C. 411, 150 S.E. 2d 767 (1966) (judge instructed jury "You must consider this case until we have exhausted every possibility of an agreement."). The "common thread" running through these cases is that the judge must not fail to state that the jurors should adhere to their conviction and free will in making their decision. This Court has stated:

> ". . . The trial judge therefore should, in giving additional instructions to the jury urging a verdict, state in plain, clear and concise language that he is not expressing an opinion as to what their verdict should be and also that he does not mean to infer that any of them should surrender

his conscientious convictions or his free will and judgment in order to agree on a verdict." (Citation omitted.) *In re Henderson*, 4 N.C. App. 56, 59, 165 S.E. 2d 784 (1969).

But see State v. Carr, 23 N.C. App. 546, 209 S.E. 2d 320 (1974), where the judge's failure to admonish the jury that they should not surrender their conscientious convictions was held not to be coercive *per se*.

[3] In the case *sub judice*, the judge sent the jury back for additional deliberations on three occasions. The first occurred midway through the afternoon of the initial day of deliberations. At that time, the judge told the jury to " . . . reconcile your differences as much as possible without the surrender of your conscientious convictions . . ." Although he urged them to reach a verdict, his remarks were not coercive. *State v. McKissick, supra; In re Henderson, supra.*

Later that afternoon, after a jury poll revealed a less than unanimous verdict, the judge again sent the jury back to the jury room ". . . for a few minutes at which time I will call you back again in ten or fifteen minutes to ask you again what your verdict is in the case." Defendant contends that the time limit imposed by the judge, together with his failure to remind the jury to adhere to their conscientious convictions, coerced the jury to convict defendant. However, the mere fact that a judge prescribes a time limit for the jury's decision does not amount to coercion where the jury does not actually come to a decision within the general limits imposed by the judge. *State v. Tudor*, 14 N.C. App. 526, 188 S.E. 2d 583 (1972). The record reveals that the jury returned to the courtroom after the allotted time had passed and were still undecided. This demonstrates that the jurors were not coerced into reaching a verdict, and we therefore find no prejudicial error in the judge's remarks. *State v. Carr, supra.*

The final instructions to the jury occurred on the following morning when the judge asked the jury foreman if their verdict of the previous day had been unanimous. The foreman responded that he could not answer that question without further deliberations, whereupon the judge gave additional instructions on possession and directed the jury ". . . to take no more than five minutes to ascertain whether or not the verdict which you reported yesterday was unanimous." Fifteen minutes later, the jury reported that they unanimously found defendant guilty

of all three charges. The State argues that the judge's directions were not coercive because he did not urge them to *reach a verdict,* but only to *report whether their verdict of the previous day was unanimous.* We find no merit in this distinction drawn by the State. Since the jury had previously reported on three occasions that they were unable to reach a unanimous decision, it was obvious that their earlier verdict was not assented to by all the jurors. Therefore, the practical effect of the judge's instructions ". . . to ascertain whether or not the verdict which you reported yesterday was unanimous . . ." was to compel the jurors to reach a unanimous verdict. We believe that these instructions could be construed by some jurors as coercive and suggestive that they surrender their conscientious convictions for the sole purpose of reaching a unanimous verdict. Accordingly, defendant is entitled to a new trial.

It is not necessary to consider defendant's other assignments of error because they are unlikely to re-occur at his new trial.

New trial.

Judges CLARK and ARNOLD concur.

IN THE MATTER OF: WALTER L. USERY, EMPLOYEE-CLAIMENT, AND BEAUNIT CORPORATION TRUCKING DIVISION AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 7627SC452

(Filed 15 December 1976)

1. **Master and Servant § 109— unemployment caused by labor dispute — management lockout as labor dispute**

As used in G.S. 96-14(5), the statute providing that an individual shall be disqualified for unemployment benefits during the time his unemployment is caused by a labor dispute in active progress, a "labor dispute" includes work stoppage caused by management lockouts.

2. **Master and Servant § 109— management lockout — denial of unemployment benefits — determination as to fault not required**

The Employment Security Commission is not required, prior to denying benefits to victims of a lockout, to determine whether the employees were out of work due to some involuntary conduct on their part.

APPEAL from *Falls, Judge.* Judgment entered 19 February 1976 in CLEVELAND County Superior Court. Heard in the Court of Appeals 13 October 1976.

This is an appeal from a judgment denying unemployment insurance benefits to Walter L. Usery (hereinafter called "claimant"). The claim arose from a work stoppage at the trucking division of Beaunit Corporation (hereinafter called "Beaunit") in Kings Mountain, North Carolina. Claimant, along with other employees of Beaunit, was represented for purposes of collective bargaining by Teamster Local Union No. 71 (hereinafter called the "Union").

Beaunit and the Union were bound by terms of a collective bargaining agreement which remained in effect until 31 August 1975. The agreement further provided that it would remain "in full force and effect from year to year [after 31 August 1975] . . . unless written notice of desire to cancel or terminate the agreement is served by either party upon the other at least sixty (60) days prior to the date of expiration." On 25 June 1975, the Union notified Beaunit that it wished to negotiate changes in the contract regarding working conditions, fringe benefits, wages and other provisions. Between 25 June 1975 and 31 August 1975, Beaunit and the Union negotiated in an effort to reach an accord, but the areas of disagreement were not eliminated. A new agreement was not reached prior to 31 August, and the parties agreed to extend the contract for seven additional days. An agreement was not reached during the extension period, and on 5 September, Beaunit began refusing assignments to the drivers. By 10 September 1975, the entire trucking division of Beaunit in Kings Mountain was shut down. Beaunit freely admits that it "locked out" its employees and will not recall them until a new agreement is reached.

On 10 September 1975, claimant filed for unemployment insurance benefits with the Employment Security Commission of North Carolina (hereinafter called "Commission"), alleging that Beaunit, his employer, was closing down its operations. Beaunit responded that claimant's employment ended because "operations [were] suspended due to a labor dispute." A hearing on the matter was held before a Special Appeals Deputy of the Commission, who held that claimant and other employees of Beaunit were disqualified from receiving benefits ". . . until it is shown to the satisfaction of the Commission that their

unemployment is no longer caused by a labor dispute in active progress . . ." Claimant appealed to the Full Commission, which affirmed the Deputy's decision. Claimant then appealed to the Cleveland County Superior Court which on 19 February 1976 entered an order affirming the decision of the Commission.

Roberts, Caldwell & Planer, P.A., by Joseph B. Roberts III, for claimant appellant.

Poyner, Geraghty, Hartsfield and Townsend, by Marvin D. Musselwhite, Jr., and Cecil W. Harrison, Jr., and Kullman, Lang, Inman and Bee, by Andrew C. Partee, Jr., for appellee Beaunit Corporation.

Garland D. Crenshaw, Howard G. Doyle, Thomas S. Whitaker and William H. Guy for appellee Employment Security Commission of North Carolina.

MORRIS, Judge.

[1] Claimant makes six assignments of error but only two of them are brought forward and argued in his brief. He treats them together, and we shall do the same. Thus, the sole question before us is whether the Superior Court erred in upholding the Commission's order that claimant was disqualified from receiving unemployment benefits.

G.S. 96-14 provides in pertinent part:

"Disqualification for benefits.—An individual shall be disqualified for benefits:

. . .

(5) For any week with respect to which the Commission finds that his total or partial unemployment is *caused by a labor dispute* in active progress on or after July 1, 1961, at the factory, establishment, or other premises at which he is or was last employed or caused after such date by a labor dispute at another place. . . " . (Emphasis supplied.)

Claimant contends that a lockout by management which results in work stoppage is not a "labor dispute" within the scope of G.S. 96-14(5). We disagree.

Since "labor dispute" is not defined in Chapter 96 of the General Statutes, claimant maintains that our interpretation

of G.S. 96-14(5) should be controlled by the general public policy as expressed by our legislature in G.S. 96-2. That section states that Chapter 96 should be interpreted and applied ". . . for the benefit of persons unemployed *through no fault of their own.*" (Emphasis supplied.) Claimant argues that, because he was at all times ready, willing and able to continue working at Beaunit but was prevented from doing so by the lockout, his resulting unemployment was "through no fault of his own" and entitles him to benefits under Chapter 96. However, our Supreme Court has held that the section of Chapter 96 which sets out the specific grounds for disqualification of benefits will prevail over the general policy provisions of G.S. 96-2. *In re Steelman*, 219 N.C. 306, 13 S.E. 2d 544 (1941). Therefore, the policy expression is not controlling, and we must look elsewhere to determine whether a lockout is a "labor dispute" within G.S. 96-14(5).

In *Buchholz v. Cummins*, 6 Ill. 2d 382, 128 N.E. 2d 900 (1955), the Illinois Supreme Court examined the exact question now before us. In holding that a lockout was a labor dispute within the Illinois Unemployment Compensation Act, similar to our own Chapter 96, the Court stated:

> "The general purpose of the Illinois Act, as expressed in section 1, is to relieve involuntary unemployment. However, section 7(d) specifically disqualifies any individual for benefits for any week in which it is found that his unemployment is due to a stoppage of work which exists because of a labor dispute at the establishment at which he is or was last employed. By this provision the Illinois legislature adopted the policy that the State shall not, by payment of unemployment compensation, assist one party to a labor dispute, regardless of fault; and that *the State in cases of industrial strife ought not to take sides and place blame. This provision was designed to maintain the neutrality of the State in labor disputes.*" 6 Ill. 2d at 386, 128 N.E. 2d at 902-03. (Emphasis supplied.)

The Supreme Court of Washington, in *In Re North River Logging Co.*, 15 Wash. 2d 204, 130 P. 2d 64 (1942), has likewise held that a lockout constituted a labor dispute for purposes of disqualification from unemployment benefits. The Court noted that a lockout is the employer's weapon equivalent to the employee's strike, and that

> "[t]he essential features of our unemployment compensation act are borrowed from the English acts, the original of which was passed in 1911. . . . The English decisions are uniform in holding that a lockout is a labor dispute in contemplation of the national insurance acts." 15 Wash. 2d at 208-09, 130 P. 2d at 66.

For cases of other jurisdictions also holding a lockout to be a labor dispute for purposes of unemployment compensation, see: *Olusczak v. Industrial Comm.*, 230 So. 2d 31 (Fla. 1970); *Baltimore Typographical Union v. Hearst Corp.*, 246 Md. 308, 228 A. 2d 410 (1967); *Salenius v. Employment Security Comm.*, 33 Mich. App. 228, 189 N.W. 2d 764 (1971); *Adams v. Industrial Comm.*, 490 S.W. 2d 77 (Mo. 1973); *Basso v. News Syndicate Co., Inc.*, 90 N.J. Super. 150, 216 A. 2d 597 (1966); *Nelson v. Employment Comm.*, 290 S.W. 2d 708 (Tex. Civ. App. 1956).

G.S. 96-14(5) does not define "labor dispute" to include only those work stoppages caused by strikes, or, conversely, by lockouts; it is neutral on its face. "It thus appears that the State seeks to be neutral in the labor dispute as far as practicable, and to grant benefits only in conformity with such neutrality." *In re Steelman, supra,* at p. 310. While the decisions from other jurisdictions are not controlling on this Court, they are extremely persuasive when examined in conjunction with the neutrality of our statute. Further, we note that G.S. 96-14(3)(a) impliedly denotes that a lockout is a labor dispute by making reference to ". . . a strike, lockout, *or other* labor dispute." (Emphasis supplied.) Accordingly, we believe, and so hold, that a "labor dispute" as used in G.S. 96-14(5), includes work stoppage caused by management lockouts.

[2] Moreover, we reject the position, urged by appellant, that the Commission, before denying benefits to victims of a lockout, should determine whether the employees were out of work due to some involuntary conduct on their part. "As a general rule, in the absence of a statutory provision requiring a conclusion to the contrary, the fault or responsibility behind a work stoppage or loss of employment is immaterial in determining whether a claimant is disqualified under a statute denying benefits to a person whose unemployment is caused by a labor dispute. . . ." 81 C.J.S., Social Security & Public Welfare, § 185, p. 279. *See also, Buchholz v. Cummins, supra; Adams v. Industrial Comm., supra; Nelson v. Employment Comm., supra.*

We believe that the position taken by the Commission and the Superior Court implements the intention of the General Assembly that the Commission avoid inquiry into the cause or fault of a labor dispute. Clearly, this is the more practical result as well. The Commission should not be compelled to expend its time and resources in order to determine which party is to blame for a work stoppage. The judgment is

Affirmed.

Judges CLARK and ARNOLD concur.

RGK, INC. v. UNITED STATES FIDELITY AND GUARANTY COMPANY, CECIL'S, INC., AND FAIRWAY PROPERTIES, A LIMITED PARTNERSHIP

No. 7615SC527

(Filed 15 December 1976)

Principal and Surety § 10— construction bond — action against surety — sufficiency of complaint

In an action wherein plaintiff subcontractor sought to recover from defendants, a general contractor, owner and surety, for labor and material provided by plaintiff in the construction of an apartment complex, plaintiff's allegations that it was a claimant within the meaning of the bond executed by the general contractor as principal and the surety, that the principal defaulted in its obligations to pay plaintiff, and that the surety was therefore liable under the bond clearly stated a claim upon which relief could be granted against defendant surety.

APPEAL by plaintiff from *McLelland, Judge.* Judgment entered 23 April 1976 in Superior Court, ALAMANCE County. Heard in Court of Appeals 17 November 1976.

This is a civil action wherein the plaintiff, RGK, Inc., seeks to recover from the defendants, Cecil's, Inc. (general contractor), Fairway Properties (owner), and United States Fidelity and Guaranty Co. (surety), jointly and severally, $16,294.60 for labor and material provided by the plaintiff in the construction of an apartment complex in Alamance County, N. C. The

allegations of plaintiff's amended complaint, except where quoted, are summarized as follows:

On 4 December 1974 defendant Cecil's, Inc., general contractor, entered into an agreement with Fairway Properties, owner, for the construction of an apartment complex in Alamance County, N. C.

On 15 February 1974 plaintiff as subcontractor entered into two agreements with Cecil's, Inc., as general contractor, and with Fairway Properties to provide certain labor and material (clearing, grading, and installing storm sewer) in the construction of the apartment complex pursuant to the agreement between Cecil's, Inc. and Fairway Properties. (Copies of these two agreements are attached to and made part of plaintiff's amended complaint.)

Paragraph 3 of plaintiff's amended complaint is as follows: "On March 21, 1974, United States Fidelity and Guaranty Company executed and entered into a Labor and Material Payment Bond with the defendant, Cecil's, Inc., a copy of which is attached hereto and made a part hereof as Exhibit 'D.'" The pertinent provisions of the bond necessary to an understanding of our decision are set out in the opinion.

Plaintiff provided labor and materials pursuant to the agreements with Cecil's, Inc., and Fairway Properties, and such labor and material "were used or reasonably required for use in the performance of the contract between Cecil's, Inc. and Fairway Properties. . . ."

Paragraph 5 of plaintiff's amended complaint is as follows:

> "Cecil's, Inc. has failed and refused to make payment to plaintiff for the labor and/or materials furnished for use in the construction of The Wellington Apartments pursuant to the December 4, 1974 contract between Cecil's, Inc. and Fairway Properties, a Limited Partnership. By reason of said default by Cecil's, Inc., the defendant, United States Fidelity and Guaranty Company, is indebted and obligated under the provisions of the Labor and Material Payment Bond to plaintiff in the amount of $16,294.60, plus interest at the rate of 6% per annum from May 8, 1975 until paid."

Defendant USF&G filed an answer to plaintiff's complaint, wherein it, among other things, moved pursuant to G.S. 1A-1,

Rule 12(b)(6) to dismiss the complaint as to it for failure to state a claim upon which relief can be granted. On 26 March 1976 the court entered an order granting USF&G's 12(b)(6) motion and dismissing plaintiff's complaint as to USF&G for failure to state a claim upon which relief can be granted. On 23 April 1976 the court "revised" the order dated 26 March 1976 with the consent of the parties to provide that "the motion of the defendant, USF&G, be treated as a motion for judgment on the pleadings under Rule 12(c) and that there being no just reason for delay final judgment is hereby granted for the defendant, USF&G, from which an immediate right of appeal shall lie." Plaintiff appealed.

Vernon, Vernon & Wooten by John H. Vernon III for plaintiff appellant.

Brooks, Pierce, McLendon, Humphrey and Leonard by L. P. McLendon, Jr., and M. Daniel McGinn for defendant appellee.

HEDRICK, Judge.

We note at the outset that the allegations in the complaint and the recitation in the bond indicate that the principal contract between Cecil's, Inc., and Fairway Properties was entered into on 4 December 1974 approximately 9 months after the making of the subcontracts and the signing of the bond, all of which recite the principal contract as already being in existence. No one, including the trial judge, seems to have been aware of what appears on the record to have been a factual impossibility. We proceed to consider the one question argued on appeal on the assumption that the principal contract was entered into before the formation of the subcontracts and the execution of the bond.

Even though the trial judge "revised" the order dismissing plaintiff's complaint for failure to state a claim upon which relief can be granted to a judgment on the pleadings, the parties recognize that the one question presented on this appeal is whether plaintiff's complaint states a claim upon which relief can be granted as to defendant USF&G. See *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970); *Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E. 2d 494 (1974).

The pertinent portions of the payment bond in question are as follows:

"KNOW ALL MEN BY THESE PRESENTS:

BOND NUMBER .....

That Cecil's, Inc., P. O. Box 1945, Spartanburg, South Carolina 29301 as Principal, hereinafter called Principal, and UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation organized and existing under the laws of the State of Maryland, Baltimore, Maryland as Surety, hereinafter called Surety, are held and firmly bound unto Fairway Properties, a limited partnership as Obligee, hereinafter called Owner, for the use and benefit of claimants as hereinbelow defined, in the amount of Two Million, Six Hundred Forty-eight Thousand, Two Hundred and Ninety and No/100—Dollars ($2,648,290.00**) for the payment whereof Principal and Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, Principal has by written agreement dated December 4, 1974 entered into a contract with Owner for Construction of The Wellington Apartments, Burlington, North Carolina . . . which contract is by reference made a part hereof, and is hereinafter referred to as the Contract.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that if the Principal shall promptly make payment to all claimants as hereinafter defined, for all labor and material used or reasonably required for use in the performance of the Contract, then this obligation shall be void; otherwise it shall remain in full force and effect, subject however, to the following conditions:

(1) A claimant is defined as one having a direct contract with the Principal or with a sub-contractor of the Principal for labor, material, or both used or reasonably required for use in the performance of the contract . . .

(2) The above named Principal and Surety hereby jointly and severally agree with the Owner that every claimant as herein defined, who has not been paid in full . . . may sue on this bond for the use of such claimant,

prosecute the suit to final judgment for such sum or sums as may be justly due claimant, and have execution thereon. The Owner shall not be liable for the payment of any costs or expenses of any such suit."

Plaintiff has alleged that it is a claimant within the meaning of the bond executed by Cecil's, Inc., as principal, and USF&G as surety, that the principal has defaulted in its obligation to pay plaintiff, and that the surety is therefore liable under the bond. The complaint clearly states a claim upon which relief can be granted against the defendant USF&G. See *Electrical Co. v. Construction Co.*, 12 N.C. App. 63, 182 S.E. 2d 601 (1971).

In its brief USF&G states: "The defendant appellee contends, and the trial court agreed, that the plaintiff, in order to recover on the payment bond, must ALLEGE AND PROVE that the principal-general contractor defaulted on its contract with the owner." Defendant then argues that "The case of *Carolina Builders Corp. v. New Amsterdam Casualty Co.*, 236 N.C. 513, 73 S.E. 2d 155 (1952), is controlling on this point." We do not agree.

In the cited case the demurrer of the defendant, surety on the bond, to the complaint of plaintiff, subcontractor, for labor and material furnished in the construction of several houses was overruled by the trial court. In its complaint plaintiff did not plead the contract between the general contractor, principal on the bond, and the owner. The surety's obligation on the bond to pay subcontractors was not significantly different from the surety's obligation to make such payments under the payment bond in the present case. The Supreme Court reversed the trial court and sustained defendant's demurrer. In reversing the trial court the Supreme Court held that plaintiff's complaint failed to state a cause of action against the surety on the bond because the plaintiff did not allege sufficient facts to show that the labor and material furnished by it was *in furtherance of the contract between the general contractor, principal on the bond, and the owner.*

Procedurally, the cited case and the present case are distinguishable upon the basis of the difference between "fact pleading" in the former and "notice pleading" in the latter. Substantively, we think the cited case stands for the proposition that a subcontractor who qualifies as a *claimant* within the

meaning of a payment bond can maintain an action against the surety on the bond by alleging and proving that the principal on the bond has defaulted in its obligations to pay such subcontractor.

For the reasons stated the judgment for defendant dated 23 April 1976 is reversed, and the cause is remanded to the superior court for further proceedings.

Reversed and remanded.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. JOHN P. LOCKAMY AND SHERRILL G. STRICKLAND

No. 764SC546

(Filed 15 December 1976)

1. **Automobiles § 134— possession of stolen vehicle — constitutionality of statute**

The statute prohibiting receiving, transferring, or possessing a vehicle with knowledge or reason to believe it has been stolen or unlawfully taken is not unconstitutionally vague. G.S. 20-106.

2. **Automobiles § 134— possession and transfer of stolen vehicle — sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution of defendants for possession and transfer of possession with intent to pass title of a vehicle which they had reason to believe had been stolen.

3. **Criminal Law § 113— joint trial — instructions — conviction or acquittal of both defendants**

In a joint trial of two defendants for the same crime, a charge which was susceptible to the construction that the jury must either acquit both defendants or convict both defendants constituted reversible error.

APPEAL by defendants from *Gavin, Judge.* Judgments entered 11 February 1976 in Superior Court, SAMPSON County. Heard in Court of Appeals 10 November 1976.

Each of the defendants, John P. Lockamy, Jr., and Sherrill G. Strickland, was charged in a separate bill of indictment with the possession and the transfer of possession with intent

to pass title of a vehicle which he knew or had reason to believe had been stolen, in violation of G.S. 20-106. The cases were consolidated for trial, and upon each defendant's plea of not guilty the State offered evidence tending to show the following:

Sometime in March 1974 a green and white 1974 Ford Ranger pickup truck, Serial No. F10YCT81618, with automatic transmission, power steering, power brakes, air condition, radio and a toolbox in the cargo portion of the truck, was stolen from the lot of the Clark-Shaw Ford Dealership in Elizabethtown, North Carolina. On 8 May 1974 Dunn Auto Sales purchased from defendants, who own and operate a body shop known as Sav-A-Lot, a green and white Ford Ranger pickup truck with automatic transmission, power steering, power brakes, radio and a toolbox showing mileage of between 3,000 and 5,000 miles and the apparent Serial No. of F10YCS60060. Other than the mileage the truck did not appear to be a used vehicle. Dunn Auto Sales put one of its stickers on the bumper and on 19 June 1974 sold the truck to Danny Gregory. In September 1974 the truck was stolen from Danny Gregory, and in November 1974 was found in some woods in Sampson County. The identification number usually found on the door was gone but on the truck's frame was the Serial No. F10YCT81618. Gregory identified the truck found in the woods as the one sold to him by Dunn Auto Sales.

On 4 October 1973 John Conner purchased in Guilford County a 1974 gold Ford pickup truck (not a Ranger), Serial No. F10YCS60060, with straight transmission but without radio, air conditioning, power steering, power brakes or a toolbox. Shortly after having been purchased by Conner, the truck was stolen and found a few hours later on fire in Guilford County. The whole inside of the truck had been completely melted including the steering wheel, and under the hood the battery had been melted and the whole front end including the grill had been melted. The burned truck had 8,000 miles on it. Conner's insurance company sold the burned truck to Salvage Disposal Company which in turn sold it to defendants.

The jury found each defendant guilty as charged. From the judgments of the court imposing a prison sentence of five years on each defendant, defendants appealed.

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

Chambliss, Paderick, Warrick & Johnson by Joseph B. Chambliss for the defendant appellants.

HEDRICK, Judge.

[1] Defendants assign as error the court's denial of their motions to quash the bills of indictment. Defendants argue that G.S. 20-106 is unconstitutionally vague. Suffice it to say this Court held G.S. 20-106 to be constitutional in *State v. Rook*, 26 N.C. App. 33, 215 S.E. 2d 159 (1975), *appeal dismissed for lack of substantial constitutional question*, 288 N.C. 250, 217 S.E. 2d 674 (1975). This assignment of error is overruled.

[2] Defendants next contend the court erred in denying their motions for judgment as of nonsuit. In view of our decision in this case further elaboration on the evidence at this time is unnecessary. We hold the evidence is sufficient to require the submission of the cases to the jury.

[3] By their eleventh assignment of error defendants contend the trial judge erred in charging the jury in such a manner that the charge was susceptible to the contruction that the jury must either acquit both defendants or convict both defendants. In its final mandate the trial judge instructed the jury as follows:

> "So I charge if you find from the evidence and beyond a reasonable doubt that on or about June 19, 1974, . . . the defendants, John P. Lockamy, Jr., and Sherrill G. Strickland, did have in their possession a 1974 Ford pickup truck, serial number F 10YCT 81618 which they knew or should have known to be stolen, if you further find that they were not law enforcement officers at the time or acting in the duties as law enforcement officers and if you further find from the evidence and beyond a reasonable doubt—that goes for all these findings, ladies and gentlemen, that they intended to procure or pass title to a 1974 Ford pickup truck which they knew or should have known to be stolen and did in fact receive or transfer such title from one to another, if you find those things beyond a reasonable doubt, then it would be your duty to return a verdict of guilty.

> However, if you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty."

Where two or more defendants are tried jointly on the same charge, each defendant is entitled to have the jury pass upon his guilt or innocence without regard to the guilt or innocence of a codefendant. *State v. Norton,* 222 N.C. 418, 23 S.E. 2d 301 (1942); *State v. Douglas,* 10 N.C. App. 136, 177 S.E. 2d 743 (1970).

A specific application of this general proposition is noted in *State v. Tomblin,* 276 N.C. 273, 276, 171 S.E. 2d 901, 903 (1970), wherein the Supreme Court stated:

> "This Court has repeatedly held that, when two or more defendants are jointly tried for the same offense, a charge which is susceptible to the construction that the jury should convict all if its finds one guilty is reversible error." (Citations omitted.)

Because the defendants were charged with identical offenses and because the evidence adduced at the consolidated trial was identical as to each defendant, it was not necessary for the trial judge to give wholly separate instructions as to each defendant in order to comply with G.S. 1-180. It was reasonable for the the court to declare and explain the law arising from the evidence in the cases as to both defendants simultaneously. However, the trial judge must either give a separate final mandate as to each defendant or otherwise clearly instruct the jury that the guilt or innocence of one defendant is not dependent upon the guilt or innocence of a codefendant. This was not accomplished in the present case, as the State contends, when the judge in his charge to the jury merely read the separate bills of indictment. Because the charge in the present case is susceptible to the interpretation that the jury must find either both defendants guilty or both defendants not guilty, defendants are entitled to a new trial.

Defendants have other assignments of error which we need not discuss since there must be a new trial. For error in the charge the defendants are awarded a

New trial.

Chief Judge BROCK and Judge PARKER concur.

BRAMCO ELECTRIC CORP., A NEW YORK CORPORATION v. P. WESLEY SHELL, TRADING AND DOING BUSINESS AS SHELL ELECTRIC CO.

No. 7622DC612

(Filed 15 December 1976)

1. **Evidence § 29— affidavit of attorney — no itemized verified statement of account**

In an action to recover a sum allegedly due on an open account, the trial court did not err in refusing to allow into evidence an affidavit of an attorney for plaintiff which set forth certain communications between affiant and defendant, since the affidavit did not qualify as a "verified itemized statement" of an account between plaintiff and defendant which would have been admissible pursuant to G.S. 8-45.

2. **Evidence § 29— purported statement of open account — failure to itemize — statement inadmissible**

In an action to recover a sum allegedly due on an open account, the trial court did not err in refusing to allow into evidence a verified document purporting to be an itemized statement of defendant's account with plaintiff, since plaintiff failed to show that the affiant had any personal knowledge of the matters set forth in the document, that she was familiar with the books and records of plaintiff corporation, or that she would have been competent to testify if called as a witness at trial; moreover, the exhibit did not qualify as an *itemized* statement of the alleged account as contemplated by G.S. 8-45.

APPEAL by plaintiff from *Johnson, Judge.* Judgment entered 22 March 1976 in District Court, IREDELL County. Heard in the Court of Appeals 9 December 1976.

In this action plaintiff, a New York corporation, seeks to recover from defendant $1,546.60, plus interest, allegedly due on an open account. Made a part of the verified complaint by reference is a document marked Exhibit "A" purporting to be an itemized statement of defendant's account with plaintiff.

In his answer defendant denied owing plaintiff anything and pled several affirmative defenses including the three-year statute of limitations. While admitting that in prior years he had done business with plaintiff, defendant alleged that he now owes plaintiff nothing and asked that plaintiff be required to furnish an itemized statement "showing any or all merchandise sold and delivered by the plaintiff to the defendant and a statement of all payments and credits" arising during the said period of time that defendant did business with plaintiff.

Neither party demanded trial by jury, and both parties moved for summary judgment pursuant to Rule 56. On 1 De-

cember 1975, the court entered an order denying defendant's motion for summary judgment but the record does not disclose any ruling on plaintiff's motion.

When the cause came on for trial at the 22 March 1976 Civil Session of the Court, plaintiff offered in evidence Exhibit 1 which, except for the verification, is the same as Exhibit "A" attached to the complaint, and the affidavit of Bruce S. Coleman, identified in the affidavit as a New York attorney for plaintiff. Defendant objected to the admission of the documents and the court sustained the objection.

Plaintiff offered no other evidence and the court entered judgment reciting the trial proceedings and providing that plaintiff recover nothing of defendant. Plaintiff appealed.

Sowers, Avery & Crosswhite, by W. E. Crosswhite, for plaintiff appellant.

R. A. Collier for defendant appellee.

BRITT, Judge.

The determinative question presented by this appeal is whether the trial court erred in rejecting as evidence the purported statement of account designated as Exhibit 1 and the affidavit of Attorney Coleman. We hold that the court did not err.

Plaintiff contends that the admission of the documents in evidence is authorized by G.S. 8-45 which provides as follows:

> "Itemized and verified accounts.—In any actions instituted in any court of this State upon an account for goods sold and delivered, for rents, for services rendered, or labor performed, or upon any oral contract for money loaned, a verified itemized statement of such account shall be received in evidence, and shall be deemed prima facie evidence of its correctness."

[1] Clearly, the quoted statute does not authorize the admission of the affidavit of Attorney Coleman into evidence. In addition to identifying the affiant, it sets forth certain communications between him and defendant but does not come close to qualifying as "a verified itemized statement" of an account between plaintiff and defendant.

[2] Although plaintiff's Exhibit 1 more closely approaches qualification under the statute, we think that it too fails to meet the tests. In the first place, plaintiff failed to show that the affiant in this exhibit was a competent witness to the facts and would be competent to testify with respect to the account if called upon at trial.

The quoted statute was designed to facilitate the collection of accounts about which there is no bona fide dispute, and the statute must be strictly construed. *Nall v. Kelly,* 169 N.C. 717, 86 S.E. 627 (1915). An affiant who verifies an account of goods sold and delivered, which is to be received into evidence and taken as *prima facie* evidence of its correctness pursuant to said statute, shall be regarded and dealt with as a witness *pro tanto,* and to such extent must meet the requirements and is subject to the qualifications and restrictions as other witnesses. *Nall v. Kelly, supra. See also Endicott-Johnson Corporation v. Schochet,* 198 N.C. 769, 153 S.E. 403 (1930).

Plaintiff's purported itemized statement was verified by Miriam Coleman who is identified in the verification as the president of plaintiff corporation. The verification contains no statement to the effect, and there is no other showing, that affiant had any personal knowledge of the matters set forth in the affidavit or that she was familiar with the books and records of plaintiff corporation. The burden was on plaintiff to establish a *prima facie* case, and we hold that it failed to show that the affiant would have been competent to testify if called as a witness at trial. *Nall v. Kelly, supra.*

In the second place, we do not think the exhibit qualifies as an *itemized* statement of the account. The first entry on the statement is "8/30/71 Balance $9414.06." This entry is followed by thirteen debits, ten credits and twenty-three "balances." The only description of the debits on the statement is the letter A followed by various numbers—6204, etc. Included as a part of the record on appeal are reproductions of twenty-nine invoices bearing dates from 29 November 1969 to 28 February 1972, each of which contains a charge for interest on a balance then outstanding. However, a total of the charges shown on the invoices predating 30 August 1971 is approximately $600 as opposed to $9,414.06, the first entry on the statement. We also note that the copy of invoice bearing No. A 5445 names a firm in Atlanta, Georgia, as the debtor. Only six of the thirteen debits appearing on the statement are supported by copies of invoices.

Our research fails to disclose a case in which an appellate court of this State has attempted to interpret what is contemplated by our statute as an *itemized* statement. Since many of the other states have statutes similar to G.S. 8-45, we deem it appropriate to review several decisions from some of those states.

In *People v. Lowden,* 285 Ill. 618, 121 N.E. 188, 189 (1918), we find:

> ". . . The meaning of an itemized statement of an account, claim, or demand is well understood and is constantly enforced by the courts in requiring bills of particulars showing the items of a claim or demand. The court defined the meaning of a legislative provision for an itemized statement in the case of *Lovell v. Sny Island Levee Drainage District,* 159 Ill. 188, 42 N.E. 600, where it was said:
>
> " 'An item is a separate particular of an account, and to itemize is to state in items or by particulars.'
>
> "A like definition is given in Webster's New International Dictionary that, as related to an account, to itemize is to state in items or by particulars; to set down as an item or by items; and the Standard Dictionary defines 'itemize' to mean to set down by items; state or describe by particulars, as to demand an itemized bill. . . ."

In *Taylor v. Crouch,* 219 Ark. 858, 245 S.W. 2d 217, 218 (1952), we find:

> In *Brooks v. International Shoe Co.,* 132 Ark. 386, 200 S.W. 1027, 1028, we held that a statement, which merely listed the date and amount of each invoice, was *not* an itemized statement. We there quoted with approval the California Supreme Court, *Conner v. Hutchinson,* 17 Cal. 279: " 'The item must in all cases be set forth with as much particularity as the nature of the case will admit; * * *.' "
>
> We also quoted to the same effect from Sutherland on Code Pleading: " 'The items of the account furnished must be set forth with as much particularity as the nature of the case admits of. * * *' "
>
> Webster's New International Dictionary says: "Itemized" is "to state in items, or by particulars; as, to *itemize* costs, charges." The same publication says an "item" is

"an article; a separate particular in an enumeration, account, or total; a detail; as, the *items* in a bill." In 48 C.J.S., p. 788, the text says of "Itemize": "To set down by items; state or describe by particulars, as to demand an itemized bill; to state in items or by particulars."

In *Mugerdichian v. Goudalion,* 134 Me. 290, 186 A. 611, 612 (1936), the Supreme Judicial Court of Maine said: "An 'itemized account' is a detailed statement of items of debt and credit arising on the score of contract. *Turgeon v. Cote,* 88 Me. 108, 33 A. 787. 'Itemized' requires specific statement. *Dyar Sales, etc., Co. v. Mininni,* 132 Me. 79, 166 A. 620."

In *Brooks v. International Shoe Company,* 132 Ark. 386, 200 S.W. 1027 (1918), the Supreme Court of Arkansas said: ". . . The fact that invoices of the goods had been furnished at the time of the sale of the goods did not relieve the pleader from compliance with the statute by furnishing an itemized account. . . ."

We hold that plaintiff's Exhibit 1 did not qualify as an *itemized* statement as contemplated by G.S. 8-45.

For the reasons stated, the judgment appealed from is

Affirmed.

Chief Judge BROCK and Judge MORRIS concur.

NORTH CAROLINA NATIONAL BANK v. G. C. WALLENS AND WIFE, J. W. WALLENS, DONALD SCHAAF, AND WIFE, DORIS SCHAAF v. SAMUEL LONGIOTTI

No. 7615SC515

(Filed 15 December 1976)

Uniform Commercial Code § 28— loan to partnership — no signature of partnership on note — liability of guarantors of partnership

Where plaintiff alleged that defendants unconditionally guaranteed and assumed primary liability for any debts of a named partnership, plaintiff loaned the partnership a named sum, and defendants executed a promissory note on behalf of the partnership, but the name of the partnership did not appear on the note, the trial court erred in concluding that, since the signature of the partnership did not appear on the note, the partnership was not liable, and, consequently, defend-

ants were not liable on their guaranty of the debt of the partnership, and the court also erred in dismissing plaintiff's action, since plaintiff was entitled to recover, even without the signature of the partnership, if it proved that the signing partner was acting on behalf of the partnership in procuring the loan and was authorized to so act, or that the partners, with knowledge of the transaction, thereafter ratified the acts of their partner. G.S. 25-3-401.

APPEAL by plaintiff from *Preston, Judge.* Judgment entered 12 April 1976 in Superior Court, ORANGE County. Heard in the Court of Appeals 16 November 1976.

On 23 April 1974, plaintiff started this action to recover on an agreement wherein defendants agreed to guarantee and assume primary liability for any debts of Koretizing Mart of Chapel Hill, a partnership.

The only responsive pleading that appears of record is a motion to dismiss filed pursuant to Rule 12(c) of the Rules of Civil Procedure. That motion to dismiss for failure to state a claim upon which relief can be granted was filed on 15 March 1976. On 12 April 1976, defendants' motion was allowed and judgment was entered dismissing the action.

Smith, Moore, Smith, Schell & Hunter, by Larry B. Sitton and Thomas S. Stukes, for plaintiff appellant.

Manning, Fulton & Skinner, by Thomas C. Worth, Jr., and Lawrence W. Hill, Jr., for defendant appellees.

VAUGHN, Judge.

A complaint should not be dismissed for failure to state a 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. Detailed fact pleading is not required. A pleading is sufficient if it gives enough notice of the events or transactions that produced the claim to enable the adverse party to understand the nature and basis of the claim, to file a responsive pleading, and, by using the rules provided for discovery, to get additional information needed for trial. *Sutton v. Duke,* 277 N.C. 94, 176 S.E. 2d 161.

The complaint, in pertinent part, is as follows:

On 23 July 1970, defendants unconditionally guaranteed and assumed primary liability "on any and all notes, drafts,

debts, obligations and liabilities of Koretizing Mart of Chapel Hill, a partnership. . . ." Donald Schaaf and G. C. Wallens were the sole partners.

On account of that agreement, plaintiff did "grant and did make a loan to the said Koretizing Mart of Chapel Hill; that for and on account of the said value received, the defendant, G. C. Wallens, for and on behalf of the said Koretizing Mart of Chapel Hill, executed and delivered to the plaintiff a certain promissory note. . . ." The note was dated 2 March 1973 and was in the amount of $76,370.25.

Koretizing Mart of Chapel Hill "defaulted in payment of said note, whereby the plaintiff declared the entire unpaid balance due. . . ."

On 27 March 1974, plaintiff notified defendants of "the default in said note, and demanded from defendants payment of the entire unpaid outstanding balance of . . . ($52,102.76) . . .; that payment was refused by the defendants and that the defendants have still refused and failed to pay the said indebtedness; that the amount of the said indebtedness now due the plaintiff is . . . ($52,102.76). . . ."

The note and guaranty agreement referred to were made a part of the complaint. The note was signed "G. C. Wallens." The name "Koretizing Mart of Chapel Hill" does not appear on the note.

The trial judge concluded that, since the signature of the partnership did not appear on the note, the partnership could not be liable, and, consequently, defendants are not liable on their guaranty of the debt of the partnership.

The judge apparently relied on the following section of the Uniform Commercial Code relating to negotiable instruments: "No person is liable on an instrument unless his signature appears thereon." G.S. 25-3-401(1). A partnership is a "person" within the meaning of that section and "instrument" means a negotiable instrument.

The enactment of the foregoing section made no real change in the law. North Carolina Comment on G.S. 25-3-401(1). The section replaced a former section of the Uniform Negotiable Instrument Law. In part, former G.S. 25-24 provided "no person is liable on the instrument whose signature does not appear thereon. . . ."

The Official Comment on G.S. 25-3-401 contains the following: "Nothing in this section is intended to prevent any liability arising apart from the instrument itself. The party who does not sign may still be liable on the original obligation for which the instrument was given."

The case of *Brewer v. Elks,* 260 N.C. 470, 133 S.E. 2d 159 was decided prior to the repeal of former G.S. 25-24. In that case some, but not all, of the partners signed a note. The suit was against partners who did not sign. Plaintiff had been nonsuited at trial. The Supreme Court said:

> "Here the note was not signed in the partnership name; it did not on its face purport to be for the benefit of the partnership. To establish liability, plaintiff must show that the partner was acting on behalf of the partnership in procuring the *loan* and was authorized to so act; or that the partners, with knowledge of the *transaction,* thereafter ratified the acts of their partner.
>
> * * *
>
> Partnership contracts are not usually made in the names of the individual partners. The usual way for a partnership to indicate its liability for money borrowed is to execute the note in its name. Since *the note here sued on* was not executed in the name of the partnership, plaintiff had the burden of showing defendants Keel [nonsigning partners] had authorized the *transaction." Brewer v. Elks, supra,* at pp. 472, 473. (Emphasis added.)

The judgment of nonsuit was reversed because of other evidence offered by plaintiff. The court clearly held, however, that although the *note* "here sued on was not executed in the name of the partnership," plaintiff could recover against the nonsigning partners if he carried the burden of showing they authorized the "transaction."

In *Brewer,* as here, defendants' potential liability had to be based on something other than that of a party to the note. That a nonsigner is ordinarily not liable on an instrument which he has not signed "does not mean that a nonsigner may not be liable under some principle of law. It only means that the liability of the nonsigner is not *as a party to the instrument."* 2 Anderson, Uniform Commercial Code, § 3-401:5 (2d ed., 1971). (Emphasis added.)

The code section does not affect the liability of a non-signer in connection with an original obligation for which the instrument was later given on other circumstances relating to the same transactions.

We conclude that the court erred in dismissing plaintiff's action. No insurmountable bar to recovery appears on the face of the complaint. The pleading gives defendants sufficient notice of the transactions that produced the claim to enable them to understand the nature and basis of the claim so that they can plead responsively.

The essence of the claim is that defendants promised plaintiff they would pay all debts of Koretizing Mart and, relying on that guarantee, plaintiff made a loan to Koretizing Mart which has not been paid. Plaintiff must, of course, prove that the loan was made to Koretizing Mart. Plaintiff must prove that the signing "partner was acting on behalf of the partnership in procuring the loan and was authorized to so act; or that the partners, with knowledge of the transaction, thereafter ratified the acts of their partner." *Brewer v. Elks, supra.*

It is true that the complaint also discloses that "on account of said value received" (the loan) a note was signed by a partner; that the note was not signed in the name of the partnership; and that plaintiff seeks relief according to the terms of the note. We hold, however, that these allegations do not prevent plaintiff from attempting, in this action, to prove that defendants are liable on their guaranty for the original obligation (the alleged loan made to the partnership) for which the instrument was given. The judgment dismissing the action is reversed and the case is remanded.

Reversed and remanded.

Judges BRITT and MARTIN concur.

STATE OF NORTH CAROLINA v. JAMES CLINTON SINK AND LARRY LEWIS

No. 7618SC509

(Filed 15 December 1976)

1. **Witnesses § 1— mental competency of witness**

Evidence was sufficient to support the trial court's finding that the State's principal witness was mentally competent to testify.

2. **Criminal Law § 34— defendant's participation in separate offense — testimony admissible**

In a prosecution for breaking and entering and larceny, the trial court did not err in allowing the State's principal witness to testify implicating defendant in a separate instance of breaking and entering, since such evidence was admissible to show mental intent or state and to establish a common plan or scheme.

APPEAL by defendants from *Long, Judge.* Judgments entered 21 January 1976 in Superior Court, GUILFORD County. Heard in the Court of Appeals 8 November 1976.

By separate three-count bills of indictment, each defendant was charged with the felonies of (1) breaking or entering the Greensboro Moose Lodge, (2) larceny, and (3) receiving. The cases were consolidated for trial.

The State's evidence tends to show the following: At about 9:00 p.m. defendant Larry Lewis called Allen Odell Smith and asked if he knew a place they could break in. Smith told Lewis they could break in the Carolina Aluminum Building on West Market Street. Lewis drove to Smith's house, and the two of them went to defendant James Clinton Sink's house. Smith asked Sink if he was ready to go, and Sink said he was. Smith, defendant Sink, and defendant Lewis, with Lewis driving, rode out West Market Street to Carolina Aluminum. The three of them entered the Carolina Aluminum Building by prying open a back door. They looked through offices and found approximately $9.00. After finding no other money, they left the building the way they had entered. The three then went to defendant Lewis' house where they waited until 1:00 or 1:30 a.m. for the Moose Lodge to close. Smith, defendant Sink, and defendant Lewis, with Lewis driving, rode to the premises of the Greensboro Moose Lodge No. 685. Smith and defendant Sink left the car and instructed defendant Lewis where to pick them up. Smith and Sink stacked crates beside the Moose Lodge Building, and Smith

climbed onto the roof leaving Sink as a lookout. Smith entered the building through a vent in the roof and took money from a box under the club counter. The burglar alarm sounded, and police were dispatched to the scene. Smith ran out the back door where he joined Sink, and the two of them ran through the woods. In the meantime police officers stopped the car driven by Lewis because it was coming from the vicinity of the Moose Lodge. The officers found no cause to arrest Lewis at that time; therefore, he was permitted to leave. Smith and Sink made their way to a gasoline service station where Smith called his wife to come pick them up. Smith's wife picked up Smith and Sink, drove Sink to his house at about 5:00 a.m., and then drove home. When Sink went into his apartment, he showed his girl friend some money and told her they had broken in the Moose Lodge. Allen Odell Smith testified for the State in these cases in compliance with a plea bargain in several criminal charges pending against him.

Defendant Larry Lewis offered no evidence. Defendant James Clinton Sink testified that he did not participate in the offense and that Allen Odell Smith was implicating him solely because Smith was angry with Sink over Sink's making love to Smith's wife. Sink accounted for his actions throughout the time involved. Sink further testified that Smith's wife and his (Sink's) girl friend lied when they gave testimony implicating him in the offense. Sink offered a witness who corroborated his alibi and testified that she heard Smith threaten to get even with Sink.

The jury found both Sink and Lewis guilty of the felonious breaking or entering and guilty of the felonious larceny. As to the verdicts against Sink, judgment of imprisonment for a period of ten years was entered on the breaking or entering conviction, and for a period of not less than eight nor more than ten years on the larceny conviction, which sentence is to commence at the expiration of the sentence imposed on the breaking or entering conviction. As to the verdicts against Lewis, judgment of imprisonment for a period of ten years was entered on the breaking or entering conviction, and for a period of not less than five nor more than ten years on the larceny conviction, which sentence is to commence at the expiration of the sentence imposed on the breaking or entering conviction.

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

Neill A. Jennings for defendant James Clinton Sink.

Z. H. Howerton, Jr., for defendant Larry Lewis.

BROCK, Chief Judge.

Each defendant was convicted of felonious breaking or entering and of felonious larceny. Each defendant was sentenced to a term of ten years' imprisonment on the breaking or entering count. Also each defendant was sentenced to a consecutive term of imprisonment on the larceny count. Yet in the record on appeal counsel has included only the judgment and commitment for breaking or entering with respect to defendant Sink, and only the judgment and commitment for larceny with respect to defendant Lewis. Also in the brief counsel refers only to one judgment and commitment as to each defendant.

This Court caused the additional judgment as to each defendant to be certified by the trial court. Therefore, the record in this Court now shows that each defendant was convicted and sentenced both for breaking or entering and for larceny as set out in the statement of facts above. It is the duty of counsel to present to the appellate division a correct record of the trial proceedings.

[1] Defendants argue that the trial court committed error in denying their motions to suppress the testimony of Allen Odell Smith, the State's principal witness, on the ground that Allen Odell Smith was not mentally competent to testify. A *voir dire* was conducted upon defendants' motions to suppress. The State offered the testimony of Dr. Bob Rollins, who was stipulated to be qualified to give his opinion in the area of forensic psychiatry. The defendants offered the testimony of Dr. Douglas Gold, who was permitted to testify as an expert in clinical psychology. At the conclusion of the testimony the trial judge ruled that Allen Odell Smith was competent to testify for the State. We perceive no error in this ruling. It seems clear to us from the *voir dire* testimony that Allen Odell Smith was found to be of ordinary or above ordinary intelligence. His credibility under all of the circumstances was for jury determination. This assignment of error is overruled.

[2] Defendants argue that it was error to permit Allen Odell Smith to testify concerning breaking or entering the Carolina Aluminum Building. They argue that this testimony was evidence of their commission of an unrelated, independent offense which is forbidden by the rule laid down in *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). Defendants overlook the well established exceptions as set out in *State v. McClain, supra*, e.g.:

> "Where a specific mental intent or state is an essential element of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite mental intent or state, even though the evidence discloses the commission of another offense by the accused."
>
> * * *
>
> "Evidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission. (Citations omitted.) Evidence of other crimes receivable under this exception is ordinarily admissible under the other exceptions which sanction the use of such evidence to show criminal intent, guilty knowledge, or identity.

In our opinion defendants received a fair trial free from prejudicial error.

No error.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. HUBERT TEASLEY, JR., AKA/HUBERT TEASLEY

No. 7612SC539

(Filed 15 December 1976)

Criminal Law § 99— filing false insurance claim — court's comment in disposing of another case

In this prosecution for filing a false insurance claim and conspiracy to file a false insurance claim, the trial judge expressed an

opinion in violation of G.S. 1-180 when, in disposing of an unrelated case by guilty plea during a pause in defendant's case, he stated in the presence of the jury, "What is this, another case of somebody ripping off an insurance company?", and such error was not cured by the court's instruction to the jury that the case disposed of by guilty plea was unrelated to defendant's case or by the court's questioning of jurors as to whether any of them would consider anything regarding the other case as against defendant and whether they understood that the State had the burden of proving guilt.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 28 April 1976 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 9 November 1976.

Defendant was indicted for filing a false insurance claim and conspiracy to file a false insurance claim. Upon entering a plea of not guilty as to both counts, defendant was convicted by a jury on the charges. He was sentenced to imprisonment for a term of ten years on the conspiracy charge and five years on the charge of filing a false return.

Other relevant facts are set out in the opinion below.

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

Morgan, Bryan, Jones, Johnson, Hunter & Green, by Robert C. Bryan, for defendant appellant.

MORRIS, Judge.

After court was convened on the morning of the second day of this case, the trial was delayed to enable defense counsel to interview a witness. During the pause, the court directed the district attorney to call another case for disposition by plea. The jury remained in the jury box but was instructed by the trial judge that the case being heard on the plea of guilty was completely unrelated to the charges against defendant. The district attorney then called *State v. Roosevelt McPherson,* a case which, although factually unrelated to the case *sub judice,* also involved a defendant charged with filing a false claim with an insurance company. When the district attorney explained the nature of the case to the court, the trial judge stated, in the presence of the jury, "What is this, another case of somebody ripping off an insurance company?" The district attorney affirmed that such was the case, whereupon the evidence against McPherson was reviewed, sentence was imposed and defendant's case was recalled.

Upon request of defendant's counsel, the jury was excused, and defendant moved for a mistrial. The motion was denied. The jury returned and was told by the court:

> "Ladies and gentlemen, we will resume the trial of the case that we started yesterday. Is there anyone on the jury who has any idea that the case related to Roosevelt McPherson who pled guilty to a similar charge but not related charges in any way connected to this case, is there any member of the jury who would consider anything they heard in the McPHERSON case against this defendant? If so, would you please raise your hand? (NOTE: No one raised his hand) You all understand that the State has the burden of proving guilt or else the defendant is entitled to a verdict of not guilty, is that correct? (NOTE: All indicated that they understood that the State had the burden of proving the defendant's guilt.) . . . You may proceed."

Defendant contends that the trial judge committed prejudicial error when he stated "What is this, another case of somebody ripping off an insurance company?" Defendant also maintains that this error was not corrected by the judge's instructions that the McPherson case was unrelated to defendant's case.

G.S. 1-180, which requires that the trial judge in his jury charge explain the law but express no opinion as to the facts, has been interpreted to forbid the judge's expression of an opinion before the jury at *every* stage of the trial process. *State v. Carriker,* 287 N.C. 530, 215 S.E. 2d 134 (1975); *State v. Greene,* 285 N.C. 482, 206 S.E. 2d 229 (1974); *State v. Holden,* 280 N.C. 426, 185 S.E. 2d 889 (1972); *State v. Smith,* 240 N.C. 99, 81 S.E. 2d 263 (1954). In *State v. Carriker, supra,* the remarks of the trial judge made in the presence of a jury panel shortly before defendant's case was called were held to be within the general prohibition. And in *State v. Canipe,* 240 N.C. 60, 81 S.E. 2d 173 (1954), prejudicial comments made while the trial judge questioned *prospective* jurors were held to be within the rule.

Here, the statement of the learned trial judge ("What is this, another case of somebody ripping off an insurance company?") was made before the jury trying defendant's case. More importantly, it went to the heart of the very issue for which defendant was on trial, that is, whether he defrauded an

insurance company by filing a false claim. By implying that *State v. Roosevelt McPherson* was "*another* case of somebody ripping off an insurance company," the judge opined that defendant was likewise guilty of similar misconduct. This is precisely the type of expression of opinion which is prohibited by G.S. 1-180 and the case law thereunder.

All expressions of opinion, however, do not warrant a new trial. A remark made by the judge in the presence of the jury does not entitle defendant to a new trial if the statement, considered in the light of all the facts and attendant circumstances, is not of such prejudicial nature as could reasonably have had an appreciable effect on the result of the trial. *State v. Perry*, 231 N.C. 467, 57 S.E. 2d 774 (1950). Having determined that the statement by the trial judge constituted an expression of opinion before the jury, we must now determine whether it constitutes prejudicial, reversible error.

Once the trial judge expresses an opinion as to the facts before the jury, the resulting prejudice to the defendant is virtually impossible to cure. *State v. Clanton*, 20 N.C. App. 275, 201 S.E. 2d 365 (1973); 3 Strong, N. C. Index 2d, Criminal Law § 170, pp. 138-39. The prejudice is not removed by the judge's instructing the jury not to consider the remarks. *State v. McEachern*, 283 N.C. 57, 194 S.E. 2d 787 (1973); *State v. Carter*, 268 N.C. 648, 151 S.E. 2d 602 (1966).

Here, the trial judge instructed the jury that the case disposed of by guilty plea was unrelated to defendant's case. He also asked the jurors if any of them would consider anything regarding the McPherson case as against defendant and if they understood that the State had the burden of proving guilt. We do not believe that these attempts to remove any resulting prejudice, though commendable, could effectively erase the opinion as to defendant's guilt in the minds of the jurors. As stated by Ervin, Judge, in *State v. Canipe, supra:*

> "The judge occupies an exalted station, and jurors entertain a profound respect for his opinion. (Citation omitted.) As a consequence, the judge prejudices a party or his cause in the minds of the trial jurors whenever he violates the statute by expressing an adverse opinion on the facts. *When this occurs, it is virtually impossible for the judge to remove the prejudicial impression from the minds of the trial jurors by anything which he may afterwards say to*

them by way of atonement or explanation. (Citations omitted.)" 240 N.C. at 64. (Emphasis supplied.)

We believe, and so hold, that the prejudicial effect of the remark made by the learned judge was not cured by his correcting statements. Accordingly, defendant is entitled to a new trial.

New trial.

Judges CLARK and ARNOLD concur.

STATE OF NORTH CAROLINA v. OBIE GEORGE HILL

No. 7618SC571

(Filed 15 December 1976)

1. **Automobiles § 120— driving while blood contains .10 percent alcohol — source of alcohol immaterial**

Defendant's contention that the source of the proscribed alcohol in G.S. 20-138(b) must be an intoxicating beverage rather than cough syrup is without merit, since a person whose blood contains .10 percent or more by weight of alcohol, regardless of the source of the alcohol, and who drives upon the highways within the State violates G.S. 20-138(b).

2. **Automobiles §§ 120, 129— driving while blood contains .10 percent alcohol — guilty knowledge not element of offense — instructions proper**

Guilty knowledge is not an element of the crime of operating a vehicle upon the highways of the State when the amount of alcohol in one's blood is .10 percent or more by weight; therefore, in a prosecution of defendant for that crime where he claimed that he innocently imbibed alcohol in the form of cough medicine, the trial court did not err in failing to instruct that, in order to violate G.S. 20-138(b), appellant must have known or had reasonable grounds to believe that he was drinking alcohol.

3. **Automobiles § 129— driving while blood contained .10 percent alcohol — breathalyzer reading — no instruction as to rebuttable presumption**

In a prosecution of defendant for driving when his blood contained .10 percent or more by weight of alcohol, it was not error for the trial court to fail to instruct that evidence of a breathalyzer test reading was rebuttable on the issue of whether defendant's blood level was .10 percent or higher by weight, since no presumption as to intoxication arose from the evidence.

State v. Hill

APPEAL by defendant from *Long, Judge.* Judgment entered 14 April 1976 in Superior Court, GUILFORD County. Heard in the Court of Appeals 17 November 1976.

Defendant was charged with the unlawful and willful operation of a motor vehicle on a public street while under the influence of intoxicating liquor. At the *de novo* trial in superior court, two police officers testified that they first saw defendant in a restaurant, and that defendant appeared to have been drinking. They later observed defendant drive away from the restaurant. Defendant's driving was erratic, and he swerved back and forth in his lane of traffic, crossing the yellow line.

The officers stopped defendant's car. They smelled alcohol on defendant's breath, and he was asked to perform certain tests of balance and dexterity which the officers said he performed poorly. Defendant was arrested, administered a breathalyzer test, and he "blew" .10 percent. At the time the test was administered, defendant told the officers that he had consumed one beer in addition to drinking Nyquil cough medicine.

Defendant testified that he had not drunk any beer, but that he had been drinking Vick's Formula 44 cough syrup, which, unknown to him at the time, is 10 percent alcohol. He also testified that he read poorly and that he did not realize the cough medicine contained alcohol.

The jury found defendant not guilty of driving under the influence of intoxicating liquor, but guilty of the lesser charge of driving with .10 percent alcohol in his blood, a violation of G.S. 20-138(b). Defendant appealed.

Attorney General Edmisten, by Associate Attorney Richard L. Griffin, for the State.

Hubert E. Seymour, Jr., for defendant appellant.

ARNOLD, Judge.

Appellant was charged with violating G.S. 20-138(a) and convicted of violating G.S. 20-138(b). The statute itself provides:

> "(a) It is unlawful . . . for any person who is under the influence of intoxicating liquor to drive or operate any vehicle upon any highway . . . within this State.

"(b) It is unlawful for any person to operate any vehicle upon any highway . . . within this State when the amount of alcohol in such person's blood is 0.10 percent or more by weight . . . . An offense under this subsection shall be treated as a lesser included offense of the offense of driving under the influence."

[1] Since G.S. 20-138(b) is treated as a lesser included offense within G.S. 20-138(a) defendant contends that the sources of the proscribed alcohol in G.S. 20-138(b) must be an intoxicating beverage. He supports this argument by asserting that G.S. 20-139, forbidding one to drive while under the influence of any drug, covers non-beverage alcohol. Defendant cites no authority for his position, and we find it untenable.

The primary purpose for which the General Assembly enacted G.S. 20-138(b) is to regulate conduct for the safety of the public using the State's highways. It would be contrary to the legislative intent of G.S. 20-138(b) to read into it a requirement that the source of alcohol be intoxicating beverage as required in G.S. 20-138(a). A person whose blood contains .10 percent or more by weight of alcohol, regardless of the source of the alcohol, and who drives upon the highways within the State violates G.S. 20-138(b).

[2] Appellant next argues that because he innocently imbibed alcohol in the form of cough medicine he lacked the guilty intent, the *mens rea,* which is an element of many common law crimes. Thus, he argues, the judge erred in failing to instruct that, in order to violate G.S. 20-138(b), appellant must have known or had reasonable grounds to believe that he was drinking alcohol. We disagree. As is well said in 1 Burdick, Law of Crime § 129j (1946):

"The legislature may deem certain acts, although not ordinarily criminal in themselves, harmful to public safety, health, morals and the general welfare, and by virtue of its police power may absolutely prohibit them, either expressly or impliedly by omitting all references to such terms as 'knowingly', 'wilfully', 'intentionally' and the like. Such statutes are in the nature of police regulations, and it is well established that the legislature may for the protection of all the people, punish their violation without regard to the question of guilty knowledge. . . . "

The statute in question, G.S. 20-138(b), speaks absolutely. It is in the same category as our speed limit statutes. See, G.S. 20-141(b). Unlike our reckless driving statute, G.S. 20-140, it does not use the word "willful." Neither does it use the words "knowing" or "intentional." "When the language [of a statute] is plain and positive, and the offense is not made to depend upon the positive, wilful intent and purpose, nothing is left to interpretation." *State v. McBrayer,* 98 N.C. 619, 623, 2 S.E. 755 (1887). Guilty knowledge is not an element of G.S. 20-138(b).

[3] Finally, citing *State v. Cooke,* 270 N.C. 644, 155 S.E. 2d 165 (1967), appellant asserts that he was entitled to special instructions emphasizing that the jury was free to disbelieve the breathalyzer reading. If defendant desired a special instruction further explaining the breathalyzer evidence he should have requested it. See, *State v. Boyd,* 278 N.C. 682, 180 S.E. 2d 794 (1971). The State's position is that the statutory offense for which defendant was convicted was enacted since *Cooke.* More importantly, G.S. 20-139.1, as it existed when *Cooke* was decided, created a "presumption" of intoxication for driving under the influence when the breathalyzer blood alcohol reading was .10 percent or higher. That presumption is no longer contained in G.S. 20-139.1. Since no presumption arose from the evidence, it was not error to fail to instruct that the breathalyzer evidence was rebuttable on the issue of whether the blood level was .10 percent or higher by weight. We agree with this position.

In the trial court's decision we find

No error.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. ELIJAH GRAY WELLS

No. 767SC513

(Filed 15 December 1976)

1. Criminal Law § 162— permitting child to whisper testimony to court reporter — question not presented on appeal

In a prosecution for taking indecent liberties with a child, the question of whether the court erred in permitting the child to whisper

a portion of her testimony to the court reporter, who then read it to the jury, was not presented where defendant failed to object to the procedure and failed to object to or move to strike the child's testimony.

2. **Criminal Law § 89— testimony admissible for corroboration**

In a prosecution for taking indecent liberties with a child, testimony by the child's grandmother that the child told her that defendant "had messed with her before" was properly admitted for the purpose of corroborating the child's testimony that she told her grandmother that defendant had molested her on numerous other occasions.

3. **Criminal Law §§ 89, 162— impeachment testimony — conjecture — absence of objection**

The State was entitled to ask a witness for purposes of impeachment whether defendant's witness had made prior statements inconsistent with her trial testimony, and defendant cannot complain on appeal about the witness's testimony as to what defendant's witness had "led her to believe" where defendant did not object to the witness's testimony or move to have it stricken from the record.

APPEAL by defendant from *Tillery, Judge.* Judgment entered 2 March 1976 in Superior Court, EDGECOMBE County. Heard in Court of Appeals 8 November 1976.

This is a criminal action, wherein the defendant, Elijah Gray Wells, was charged in an indictment, proper in form, with "taking indecent liberties" with a child, a felony, in violation of G.S. 14-202.1. Upon the defendant's plea of not guilty the State offered evidence tending to show the following:

The female child in question, who was nine years old, lived with her grandmother in Louisburg, N. C. On 31 October 1975 she went to spend the week end with her mother and stepfather, the defendant, in Rocky Mount, N. C. During the early morning hours of 1 November 1975, while the child was sleeping on a mattress in the living room with her younger sister, the defendant made certain sexual advances by placing his hands on her private parts. No useful purpose will be served by further elaboration on the details of the incident.

Upon returning to Louisburg the child was unusually quiet and nervous, and she became frightened at night. After a week or ten days had elapsed, she told her grandmother about the incident. She also told her grandmother that defendant had molested her on other occasions.

Defendant offered evidence tending to show he did not molest the child.

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

Attornel General Edmisten by Associate Attorney Henry H. Burgwyn for the State.

Howard A. Knox, Jr., for the defendant appellant.

HEDRICK, Judge.

[1] At trial the minor witness, in the presence of the jury, was allowed to whisper a portion of her testimony, which was of a very personal nature, to the court reporter, who in turn read the testimony to the jury. This procedure, which was utilized for the answers to three questions, provides the basis for defendant's first three exceptions. Defendant neither objected to this procedure nor the evidence obtained by it nor moved to strike the child's testimony. Therefore, these exceptions present no question for review, and the assignment of error based thereon is not sustained. *State v. Blackwell,* 276 N.C. 714, 174 S.E. 2d 534 (1970), *cert. denied,* 400 U.S. 946, 91 S.Ct. 253, 27 L.Ed. 2d 252 (1970).

[2] By his second assignment of error defendant contends the court erred in allowing the child's grandmother to testify that the child told her that the defendant "had messed with her before." Prior to the testimony challenged by this exception, the child had testified, without objection, that she told her grandmother the defendant had molested her on numerous other occasions. The trial judge allowed the grandmother's testimony into evidence as corroborative of the child's prior testimony, and in his charge instructed the jury that the challenged evidence should be considered only for the purpose of corroborating the child's testimony at trial, if it did. The challenged testimony was admissible. *Webster v. Trust Co.,* 208 N.C. 759, 182 S.E. 333 (1935); *State v. Feimster,* 21 N.C. App. 602, 205 S.E. 2d 602 (1974), *cert. denied,* 285 N.C. 665, 207 S.E. 2d 763 (1974). This assignment of error has no merit.

[3] On direct examination Hilda Wells, defendant's ex-wife, testified in substance that defendant had never done anything that would indicate a propensity to commit the crime with which he was charged. On rebuttal Maria Cook was asked, over

defendant's objection, to relate a conversation she had with Hilda Wells. The records reveals the following:

"Q. What did she tell ya'll?

OBJECTION BY MR. KNOX. OVERRULED.

[A.] She was wondering what she was going to tell her boys. She said, well, she was very upset and I might have asked her a few questions, but she really didn't want to talk about it too much she was really, she was just very upset. She did say, she kept saying, 'Oh, my God, oh my God, I thought he had outgrown that.' When I asked her what she meant by outgrown what—

OBJECTION BY MR. KNOX. OVERRULED.

A. She said that she had loved Pee Wee for a lot of years, ten or fifteen years and that she had covered for him and protected him because of that problem, but that he had, *she led me to believe* that he had had his hands on other little girls but he had never gone so far as to mess with them internally like he did Jamie.

EXCEPTION NO. 7" (Emphasis added).

By his fifth assignment of error defendant contends the trial court erred in not striking the answer quoted above because it "was based on conjecture and created an insinuation not based on fact which prejudiced the jury." This assignment of error has no merit. Clearly the State was entitled to ask the witness for purposes of impeachment if Hilda Wells had made prior statements inconsistent with her testimony at trial. *Perkins v. Clarke,* 241 N.C. 24, 84 S.E. 2d 251 (1954). Assuming *arguendo* that by testifying as to what Mrs. Wells had "led her to believe," Mrs. Cook gave an inadmissible interpretation of her conversation with Mrs. Wells, defendant cannot raise the alleged error on appeal because he did not object to the witness's answer or move to have it stricken from the record. *State v. Blackwell, supra.*

We hold that the defendant had a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. WILLIE JAMES PAGE

No. 7618SC563

(Filed 15 December 1976)

1. **Criminal Law § 66— in-court identification of defendant — observation at crime scene as basis**

Evidence in a rape prosecution was sufficient to support the finding of the trial court that the victim's in-court identification of defendant as the perpetrator of the crime was based solely upon her having seen defendant before and during the commission of the crime.

2. **Criminal Law § 86— other criminal acts by defendant — cross-examination proper**

Defendant was not prejudiced where the trial court allowed him to be questioned on cross-examination as to whether he had committed certain specific criminal acts collateral to the crime for which he was then on trial, since each question related to defendant's criminal and degrading conduct within his own knowledge, and the court correctly instructed the jury that it could consider this testimony only as it related to defendant's credibility.

APPEAL by defendant from *Wood, Judge.* Judgment entered 13 February 1976 in Superior Court, GUILFORD County. Heard in Court of Appeals 16 November 1976.

This is a criminal action wherein the defendant, Willie James Page, age 24, was charged in a bill of indictment, proper in form, with second degree rape. Upon the defendant's plea of not guilty, the State offered evidence tending to show the following:

At 10:30 p.m. on 20 July 1975, Mrs. Maggie Mack, age 41, went to a beer joint named Ben Floyd's in Greensboro, North Carolina. Defendant was also at Ben Floyd's, but left at approximately 11:30 p.m. with his girl friend. Defendant returned to Ben Floyd's at approximately 1:30 a.m. Mrs. Mack was sitting at a table with Patricia Coleman and defendant joined them. Mrs. Mack observed defendant's face from about two feet away for fifteen minutes. The bar was well-lighted. Mrs. Mack and Patricia Coleman decided to leave at approximately 2:30 a.m., and defendant offered to walk them home. They walked to Patricia Coleman's house and she went inside. Mrs. Mack and defendant then crossed the street in the direction of her house at which time defendant asked to spend the night with her. When Mrs. Mack refused, defendant grabbed her by the throat,

threw her to the ground and raped her. Defendant told her that he would kill her if she reported the rape and then departed.

Defendant testified in his own behalf as follows: On the night in question he saw Mrs. Mack at Ben Floyd's at approximately 10:30 p.m. He left Ben Floyd's with his girl friend at approximately 11:30 and took her home. Later he returned to Ben Floyd's to get some cigarettes. Mrs. Mack gave him her phone number and asked him to visit her the next day. She then left with a man named Buck. Defendant walked Patricia Coleman part of the way to her house and then walked to his own house.

The jury found the defendant guilty as charged. From the judgment of the court imposing a prison sentence of twenty-five to thirty years, defendant appealed.

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

Wallace C. Harrelson, Public Defender for the Eighteenth Judicial District, for the defendant appellant.

HEDRICK, Judge.

[1] By his first two assignments of error defendant contends the court erred in denying his motion to suppress the in-court identification of Mrs. Mack of defendant as the man who raped her. After a voir dire hearing upon defendant's motion to suppress Mrs. Mack's in-court identification of defendant as the perpetrator of the crime, the court found and concluded that Mrs. Mack's in-court identification was based solely upon her having seen the defendant before and during the commission of the crime. This finding is supported by the evidence, and the court properly overruled defendant's motion to suppress. *State v. Taylor,* 280 N.C. 273, 185 S.E. 2d 677 (1972). This assignment of error has no merit.

[2] On cross-examination the defendant was asked a series of questions as to whether he had committed certain specific criminal acts collateral to the crime for which he was then on trial. Defendant objected to each question but was required to respond. The court instructed the jury that it should consider this evidence only as it related to the credibility of defendant's testimony at trial. By his sixteenth and twenty-first assignments of error defendant contends the court erred in admitting this

evidence of prior criminal acts and in instructing the jury that it could consider the evidence as it related to defendant's credibility.

In *State v. Williams,* 279 N.C. 663, 675, 185 S.E. 2d 174, 181 (1971), the Supreme Court stated, "It is permissible, for purposes of impeachment, to cross-examine a witness, including the defendant in a criminal case, by asking disparaging questions concerning collateral matters relating to his criminal and degrading conduct. Such questions relate to matters *within the knowledge of the witness,* not to accusations of any kind made by others. . . . " (Citations omitted).

Each question challenged by these exceptions relates to the defendant's "criminal and degrading conduct" within his own knowledge, and the court correctly instructed the jury that it could consider this testimony only as it related to defendant's credibility. These assignments of error are overruled.

Next defendant contends the court erred in allowing Mrs. Mack to demonstrate before the jury with the assistance of a police officer the manner in which defendant grabbed and raped her. The demonstration complained of was competent for the purpose of illustrating the testimony of the prosecuting witness. The assignment of error upon which this contention is based is overruled.

By his twelfth assignment of error defendant contends the court failed to set forth all the essential elements of the crime of rape. This contention has no merit. The trial court clearly set forth and described in its instructions to the jury each of the elements of the crime of rape, and the trial court also clearly explained to the jury that before it could find the defendant guilty, it must be satisfied from the evidence and beyond a reasonable doubt of each element of the offense.

Defendant has two additional assignments of error relating to the admission of testimony. We have carefully considered the exceptions upon which these assignments of error are based and find them to be without merit. No useful purpose will be served by further elaboration thereon.

We hold the defendant had a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. ERLE DOWNING

No. 7612SC596

(Filed 15 December 1976)

Constitutional Law § 33; Criminal Law § 80— business records lawfully seized — right against self-incrimination not violated by admission

The search of defendant's business office pursuant to legally issued and executed search warrants for business records, their seizure, and subsequent introduction into evidence did not violate defendant's Fifth Amendment right against self-incrimination, nor did Article I, § 23 of the N. C. Constitution, require exclusion of the records in defendant's trial for wilfully and knowingly presenting a fraudulent insurance claim.

APPEAL by the State from *Herring, Judge.* Order entered 14 June 1976 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 8 December 1976.

This is an appeal by the State from an order granting defendant's pre-trial motion to suppress certain evidence consisting of papers and records seized after a search of defendant's professional office made pursuant to valid search warrants.

Defendant is a chiropractor who maintains his office in Fayetteville. On 21 January 1976 twenty search warrants were issued for records concerning twenty of defendant's patients, which records were alleged to be in defendant's professional office. On 22 January 1976 the chief investigator for the North Carolina Insurance Department and other officers executed the warrants by conducting a search of defendant's office in his presence. As a result of this search the records now in question were seized. These records consist of defendant's chiropractic records and copies of letters written by him to various insurance companies relating to his treatment of a patient, one Willie Melvin, as well as his Day Book for the years 1971 through 1975.

When the search was made, no charges were pending against the defendant. He was subsequently indicted for violation of G.S. 14-214 by wilfully and knowingly presenting a false and fraudulent claim and proof in support of said claim for payment of benefits upon a contract of insurance for medical treatment of Willie Melvin for injuries Melvin allegedly sustained in an automobile accident.

Upon arraignment, prior to entering a plea, defendant moved to suppress the State's evidence seized pursuant to the search warrants on the ground that to allow the evidence would be compelling him to be a witness against himself in violation of the Fourth and Fifth Amendments of the United States Constitution and Article I, Sec. 23 of the North Carolina Constitution. At the hearing on the motion the defendant and the State stipulated that the search warrants were legally issued and executed. The court allowed the motion, and the State appealed.

Attorney General Edmisten by Associate Attorney General Elisha H. Bunting, Jr., for the State, appellant.

Donald R. Canady and N. H. Person for defendant appellee.

PARKER, Judge.

This appeal is authorized by G.S. 15A-979(c). The parties having stipulated that the search warrants were legally issued and executed, no Fourth Amendment problems are presented. The only question presented is whether suppression of the seized evidence is required by the Fifth Amendment to the United States Constitution or by Article I, Sec. 23, of the North Carolina Constitution. We hold that it is not and accordingly reverse the order of the trial court.

The order appealed from was entered 14 June 1976. On 29 June 1976 the United States Supreme Court decided *Andresen v. Maryland*, ___ U.S. ___, 49 L.Ed. 2d 627, 96 S.Ct. 2337 (1976), in which, on facts strikingly similar to those here presented, the Court held "that the search of an individual's office for business records, their seizure, and subsequent introduction into evidence does not offend the Fifth Amendment's prescription that '[n]o person . . . shall be compelled in any criminal case to be a witness against himself.'" We find *Andresen* controlling to dispose of defendant's Fifth Amendment claims.

We also find nothing in the Constitution or laws of this State which requires exclusion of the seized records. Article I, Section 23 of the North Carolina Constitution provides that "[i]n all criminal prosecutions, every person charged with crime has the right to . . . not be compelled to give self-incriminating evidence." Defendant here has not been compelled to do any-

thing. He voluntarily made and kept the records involved, and they were seized by lawful process without his being required to say or do anything. Although the constitutional privilege against self-incrimination applies to the production of papers so that if the accused is compelled to produce them the privilege is violated, *State v. Hollingsworth,* 191 N.C. 595, 132 S.E. 667 (1926), "[l]awful seizure of such evidence (as, for example, pursuant to a valid search warrant) obviously differs from requiring the accused to produce it and does not violate the privilege." 1 Stansbury's N. C. Evidence, Brandis Revision, § 57, p. 177-78; *see State v. Shoup,* 226 N.C. 69, 36 S.E. 2d 697 (1946); *State v. Mallett,* 125 N.C. 718, 34 S.E. 651 (1899).

Reversed.

Judges HEDRICK and CLARK concur.

STATE OF NORTH CAROLINA v. HOWARD SNYDER

No. 7623SC614

(Filed 15 December 1976)

Criminal Law § 163— instructions — exceptions and assignments of error broadside and ineffectual

Defendant's exceptions and assignments of error to the trial court's charge are broadside and ineffective to present any portion of the instructions for review, since defendant failed to identify the portion of the instruction to which he excepted and assigned error, or failed to state the substance of the instruction he contended the trial court should have given. N. C. Rules of App. Procedure, Rule 10(b)(2).

APPEAL by defendant from *Walker (Hal H.), Judge.* Judgment entered 30 March 1976 in Superior Court, ASHE County. Heard in the Court of Appeals 16 November 1976.

Defendant was charged in a bill of indictment with the murder of his brother, Earl Snyder, on 10 September 1975. The district attorney elected to proceed on the lesser-included offense of second-degree murder or such lesser offense as the jury may find. The jury found defendant guilty of voluntary manslaughter, and judgment of imprisonment for a term of not less than five nor more than seven years was entered.

Attorney General Edmisten, by Assistant Attorney General William Woodward Webb and Associate Attorney Alan S. Hirsch, for the State.

Vannoy, Moore and Colvard, by J. G. Vannoy and Howard C. Colvard, Jr., for the defendant.

BROCK, Chief Judge.

Defendant brings forward and argues only his exceptions 8 and 9. Exceptions 8 and 9 purport to be taken to the instructions of the court to the jury. Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure provides:

> "An exception to instructions given the jury shall identify the portion in question by setting it within brackets or by any other clear means of reference. An exception to the failure to give particular instructions to the jury . . . which was not specifically requested of the trial judge shall identify the omitted instruction, . . . by setting out its substance immediately following the instructions given . . ."

In this case at the end of a paragraph on approximately the seventeenth printed record page of the judge's charge (approximately the beginning of the last printed record page), defendant has inserted the words:

"DEFENDANT'S EXCEPTIONS NOS. 8 and 9."

So far as the record on appeal discloses, these exceptions relate to the foregoing seventeen printed record pages of the charge. There are no brackets or other clear means of reference to identify the portion of the instructions in question. Nor is an omitted instruction identified by its substance being set out immediately following the instruction given. The necessity for identifying the instruction objected to has long been the established practice in North Carolina. The new rules merely clarify the requirement.

For the reason that appellant has failed to identify the portion of the instructions to which he excepts and assigns error, or to state the substance of the instruction he contends the court should have given, the exceptions and assignments of

error are broadside and are ineffective to present any portion of the instructions for review.

No error.

Judges PARKER and HEDRICK concur.

JANE W. WILLIAMS v. JOHN F. WILLIAMS

No. 7610DC517

(Filed 15 December 1976)

Appeal and Error § 41— record on appeal — inclusion of pleadings — prior record on appeal incorporated by reference

The requirement of Rule 9(b)(1) of the Rules of Appellate Procedure that the record on appeal contain the pleadings on which the case was tried was not satisfied where a record on appeal of a prior, premature appeal in the case was attached as an exhibit to the present record on appeal and incorporated by reference therein.

APPEAL by plaintiff from *Greene, Judge.* Order entered 10 February 1976 in District Court, WAKE County. Heard in the Court of Appeals 17 November 1976.

Plaintiff apppeals from an order awarding her custody, ordering defendant to pay child support, and ordering psychiatric examinations of the parties.

Dixon and Hunt, by Daniel R. Dixon and Robert Monroe, for plaintiff appellant.

No brief filed by defendant appellee.

ARNOLD, Judge.

The record on appeal does not contain the pleadings on which the case was tried as required by Rule 9(b)(1) of the Rules of Appellate Procedure. Incorporated by reference and attached as an exhibit was the record on appeal of a prior, and premature, appeal in this action. This procedure does not satisfy the requirement of Rule 9(b)(1), and the appeal is subject to dismissal. *Johnson v. Hooks,* 27 N.C. App. 584, 219 S.E. 2d 664 (1975).

However, we have considered the merits of the assignments of error brought forward and argued in appellant's brief. We discern no error and affirm the order of the trial court.

Affirmed.

Judges MORRIS and CLARK concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 1 DECEMBER 1976

IN RE BREEDLOVE No. 7630DC560	Swain (76SP6)	Affirmed
STATE v. BEACHEM No. 7626SC451	Mecklenburg (75CR0462)	No Error
STATE v. HARDISON No. 7613SC552	Bladen (74CR0730)	No Error
STATE v. HUTCHINSON No. 7618SC520	Guilford (75CR14047)	No Error
STATE v. LOFTON No. 768SC556	Wayne (75CR10870(b))	No Error
STATE v. MORGAN No. 7621SC521	Forsyth (76CR0017)	No Error
STATE v. ORR No. 7620SC535	Union (75CR7585)	No Error
STATE v. OXNER No. 7626SC399	Mecklenburg (75CR60670)	No Error
STATE v. PIERCE No. 7610SC541	Wake (76CR9351-B)	No Error
STATE v. SHOOK No. 7612SC547	Cumberland (75CR25134)	No Error

FILED 15 DECEMBER 1976

CHURCH v. BOARD OF EDUCATION No. 7624SC386	Madison (75CVS87)	Dismissed
CREWS v. CREWS No. 7614SC437	Durham (73CVS5412)	Affirmed
FARR v. FARR No. 7628DC581	Buncombe (74CVD3712)	Affirmed
FOSTER v. FOSTER No. 7628DC574	Buncombe (74CVD4097)	Affirmed
GENERAL ELECTRIC CO. v. FIDELITY & GUARANTY CO. No. 7615SC526	Alamance (75CVS689)	Reversed & Remanded
IN RE BARNES No. 762SC400	Washington (75SP53)	Affirmed

McADAMS v. FIDELITY & GUARANTY CO. No. 7615SC525	Alamance (75CVS800)	Reversed & Remanded
MONTGOMERY v. DEPT. OF MOTOR VEHICLES No. 7626SC466	Mecklenburg (75CVS8785)	Affirmed
SCHULZ v. SCHULZ No. 7610DC475	Wake (74CVD5775)	Reversed & Remanded
STATE v. ADAMS No. 7627SC578	Gaston (75CR28657)	No Error
STATE v. ANDREWS No. 768SC482	Lenoir (75CR10359) (75CR10365) (75CR10366) (75CR10386) (75CR10387) (75CR10396) (75CR10397)	No Error
STATE v. BECKER No. 764SC572	Onslow (75CR13649)	No Error
STATE v. BLOUNT No. 763SC545	Craven (72CR5912)	Affirmed
STATE v. EDWARDS No. 767SC597	Wilson (76CR0013)	No Error
STATE v. FOUST No. 7619SC593	Randolph (75CR12290)	No Error
STATE v. SAULS No. 768SC601	Wayne (75CR12413)	No Error
STATE v. STARNES No. 7615SC499	Alamance (74CRS13819)	Dismissed
STATE v. WALLACE No. 7622SC604	Davidson (76CR5211)	Affirmed
STATE v. WHISNANT No. 7625SC580	Burke (75CRS272)	No Error
TOPPING v. RESPASS No. 762DC562	Beaufort (74CVD1190)	Affirmed

APPENDIX

ADDITION TO
RULES OF APPELLATE PROCEDURE

ADDITION TO NORTH CAROLINA RULES OF APPELLATE PROCEDURE

There shall be added to Rule 30 of the Rules of Appellate Procedure subparagraph "(f)," which shall read as follows:

(f) *Pre-argument review; decision of appeal without oral argument.*

(1) The Chief Judge of the Court of Appeals may from time to time designate a panel to review any pending case, after all briefs are filed but before argument, for decision under this rule.

(2) If all of the judges of the panel to which a pending appeal has been referred conclude that oral argument will not be of assistance to the Court, the case may be disposed of on record and briefs. Counsel will be notified not to appear for oral argument.

This addition to Rule 30 was adopted by the Supreme Court in conference on May 3, 1976, to become effective immediately upon its adoption. It shall be promulgated by publication in the next succeeding Advance Sheets of both the Supreme Court and the Court of Appeals.

Exum, J.
For the Court

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this index, e.g. Appeal and Error § 1, correspond with titles and section numbers in the N. C. Index 2d.

TOPICS COVERED IN THIS INDEX

ACCOUNTS

§ 1. Open and Running Accounts

Trial court's findings that femme defendant was not personally liable to plaintiff for goods sold on account to a business operated by the male defendant were supported by competent evidence and binding on appeal. *Williams v. Liles*, 345.

ADMINISTRATIVE LAW

§ 2. Exclusiveness of Statutory Remedy

A school principal's action to prohibit a board of education from dismissing her as principal was properly dismissed for failure to exhaust administrative remedies. *Church v. Board of Education*, 641.

§ 5. Appeal, Certiorari and Review as to Administrative Orders

Decision by the Secretary of the Department of Administration ordering petitioners to forfeit a bid bond was an "administrative decision" which was subject to judicial review. *In re Metric Constructors*, 88.

Where judicial review of administrative decision was provided for by statute, reviewing court properly issued a writ of certiorari as an ancillary writ to require the administrative agency to send up the records and documents necessary to dispose of the appeal. *Ibid.*

Superior court had no authority to enter a stay order of a State employee's dismissal before exhaustion of the employee's administrative remedies. *Stevenson v. Dept. of Insurance*, 299.

ADVERSE POSSESSION

§ 25. Sufficiency of Evidence

Evidence in an adverse possession proceeding was sufficient to support a finding that plaintiff held the land in question under known and visible boundaries continuously for more than 20 years. *Wiggins v. Taylor*, 79.

APPEAL AND ERROR

§ 6. Judgments and Orders Appealable

Trial court's order staying collection of costs of depositions taken by defendants until termination of a subsequent action was not immediately appealable by defendants. *Bell v. Moore*, 386.

Purported appeal from an order denying Rule 34(a) motion requiring defendant to allow plaintiff to inspect and copy certain documents is dismissed as premature. *Packing Co. v. Amalgamated Meat Cutters*, 595.

§ 16. Jurisdiction and Powers of Lower Court After Appeal

After an appellate court ordered a new trial in an action for alimony without divorce, district court had jurisdiction to entertain a motion that defendant be adjudged in contempt for failure to comply with an alimony pendente lite order. *Traywick v. Traywick*, 363.

If a child custody order is upheld by the appellate court, a violation of the order may be inquired into when the cause is remanded to the trial court. *Sturdivant v. Sturdivant*, 341.

APPEAL AND ERROR—Continued

§ 39. Time of Docketing

Appeal is dismissed where the record on appeal was filed more than 150 days after notice of appeal was given and the record was not filed within 10 days after certification by the clerk. *In re Allen*, 597.

§ 41. Form and Requisites of Transcript

Appeal is dismissed for failure of appellant to obtain the clerk's certification of the record on appeal within 10 days after the trial judge settled the record on appeal. *Ledwell v. County of Randolph*, 522.

Requirement that record on appeal contain the pleadings was not satisfied where a prior record on appeal was attached as an exhibit to the present record and incorporated by reference therein. *Williams v. Williams*, 747.

§ 42. Matters Properly Included in Record

Appellate court will not consider correspondence which was not a part of the court proceedings. *Sturdivant v. Sturdivant*, 341.

ARREST AND BAIL

§ 3. Right of Officers to Arrest Without Warrant

An officer had probable cause to believe defendant had committed the felony of possessing LSD, and the officer's arrest of defendant without a warrant was lawful. *S. v. Hardy*, 67.

Even if defendant's warrantless arrest was illegal by virtue of the fact that she committed no felony or misdemeanor in the presence of the arresting officer, the officer had probable cause to arrest defendant and the arrest was constitutionally valid. *S. v. Gwaltney*, 240.

§ 4. Territory in Which Officer May Arrest

Though an arrest by a city police officer made more than three miles from the city limits was illegal, it was not unconstitutional and evidence obtained pursuant to the arrest was constitutionally admissible. *S. v. Williams*, 237.

A lawful arrest by a State Trooper would not become unlawful because the city policeman who joined in making the arrest was outside his territorial jurisdiction. *Ibid.*

ASSAULT AND BATTERY

§ 5. Assault With a Deadly Weapon

A gun is a deadly weapon per se, and whether or not the gun is loaded is immaterial. *S. v. Ross*, 394.

§ 8. Defense of Self

In an assault prosecution where self-defense was pleaded, trial court erred in excluding testimony concerning defendant's knowledge of the victim's violent nature. *S. v. Hall*, 34.

§ 14. Sufficiency of Evidence

Evidence was sufficient for the jury where it tended to show that defendant directed police officers to the scene of the crime and the victim identified defendant as the attacker. *S. v. Boyd*, 328.

ASSAULT AND BATTERY—Continued

§ 15. Instructions

Trial court's instructions in an assault prosecution concerning self-defense were insufficient. *S. v. Hall,* 34.

Court sufficiently charged on the element of inflicting serious injury in a prosecution for felonious assault. *S. v. Ware,* 292.

Court erred in failing to include not guilty by reason of self-defense as a possible verdict in his final mandate to the jury. *S. v. Woodson,* 400.

Trial court erred in failing to charge on accident or misadventure. *S. v. Best,* 389.

The trial court in a felonious assault case erred in failing to instruct on defendant's right to defend himself in his home where the evidence showed defendant was standing on the porch of his home when he shot the victim. *S. v. Woodson,* 400.

§ 16. Necessity of Submitting Lesser Degrees of the Offense

Trial court in felonious assault case did not err in failing to instruct the jury concerning the misdemeanor of assault with a deadly weapon not inflicting serious injury. *S. v. Williams,* 111.

§ 17. Verdict

Where the jury foreman stated the verdict was "guilty of assault with a deadly weapon with intent to kill," the clerk's inquiry as to whether the verdict included "inflicting serious injury" was a proper inquiry to an unresponsive verdict, and the trial court properly accepted the verdict of assault with a deadly weapon with intent to kill inflicting serious injury. *S. v. Ware,* 292.

ASSOCIATIONS

§ 2. Membership and Rights of Members

The board of directors of a cooperative apartment association did not act arbitrarily and capriciously in refusing to approve sale of stock subscription and lease to a purchaser who intended to sublet rather than occupy the purchased apartment. *Sanders v. The Tropicana,* 276.

ATTORNEY AND CLIENT

§ 10. Disbarment and Disciplinary Proceedings

Adjudication of guilt and judgment of conviction entered upon an attorney's plea of nolo contendere to a prior offense were sufficient to prove the commission of a criminal offense showing professional unfitness. *State Bar v. Hall,* 166.

AUTOMOBILES

§ 2. Grounds and Procedure for Suspension of Driver's License

Trial court had inherent authority to dismiss a proceeding to have defendant declared an "habitual offender" of the traffic laws upon determining that the district attorney failed to bring the proceeding "forthwith" and that respondent was prejudiced thereby. *S. v. Ward,* 104.

Two year delay of the solicitor in filing a petition to have defendant declared an habitual offender was unreasonable. *S. v. Stanley,* 109.

AUTOMOBILES—Continued

§ 3. Driving After Revocation of License

The State's evidence was sufficient for the jury on issues of defendant's guilt of driving while his license was revoked and displaying a license known to be revoked. *S. v. Hayes,* 121.

Manner of giving notice of revocation of driver's license provided by G.S. 20-48 complies with due process. *Ibid.*

§ 46. Opinion Testimony as to Speed

Trial court erred in allowing an officer who did not see the vehicle in motion to express an opinion as to speed. *Johnson v. Yates,* 358.

Passenger was properly allowed to testify that she "could see that the speedometer was past a hundred." *S. v. McCall,* 543.

§ 51. Excessive Speed

Evidence tending to show defendant's excessive speed was sufficient to require submission of an issue of defendant's wilful and wanton negligence to the jury. *Johnson v. Yates,* 358.

§ 57. Exceeding Reasonable Speed at Intersection

In an action to recover for personal injuries sustained in an automobile accident occurring at an intersection, trial court properly determined that one defendant was not negligent as a matter of law. *Moore v. Archie,* 209.

§ 63. Striking Children

Trial court in a personal injury action did not err in excluding minor plaintiff's hospital records together with evidence of force with which minor plaintiff was hit by defendant's cab since the issue of damages was not reached. *Wright v. Cab Co.,* 525.

§ 72. Sudden Emergency

In a personal injury action trial court's reference to the negligence of minor plaintiff in instructing on sudden emergency did not amount to prejudicial error. *Wright v. Cab Co.,* 525.

§ 73. Nonsuit on Ground of Contributory Negligence

Where the death of plaintiff's intestate is the result of wilful and wanton conduct on the part of defendant, the intestate's contributory negligence will not bar recovery. *Johnson v. Yates,* 358.

Plaintiff's allegation of wilful and wanton negligence was sufficient to permit recovery even if plaintiff was contributorily negligent. *Siders v. Gibbs,* 481.

§ 86. Last Clear Chance

In an action for personal injuries sustained by plaintiff pedestrian, evidence was insufficient to require submission of the issue of last clear chance to the jury. *Artis v. Wolfe,* 227.

§ 87. Nonsuit for Intervening Negligence

Evidence was sufficient to show that one defendant's negligence insulated another defendant's negligence from any causal connection with plaintiff's injury in an intersection accident. *Moore v. Archie,* 209.

AUTOMOBILES—Continued

AUTOMOBILES—Continued

tests did not violate defendant's right against self-incrimination, and admission of such evidence was not dependent upon whether Miranda warnings were given defendant. *S. v. Flannery,* 617.

G.S. 20-139.1 is not violated when a request for chemical analyses of breath and blood comes from the arresting officer, and such officer is competent to testify as to defendant's refusal to submit to the test. *Ibid.*

§ 127. Sufficiency of Evidence of Driving Under the Influence

Evidence was sufficient for the jury in a prosecution for driving under the influence. *S. v. Flannery,* 617.

§ 129. Instructions

Since guilty knowledge is not an element of the crime of operating a vehicle upon the highways of the State when the amount of alcohol in one's blood was .10% or more by weight, trial court did not err in failing to instruct that in order to violate G.S. 20-138(b) defendant must have known or had reasonable grounds to believe that he was drinking alcohol. *S. v. Hill,* 733.

In a prosecution of defendant for driving when his blood contained .10% or more by weight of alcohol, it was not error for the trial court to fail to instruct that evidence of a breathalyzer test reading was rebuttable on the issue of whether defendant's blood level was .10% or higher by weight. *Ibid.*

§ 134. Unlawful Taking

Statute prohibiting receiving, transferring or possessing a vehicle with knowledge or reason to believe it to have been stolen is not unconstitutionally vague. *S. v. Lockamy,* 713.

BASTARDS

§ 3. Limitations on Prosecutions; Parties and Jurisdiction

Though an action for wilful neglect to support an illegitimate child was improperly brought before the child was born, the trial court could determine the issue of paternity before the child's birth. *S. v. Morgan,* 128.

§ 8. Verdict and Findings

Prior conviction of failure to support an illegitimate child was not conclusive as to paternity in a civil action for support of the child. *Smith v. Burden,* 145.

§ 10.5. Action to Establish Paternity

In a proceeding to determine paternity of an illegitimate child, trial court did not err in allowing the child to be exhibited to the jury. *S. v. Morgan,* 128.

BETTERMENTS

§ 1. Nature and Requisites of Claim

Defendant was not entitled to betterments where evidence showed improvements were made while he was a tenant of his father or mother. *Hackett v. Hackett,* 217.

BILL OF DISCOVERY

§ 6. Discovery in Criminal Cases

Evidence was sufficient to support trial court's finding that the State complied substantially with a pre-trial discovery order directing the district attorney to reveal certain photographs to counsel for defendant. *S. v. Artis,* 193.

Failure of the district attorney to furnish to defense counsel until the day before trial statements made by defendant when he first went to the sheriff's office to report his wife was missing did not constitute a violation of G.S. Ch. 15A, Art. 48 where the district attorney notified defendant's attorney of the statements as soon as he decided to use them at trial. *S. v. Morrow,* 654.

BILLS AND NOTES

§ 19. Defenses and Competency of Parol Evidence

Evidence of an alleged oral agreement by defendant bank to renew plaintiff's unsecured demand notes until payment could be made from proceeds of the sale of certain apartment projects would not violate the parol evidence rule. *Mozingo v. Bank,* 157.

Plaintiff's complaint was sufficient to raise the defense of lack of consideration to defendant bank's counterclaim on a secured note given by plaintiffs to defendant in lieu of outstanding unsecured notes. *Ibid.*

§ 20. Sufficiency of Evidence

Plaintiffs' verified complaint was sufficient to raise a genuine issue as to whether defendant breached an agreement to return to plaintiffs a note given as security for a loan upon plaintiffs' payment to defendant of a portion of the loan. *Mozingo v. Bank,* 157.

BROKERS AND FACTORS

§ 8. Licensing and Regulation

That section of G.S. 93A-2(a) which defines a real estate broker as one who for a fee sells the names of persons or others who have real estate for sale, rental or lease is unconstitutional. *Real Estate Licensing Board v. Aikens,* 8.

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 4. Rescission for Mutual Mistake

Plaintiff was entitled to rescission of a contract to purchase a hotel where both parties were mutually mistaken as to the permissibility under the city's zoning ordinance of a conversion and use of the hotel for apartments. *Homes, Inc. v. Gaither,* 118.

CONSTITUTIONAL LAW

§ 12. Regulation of Trades and Professions

That section of G.S. 93A-2(a) which defines a real estate broker as one who for a fee sells the names of persons or others who have real estate for sale, rental or lease is unconstitutional. *Real Estate Licensing Board v. Aikens,* 8.

CONSTITUTIONAL LAW—Continued

§ 18. Rights of Free Speech

Ordinance prohibiting use of a loudspeaker audible beyond 150 feet was constitutional. *S. v. Smedberg,* 585.

§ 30. Due Process in Trial

Defendant failed to show that his right to a speedy trial was denied. *S. v. Artis,* 193.

Probable cause existed for the issuance of an arrest warrant for defendant, and the taking of photographs of defendant after his arrest did not violate his constitutional rights. *S. v. Freeman,* 335.

Defendant's contention that an in-court identification of himself by the victim of an armed robbery should have been excluded as the fruit of an illegal arrest was without merit. *Ibid.*

Juveniles are entitled to the same due process protections as adults in any proceeding where a loss of liberty is a possible result. *In re Mikels,* 470.

A defendant convicted in the district court of misdemeanor of assault on a child under the age of 12 was denied due process when, upon his appeal for a trial de novo in superior court, he was tried upon an indictment charging felonious assault. *S. v. Mayes,* 694.

§ 31. Right of Confrontation and Access to Evidence

In a prosecution for felonious possession of heroin with intent to sell, trial court did not err in denying defendant's motion for disclosure of the identity of an unnamed informant. *S. v. Vinson,* 318.

In a trial of defendant and his companion for the same armed robbery, trial court did not err in refusing to suppress the entire confession of defendant's companion since the confession was modified to delete all parts which referred to the defendant. *S. v. Freeman,* 335.

§ 33. Self-incrimination

Trial court did not err in allowing the State to cross-examine a defense witness as to why he had remained silent concerning defendant's alibi until the trial. *S. v. Lankford,* 13.

In a prosecution for driving under the influence, admission of evidence of defendant's refusal to submit to breathalyzer and physical dexterity tests did not violate defendant's right against self-incrimination, and admission of such evidence was not dependent upon whether Miranda warnings were given defendant. *S. v. Flannery,* 617.

Lawful seizure of defendant's business records and introduction into evidence did not violate his right against self-incrimination. *S. v. Downing,* 743.

§ 37. Waiver of Constitutional Guaranties

Evidence was sufficient to support the judge's findings that defendant's oral waiver of his right to counsel was made voluntarily and understandingly. *S. v. Boyd,* 328.

Trial court properly concluded that defendant knowingly waived his right to have counsel present during interrogation and freely made inculpatory statements admissible in a case against him. *S. v. Banks,* 667.

Trial court properly concluded that defendant was fully warned of and waived his right to remain silent. *S. v. Rives,* 682.

CONTRACTS

§ 6. Contracts Against Public Policy

There was a genuine issue as to whether defendant was a general contractor who undertook construction of a showroom addition exceeding the limitation of his license or whether he acted only as a construction supervisor for plaintiff. *Furniture Mart v. Burns*, 626.

§ 27. Sufficiency of Evidence and Nonsuit

In an action to recover a sum due upon a contract whereby plaintiff sold acetone to defendant, trial court did not err in failing to submit to the jury an issue as to whether defendant accepted the goods and, if so, whether defendant revoked its acceptance of the goods. *Chemical Corp. v. Paint Co.*, 221.

Evidence was sufficient for the jury in an action to recover damages for breach of contract to install doors and windows in plaintiff's motel. *Wycoff v. Paint & Glass Co.*, 246.

§ 29. Measure of Damages for Breach of Contract

In an action to recover a sum due on a contract for the sale of acetone, trial court properly instructed the jury on the amount of damages. *Chemical Corp. v. Paint Co.*, 221.

CORPORATIONS

§ 18. Sale and Transfer of Stock

The board of directors of a cooperative apartment association did not act arbitrarily and capriciously in refusing to approve sale of stock subscription and lease to a purchaser who intended to sublet rather than occupy the purchased apartment. *Sanders v. The Tropicana*, 276.

§ 24. Sales and Chattel Mortgages

Plaintiff's evidence was insufficient to show a valid and enforceable security interest in the assets of a motor company. *Little v. Orange County*, 495.

COUNTIES

§ 8. Contracts

A county's contract for grading work in the construction of a county airport was invalid where it failed to contain certification by the county accountant that provision for payment of money due under the contract had been made by appropriation or by bonds or notes duly authorized. *Rockingham County v. Reynolds Co.*, 151.

COURTS

§ 21. What Law Governs; as Between Laws of This State and Other States

Since the validity and construction of a contract are to be determined by the law of the place where the contract was made, an action to recover on a lease agreement is remanded to the trial court to make a finding as to whether the agreement was made in California or N. C. *Leasing, Inc. v. Dan-Cleve Corp.*, 634.

CRIMINAL LAW

§ 7. Entrapment and Compulsion

Instruction placing on defendant the burden of proving entrapment to the satisfaction of the jury does not contravene the Mullaney decision. *S. v. Braun*, 101.

State's evidence in a prosecution for possession of marijuana did not disclose entrapment as a matter of law because of the conduct of an undercover agent but required submission of that issue to the jury. *S. v. Braun*, 101.

State's evidence did not show that defendant was coerced by a co-defendant into participating in an armed robbery and was sufficient to support a finding that he was a principal in the crime. *S. v. Wilson*, 323.

§ 9. Principals in the First or Second Degree; Aiders and Abettors

Where there is insufficient evidence to convict a named principal defendant, another person may not be convicted of aiding and abetting him. *S. v. Austin*, 20.

§ 15. Venue

Defendant was not entitled to dismissal of the murder charge on the ground the indictment charged the killing occurred in Rutherford County but proof indicated it occurred in McDowell County. *S. v. Morrow*, 654.

§ 16. Status of Offense; Concurrent and Exclusive Jurisdiction

Trial court properly denied defendant's motion to dismiss indictments charging the felonious sale of narcotics on the ground that warrants charging defendant with misdemeanors of unlawfully dispensing pharmaceutical preparations based on the same drug sales had been issued and served before the indictments charging the felonies were returned. *S. v. Austin*, 20.

Superior court did not have original jurisdiction to try defendant for the misdemeanor of receiving stolen goods. *S. v. Morrow*, 595.

§ 18. Jurisdiction on Appeal to Superior Court

A defendant convicted in the district court of misdemeanor of assault on a child under the age of 12 was denied due process when, upon his appeal for a trial de novo in superior court, he was tried upon an indictment charging felonious assault. *S. v. Mayes*, 694.

§ 21. Preliminary Proceeding

The rule dispensing with requirement for a preliminary hearing when defendant had been charged by indictment was not altered by enactment of G.S. 15A-606(a). *S. v. Sutton*, 697.

§ 23. Plea of Guilty

The record in a criminal case must affirmatively show on its face that defendant's guilty plea was knowing and voluntary. *In re Chavis*, 579.

§ 25. Plea of Nolo Contendere

In a disciplinary action against an attorney, adjudication of guilt and judgment of conviction entered upon the attorney's plea of nolo contendere to a prior offense were sufficient to prove the commission of a criminal offense showing professional unfitness. *State Bar v. Hall*, 166.

CRIMINAL LAW—Continued

§ 26. Plea of Former Jeopardy

Where defendant pled guilty in district court to misdemeanor possession of marijuana, trial of defendant in superior court for felonious possession with intent to sell or manufacture would subject defendant to double jeopardy. *S. v. Urban,* 531.

§ 34. Evidence of Defendant's Guilt of Other Offenses

Trial court erred in admission of an SBI agent's testimony that he investigated "the possibility" that defendant was taking marijuana into Central Prison. *S. v. Bryant,* 396.

Evidence of defendant's participation in a separate offense was admissible to show mental intent and to establish a common plan or scheme. *S. v. Sink,* 726.

§ 66. Evidence of Identity by Sight

Trial court properly permitted in-court identification of defendant based on observations at the crime scene but erred in admitting testimony of a one-man lineup identification. *S. v. Williamson,* 132.

Trial court properly concluded that in-court identification of defendant was not tainted by pretrial photographic identification. *S. v. Davis,* 134.

Defendant's contention that an in-court identification of himself by the victim of an armed robbery should have been excluded as the fruit of an illegal arrest was without merit. *S. v. Freeman,* 335.

Robbery victim's in-court identification of defendant was of independent origin and not tainted by his identification of defendant at an illegal lineup, conducted without defendant having been advised of his right to counsel. *S. v. Harvey,* 372.

§ 70. Tape Recordings

Trial court properly excluded a tape recording of telephone conversations made by defendant. *S. v. Harmon,* 368.

§ 71. "Short-hand" Statement of Fact

Testimony by an automobile passenger that she could tell that defendant "was about to lose control" of the vehicle was competent as an instantaneous conclusion of the mind. *S. v. McCall,* 543.

§ 73. Hearsay Testimony

Court committed prejudicial error in admitting into evidence an affidavit to obtain a search warrant which was based on hearsay and referred to other pending criminal charges against defendant. *S. v. Austin,* 20.

§ 75. Test of Voluntariness of Confession; Admissibility

Motion to suppress in-custody statement was properly denied although voir dire evidence was conflicting. *S. v. Anderson,* 113.

In a prosecution for driving under the influence, failure of an officer investigating an accident to advise defendant of her Miranda rights before questioning her did not render her admission that she was driving the automobile inadmissible. *S. v. Gwaltney,* 240.

Statements made by defendant prior to warnings of his rights were voluntary and not the result of an in-custody interrogation. *S. v. Boyd,* 328.

CRIMINAL LAW—Continued

Defendant's oral waiver of his right to counsel was made voluntarily and understandingly. *Ibid.*

Trial court properly concluded that defendant knowingly waived his right to have counsel present during interrogation and freely made inculpatory statements admissible in a case against him. *S. v. Banks*, 667.

Trial court properly concluded that defendant was fully warned of and waived his right to remain silent. *S. v. Rives*, 682.

§ 76. Determination and Effect of Admissibility of Confession

Admissibility of a confession is a matter for determination by the judge unassisted by the jury, while credibility and weight are for determination by the jury unassisted by the judge. *S. v. Harmon*, 368.

§ 80. Records and Private Writings

Lawful seizure of defendant's business records and introduction into evidence did not violate his right against self-incrimination. *S. v. Downing*, 743.

§ 84. Evidence Obtained by Unlawful Means

Though an arrest by a city police officer made more than three miles from the city limits was illegal, it was not unconstitutional and evidence obtained pursuant to the arrest was constitutionally admissible. *S. v. Williams*, 237.

§ 86. Credibility of Defendant

Trial court properly allowed defendant to be cross-examined concerning certain specific criminal acts committed by him which were collateral to the crime for which he was on trial. *S. v. Page*, 740.

§ 88. Cross-Examination

Trial court did not err in allowing the State to cross-examine a defense witness as to why he had remained silent concerning defendant's alibi until the trial. *S. v. Lankford*, 13.

Trial court properly sustained State's objection to a question as to whether a witness would stand to gain from a claim that deceased's estate would file against defendant and his insurer. *S. v. McCall*, 543.

§ 89. Credibility of Witness; Corroboration

Testimony by a child's grandmother was properly admitted for the purpose of corroborating the child's testimony in a prosecution for taking indecent liberties with a child. *S. v. Wells*, 736.

§ 91. Continuance

Defendant's constitutional rights were not denied by the dismissal of his motion for continuance because of the absence of a subpoenaed witness where it was stipulated that defense counsel could state to the jury what the witness would have testified. *S. v. Butcher*, 572.

§ 95. Admission of Evidence Competent for Restricted Purpose

Defendant was not entitled to a limiting instruction on corroborative evidence absent a request therefor. *S. v. Lankford*, 13.

In a trial of defendant and his companion for the same armed robbery, trial court did not err in refusing to suppress the entire confession

CRIMINAL LAW—Continued

of defendant's companion since the confession was modified to delete all parts which referred to the defendant. *S. v. Freeman*, 335.

§ 98. Presence of Defendant at Trial; Custody of Witnesses

Motion to sequester witnesses is addressed to the discretion of the trial judge. *S. v. Anderson*, 113.

Defendant waived his right to be present at a portion of his trial by his voluntary absence therefrom, and defendant was not prejudiced by the court's continuation of the charge during defendant's brief absence from the courtroom on another occasion. *S. v. Wilson*, 323.

§ 99. Expression of Opinion by Court on Evidence During Trial

In a prosecution for filing a false insurance claim, trial judge expressed an opinion in violation of G.S. 1-180 when, in disposing of an unrelated case by guilty plea during a pause in defendant's case, he stated in the presence of the jury, "What is this, another case of somebody ripping off an insurance company?" *S. v. Teasley*, 729.

§ 101. Conduct of Jury

In a first degree murder case, trial court erred in denying defendant's motions for a mistrial based on alleged jury misconduct without calling the juror to determine if any prejudice occurred to defendant. *S. v. Drake*, 187.

§ 102. Argument and Conduct of District Attorney

District attorney's reference to defendant's failure to testify was not prejudicial to defendant. *S. v. Freeman*, 335.

§ 112. Instructions on Burden of Proof and Presumptions

Instruction that jury should acquit defendant of second degree murder "if the State has satisfied you beyond a reasonable doubt, or if you have a reasonable doubt as to each and all of those elements which I have just outlined" constituted harmless error. *S. v. Anderson*, 113.

§ 113. Statement of Evidence and Application of Law Thereto

Charge susceptible to the construction that the jury must either acquit both defendants or convict both defendants constitutes reversible error. *S. v. Lockamy*, 713.

§ 118. Charge on Contentions of the Parties

Trial judge's statement of the State's contentions in a homicide case amounted to an expression of opinion on the facts. *S. v. Moore*, 536.

§ 121. Instructions on Defense of Entrapment

Instruction placing on defendant the burden of proving entrapment to the satisfaction of the jury does not contravene the Mullaney decision. *S. v. Braun*, 101.

§ 124. Sufficiency and Effect of Verdict

In a prosecution for felonious sale and delivery of controlled substances, trial court did not err in allowing to stand verdicts of guilty on the indictment relating to refills of a prescription but not the original issuance of the prescription. *S. v. Best*, 250.

CRIMINAL LAW—Continued

Where the jury foreman stated the verdict was "guilty of assault with a deadly weapon with intent to kill," the clerk's inquiry as to whether the verdict included "inflicting serious injury" was a proper inquiry to an unresponsive verdict, and the trial court properly accepted the verdict of assault with a deadly weapon with intent to kill inflicting serious injury. *S. v. Ware*, 292.

§ 126. Unanimity of Verdict

Where there is confusion in the verdict of the jury, it is proper for the court to clarify and ascertain the verdict upon which all jurors agreed by questioning the jurors. *S. v. Vinson*, 318.

Trial court's instructions to the jury as to the unanimity of their verdict acted to coerce the jury. *S. v. Sutton*, 697.

§ 137. Conformity of Judgment to Verdict

Judgment and commitment in a prosecution for possession of marijuana are corrected to conform with the verdict. *S. v. Gillespie*, 520.

§ 138. Severity of Sentence

Defendant's challenge to a sentence recommending work release imposed upon his conviction of involuntary manslaughter was prematurely raised on appeal. *S. v. Walker*, 199.

§ 143. Revocation of Suspension of Sentence

Defendant was not denied due process by the State's failure to give her a preliminary hearing prior to her probation revocation hearing. *S. v. Webb*, 691; *S. v. O'Connor*, 518.

Trial court did not err in failing to credit defendant with time spent on probation when it activated defendant's suspended sentence. *S. v. Webb*, 691.

§ 148. Judgments Appealable

No appeal lies from the trial court's continuance of prayer for judgment. *S. v. Cheek*, 379.

§ 154. Case on Appeal

Attorneys who filed two records in an appeal from a consolidated trial will be taxed with the costs of printing the unnecessary record. *S. v. Wilson*, 323; *S. v. Davis*, 590.

Defendant's appeal is dismissed where the record on appeal was presented to the clerk of superior court for certification more than 10 days after it was settled. *S. v. Motsinger*, 594.

§ 162. Objections, Exceptions and Assignments of Error to Evidence

Question of whether court erred in permitting child to whisper a portion of her testimony to the court reporter, who then read it to the jury, was not presented where defendant failed to object to the procedure. *S. v. Wells*, 736.

§ 163. Exceptions and Assignments of Error to Charge

Defendant's exceptions and assignments of error to the trial court's charge were broadside and ineffectual. *S. v. Snyder*, 745.

CRIMINAL LAW—Continued

§ 165. Exceptions and Assignments of Error to District Attorney's Argument

Trial court did not abuse its discretion in refusing to record a portion of the district attorney's argument to which defendant had objected where counsel for the State and defendant agreed that jury arguments would not be recorded. *S. v. Small,* 556.

DECLARATORY JUDGMENT ACT

§ 1. Nature and Grounds of Remedy

Determination of the status of adopted children under the terms of a will is within the purpose of the Declaratory Judgment Act. *Stoney v. MacDougall,* 678.

DESCENT AND DISTRIBUTION

§ 2. Determination of Method of Acquiring Property

Cross deeds of partition operated only to sever the unity of possession and conveyed no title to purported remaindermen named therein. *Scott v. Moser,* 268.

DIVORCE AND ALIMONY

§ 18. Alimony Pendente Lite

After an appellate court ordered a new trial in an action for alimony without divorce, district court had jurisdiction to entertain a motion that defendant be adjudged in contempt for failure to comply with an alimony pendente lite order. *Traywick v. Traywick,* 363.

§ 22. Jurisdiction and Procedure in Custody Proceeding

If a child custody order is upheld by the appellate court, a violation of the order may be inquired into when the cause is remanded to the trial court. *Sturdivant v. Sturdivant,* 341.

§ 23. Support of Children of the Marriage

Father's agreement to make payments for support and education of his son until he reaches "age 21 or is emancipated" terminates when the son attains age 18. *Loer v. Loer,* 150.

Court erred in holding defendant in contempt for failure to make child support payments on time where defendant paid the delinquent amounts prior to the hearing on the motion to hold him in contempt. *Hudson v. Hudson,* 547.

§ 24. Custody of Children of the Marriage

In a hearing on a motion for change of child custody, trial court properly excluded evidence of circumstances and plaintiff's conduct at times prior to the original order giving plaintiff custody of the child. *Owen v. Owen,* 230.

Trial court's findings were supported by competent evidence in a hearing on defendant's motion to modify a previously entered judgment providing for child custody and support. *Stanback v. Stanback,* 174.

EJECTMENT

§ 1. Nature and Scope of Remedy of Summary Ejectment

Trial court in a summary ejectment proceeding erred in directing plaintiff to convey to defendant two acres of the land in question. *Hackett v. Hackett,* 217.

EMINENT DOMAIN

§ 2. Acts Constituting a "Taking"

Defendants were not entitled to compensation because of construction of traffic islands on their property. *Highway Comm. v. Rose,* 28.

§ 7. Proceeding to Take Land and Assess Compensation

Trial court's protective order which prohibited defendants from introducing maps or photographs depicting traffic islands near their property was improper. *Highway Comm. v. Rose,* 28.

EQUITY

§ 2. Laches

Respondent's action for reformation of a deed was not barred by laches. *Huss v. Huss,* 463.

EVIDENCE

§ 19. Evidence of Similar Facts and Transactions

In an action to recover the proceeds of two life policies which had a suicide exclusion, trial court did not err in excluding records of deceased's hospitalization for depression six months prior to his death. *Adcock v. Assurance Co.,* 97.

§ 29. Accounts, Ledgers and Private Writings

An affidavit of an attorney for plaintiff which set forth certain communications between affiant and defendant did not qualify as a verified itemized statement of the account between plaintiff and defendant. *Electric Corp. v. Shell,* 717.

In an action to recover a sum allegedly due on an open account, trial court did not err in refusing to allow into evidence a verified document purporting to be an itemized statement of defendant's account with plaintiff. *Ibid.*

§ 32. Parol or Extrinsic Evidence Affecting Writings

Evidence of an alleged oral agreement by defendant bank to renew plaintiff's unsecured demand notes until payment could be made from proceeds of the sale of certain apartment projects would not violate the parol evidence rule. *Mozingo v. Bank,* 157.

Evidence of statements and conduct of the parties to a real estate purchase agreement was admissible to explain an ambiguous handwritten term stating that "Inability to get financing on the basis of credit will void this contract." *Cordaro v. Singleton,* 476.

Evidence of conduct by the parties after executing a contract is not subject to the parol evidence rule. *Ibid.*

EVIDENCE — Continued

§ 48. Competency and Qualification of Experts

Trial court erred in refusing to accept the seller's area marketing manager as an expert witness on the mechanics of a concrete pump sold to defendant. *Credit Co. v. Concrete Co.*, 450.

§ 50. Medical Testimony

Trial court properly allowed defendants' medical experts to answer questions as to whether treatment conformed with medical practices "in this community and similar communities." *Bullard v. Bank*, 312.

Court properly allowed expert medical witnesses to answer hypothetical questions that included the opinion of another physician. *Ibid.*

FORGERY

§ 2. Prosecution and Punishment

Indictment alleging defendant uttered a check upon which the signature of a named person "had been forged with the intent to defraud" was not sufficient to allege the check was uttered with intent to defraud. *S. v. Hill*, 248.

GUARANTY

In an action to recover on a guaranty agreement, trial court properly entered summary judgment where there was no genuine issue of fact as to whether the principal debtor's debt to plaintiff was extinguished. *Cameron-Brown v. Spencer*, 499.

In an action to recover on a lease agreement, trial court did not err in holding the individual defendants personally responsible for the obligations of defendant corporation since individual defendants had executed a personal guaranty agreement. *Leasing, Inc. v. Dan-Cleve Corp.*, 634.

HIGHWAYS AND CARTWAYS

§ 5. Acquisition of Rights of Way

Court was not required to make findings and conclusions in an order denying motion for extension of time to file answer in a condemnation action brought by the Board of Transportation. *Board of Transportation v. Williams*, 125.

Final judgment was properly entered against non-answering defendants in a G.S. Ch. 136 condemnation proceeding without an entry of default having previously been entered. *Ibid.*

HOMICIDE

§ 19. Evidence Competent on Question of Self-Defense

Trial court in a homicide prosecution did not err in striking testimony concerning a specific act of violence by deceased one year prior to the crime. *S. v. Cole*, 673.

§ 21. Sufficiency of Evidence and Nonsuit

Evidence was sufficient for the jury where defendant directed police officers to the scene of the killing and made incriminating statements

INSURANCE — Continued

§ 37. Actions on Life Policies

In an action to recover the proceeds of two life policies which had a suicide exclusion, trial court did not err in excluding records of deceased's hospitalization for depression six months prior to his death. *Adcock v. Assurance Co.*, 97.

Defendant insurer failed to carry its burden of proof on the issue of death by suicide in an action on a life insurance policy. *Ibid.*

JUDGMENTS

§ 44. Judgments in Criminal Prosecutions as Bar to Civil Action

Prior conviction of failure to support an illegitimate child was not conclusive as to paternity in a civil action for support of the child. *Smith v. Burden*, 145.

Plaintiff is not estopped to proceed in a civil action for assault by defendant's acquittal of a criminal assault arising out of the same occurence. *Hussey v. Cheek*, 148.

JURY

§ 1. Right to Trial by Jury

Trial court did not err in granting defendants' motion for a jury trial made two years and ten months after the time for requesting a jury trial under Rule 38 had expired. *Bullard v. Bank*, 312; *Wycoff v. Paint & Glass Co.*, 246.

LANDLORD AND TENANT

§ 2. Form, Requisites and Validity of Leases

A document executed by the parties was a lease and not a conditional sales contract. *Leasing, Inc. v. Dan-Cleve Corp.*, 634.

LARCENY

§ 8. Instructions

Trial court's instructions concerning larceny of property worth more than $200 were proper. *S. v. Corpening*, 376.

Trial court's instructions on the value of goods taken in a felonious larceny case did not amount to an expression of opinion. *S. v. Reese*, 575.

LIBEL AND SLANDER

§ 5. General Rules as Applied to Particular Statements

Trial court properly dimissed a libel action by a private individual based on defendant newspaper's alleged publication of a false statement that plaintiff had been charged with "public nuisance." *Walters v. Sanford Herald*, 233.

§ 11. Absolute Privilege

Doctrine of absolute privilege applied to protect individual members of the N. C. Board of Medical Examiners from an action for defamation

MUNICIPAL CORPORATIONS — Continued

missible to explain, extend or supplement the record of proceedings of a municipal council. *George v. Town of Edenton,* 648.

§ 20. Injuries in Connection with Drains and Culverts

In an action to recover for damages to plaintiff's property caused by flooding during a rain storm resulting from defendant's alleged negligence in maintaining its drainage system, trial court erred in admitting evidence as to the condition of portions of a creek bed located on private property and in instructing the jury that defendant had adopted the creek as part of its drainage system. *Mitchell v. City of High Point,* 71.

§ 30. Zoning Ordinances

Timeliness of notice in zoning matters is a mandatory requirement that is strictly construed even where prejudice to a property owner is not shown. *George v. Town of Edenton,* 648.

Statutory requirement that a municipality designate a planning agency to develop and certify a zoning ordinance is a prerequisite only to the municipality's initial exercise of zoning power. *Ibid.*

NARCOTICS

§ 1. Elements and Essentials of Statutory Offense

Defendant was properly tried and convicted for two separate offenses of possession and sale of the same marijuana. *S. v. Lankford,* 13.

A defendant who was not a pharmacist could be convicted under the Controlled Substances Act for sale of a controlled substance in a pharmacy although the drug sold was exactly that called for by prescriptions which appeared regular in all respects. *S. v. Austin,* 20.

The N. C. Controlled Substances Act, G.S. 90-86 et seq., is not unconstitutional by virtue of its being inconsistent within itself, nor is the Act unconstitutionally vague. *S. v. Best,* 250.

§ 4. Sufficiency of Evidence and Nonsuit

State's evidence was insufficient for the jury in a prosecution of a pharmacist for aiding and abetting felonious sales of controlled substances. *S. v. Austin,* 20.

Evidence of possession of heroin for sale was insufficient for the jury where it showed only that defendant was in close proximity to drugs. *S. v. Weems,* 569.

§ 5. Verdict

In a prosecution of defendant for felonious sale and delivery of controlled substances, trial court did not err in allowing to stand verdicts of guilty on the indictment relating to refills of a prescription but not the original issuance of the prescription. *S. v. Best,* 250.

NEGLIGENCE

§ 10. Concurring and Intervening Negligence

Trial court erred in failing to instruct on joint and concurring negligence although plaintiff, having sued only one tort-feasor, did not try the case on that theory. *Warren v. Parks,* 609.

NEGLIGENCE — Continued

§ 29. Sufficiency of Evidence of Negligence

Evidence of plaintiff truck driver was sufficient for the jury in an action to recover for injuries sustained when he stepped in a hole dug by defendant plumbing company while making a delivery to defendant manufacturer. *Hargrove v. Plumbing and Heating Service*, 1.

Evidence of defendant's negligence was insufficient for the jury where it tended to show that he held a ladder while plaintiff removed leaves from defendant's roof. *Cox v. Dick*, 565.

§ 35. Nonsuit for Contributory Negligence

Oil truck driver was not contributorily negligent as a matter of law in failing to see at night a hole in the ground which was open, unmarked and covered by a fog of steam. *Hargrove v. Plumbing and Heating Service*, 1.

§ 51. Attractive Nuisance and Injury to Children

The attractive nuisance doctrine was inapplicable in an action for wrongful death where plaintiff's intestate was a 14 year old of at least average intelligence. *Lanier v. Highway Comm.*, 304.

In a wrongful death action where plaintiff's intestate drowned in a pit maintained by defendant, the presence of sharp drops and deep holes in the pit did not bring the case within an exception to the rule that bodies of water do not per se constitute attractive nuisances. *Ibid.*

§ 57. Sufficiency of Evidence and Nonsuit in Actions by Invitee

Plaintiff's evidence was insufficient for the jury on the issue of negligence by defendant grocery store in an action for injuries sustained when plaintiff fell on an allegedly wet terrazzo floor. *Stafford v. Food World*, 213.

§ 60. Duties and Liabilities to Trespassers

Defendant owed plaintiff's intestate, a trespasser, the duty not to injure her wilfully or wantonly. *Lanier v. Highway Comm.*, 304.

PARENT AND CHILD

§ 1. The Relationship Generally

Refusal of the natural parents to consent to adoption of their child and refusal of the father to submit to counseling do not constitute "serious neglect" which would permit the courts to terminate the parental rights of the natural parents. *In re Godwin*, 137.

§ 7. Duty to Support

Father's agreement to make payments for support and education of his son until he reaches "age 21 or is emancipated" terminates when the son attains age 18. *Loer v. Loer*, 150.

§ 10. Uniform Reciprocal Enforcement of Support Act

A district court judge had no authority under the Uniform Reciprocal Enforcement of Support Act to condition the payment of support for children residing in Florida upon visitation privileges in Florida and N. C. *Pifer v. Pifer*, 486.

PARTITION

§ 12. Partition by Exchange of Deeds

Cross deeds of partition operated only to sever the unity of possession and conveyed no title to purported remaindermen named therein. *Scott v. Moser*, 268.

PENALTIES

Statute providing for recovery of a penalty from the sheriff for making a false return does not apply to criminal proceedings. *Rollins v. Gibson*, 154.

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 1. Licensing and Regulation Generally

Provisions of Controlled Substances Act prohibiting a practitioner from distributing drugs other than for a legitimate medical purpose "within the normal course of professional practice" are not unconstitutionally vague. *S. v. Best*, 250.

§ 2. Licensing and Regulation of Pharmacists

A defendant who was not a pharmacist could be convicted under the Controlled Substances Act for sale of a controlled substance in a pharmacy although the drug sold was exactly that called for by prescriptions which appeared regular in all respects. *S. v. Austin*, 20.

State's evidence was insufficient for the jury in a prosecution of a pharmacist for feloniously furnishing false and fraudulent information on records required to be kept under Article 5 of G.S. Ch. 90. *Ibid.*

§ 15. Competency and Relevancy of Evidence; Matters in Exclusive Province of Experts

Trial court properly allowed defendants' medical experts to answer questions as to whether treatment conformed with medical practices "in this community and similar communities." *Bullard v. Bank*, 312.

Court properly allowed expert medical witnesses to answer hypothetical questions that included the opinion of another physician. *Ibid.*

Trial court did not err in allowing expert medical witnesses to use expressions such as "entirely appropriate" and "good medical care" in responding to hypothetical questions. *Ibid.*

§ 16. Sufficiency of Evidence of Malpractice

An action against a professional association was properly dismissed where the jury found no negligence by doctors who were members of the association. *Bullard v. Bank*, 312.

PLEADINGS

§ 11. Counterclaims and Cross Actions

Plaintiff's claim for fraud based on differences in the original and a purported duplicate of a conditional sales contract was a permissive, not compulsory, counterclaim in defendant's prior action on the contract against plaintiff to recover a deficiency judgment where plaintiff learned of the allegedly fraudulent acts by defendant during the prior trial. *Driggers v. Commercial Credit Corp.*, 561.

PRINCIPAL AND AGENT

§ 5. Scope of Authority

A real estate agent with whom property was listed for sale had apparent authority to contract on behalf of the sellers for a sale of the property. *Cordaro v. Singleton,* 476.

PRINCIPAL AND SURETY

§ 10. Private Construction Bonds

A contractor's payment bond covering "payment to all persons supplying labor and material" did not cover amounts due for the rental of equipment, the cost of repairs made on leased equipment after the equipment was returned to the lessor, or a tire adjustment charge. *Equipment Co. v. Smith,* 351.

Allegations in plaintiff subcontractor's complaint were sufficient to state a claim upon which relief could be granted against defendant surety. *RGK, Inc. v. Guaranty Co.,* 708.

PROCESS

§ 4. Proof of Service

Statute providing for recovery of a penalty from the sheriff for making a false return does not apply to criminal proceedings. *Rollins v. Gibson,* 154.

§ 7. Personal Service on Resident Individual

Officer's return on the summons indicating process had been left with defendant's mother "who resides in defendant's dwelling house or usual place of abode" failed to disclose that service was had on defendant by leaving process at defendant's dwelling house or usual place of abode as required by statute. *Guthrie v. Ray,* 142.

§ 9. Personal Service on Nonresident Individuals in Another State

Defendants, who were attorneys practicing in N. Y., were subject to the in personam jurisdiction of the courts of this State if they promised to pay for legal services to be rendered by plaintiff in this State. *Forman & Zuckerman v. Schupak,* 62.

§ 14. Service of Process on Foreign Corporation

A Connecticut corporation was subject to jurisdiction of the courts of this State in an action for breach of contract made in this State to provide permanent financing for a motel to be constructed in this State. *Equity Associates v. Society for Savings,* 182.

PROFESSIONS AND OCCUPATIONS

Use of the term "customer engineer" by defendant to refer to its employees who install, maintain and repair its business machines is not a violation of the statute which prohibits the practice or offer to practice engineering without proper registration. *Board of Registration v. IBM,* 599.

PUBLIC OFFICERS

§ 9. Personal Liabilitiy of Public Officers to Private Individuals

The defense of sovereign immunity was not available to individual members of the N. C. Board of Medical Examiners in a defamation action where plaintiffs alleged that the individual members acted maliciously and wantonly in defaming plaintiffs. *Mazzucco v. Board of Medical Examiners*, 47.

RAPE

§ 1. Nature and Elements of the Offense

The offense of rape is not a continuing offense but is terminated by a single act or fact. *S. v. Small*, 556.

§ 5. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient for the jury in a prosecution for second degree rape. *S. v. Williams*, 588.

Evidence was sufficient for the jury in a prosecution for rape where defendant broke and entered the home of the sleeping victim and confessed that he raped her. *S. v. Banks*, 667.

REFORMATION OF INSTRUMENTS

§ 7. Sufficiency of Evidence

Respondent's action for reformation of a deed brought 13 years after execution of the deed was not barred by the statute of limitations. *Huss v. Huss*, 463.

Respondent's allegations in a proceeding for partition were sufficient to state a claim for reformation of a deed due to mutual mistake. *Ibid.*

ROBBERY

§ 3. Competency of Evidence

Trial court in an armed robbery prosecution did not err in admitting testimony that a companion had been arrested and charged with the same robbery with which defendant was charged. *S. v. Artis*, 193.

§ 4. Sufficiency of Evidence and Nonsuit

State's evidence did not show that defendant was coerced by a co-defendant into participating in an armed robbery and was sufficient to support a finding that he was a principal in the crime. *S. v. Wilson*, 323.

Evidence that defendant was present in a hardware store with a pistol in his belt was insufficient for the jury in a prosecution for attempted armed robbery. *S. v. Jacobs*, 582.

§ 5. Submission of Lesser Degrees of the Crime

Trial court in an armed robbery case did not err in failing to submit issue of common law robbery. *S. v. Wilson*, 323.

RULES OF CIVIL PROCEDURE

§ 4. Process

Defendants, who were attorneys practicing in N. Y., were subject to the in personam jurisdiction of the courts of this State if they promised to

SALES — Continued

house sold to defendants would be removed, but was insufficient for submission of an issue as to breach of warranty that certain repairs would be made and the house would be "in good shape all around." *Calhoun v. Dunn*, 224.

SCHOOLS

§ 13. Principals and Teachers

Participation by a county board of education in both the initial decision to suspend a career teacher and the final decision as to dismissal of the teacher does not constitute a denial of the teacher's right to due process. *Thompson v. Board of Education*, 401.

School boards acting in teacher dismissal cases were not strictly bound by rules of evidence. *Ibid.*

A teacher's use of "damn" and "hell" at various times in his classroom activities, his slapping, kicking, hair-pulling and "frogging" of students, and his sanctioning of card games in study hall did not constitute insubordination where there was no evidence that such acts continued after the teacher was admonished to act differently. *Ibid.*

A career teacher's characterization of a female student as a whore did not constitute immorality within the purview of the teacher dismissal statute. *Ibid.*

A school teacher's conduct did not indicate a lack of mental capacity within the purview of the teacher dismissal statute. *Ibid.*

Finding that a teacher on one occasion permitted two of his students to settle a dispute by fighting each other supported a board of education's dismissal of the teacher for neglect of duty. *Ibid.*

A school principal's action to prohibit a board of education from dismissing her as principal was properly dismissed for failure to exhaust administrative remedies. *Church v. Board of Education*, 641.

SEARCHES AND SEIZURES

§ 1. Search Without Warrant

Officer's search of defendant incident to a lawful arrest without a warrant for possession of LSD was lawful, and LSD and marijuana found during the search were properly admitted in evidence. *S. v. Hardy*, 67.

Although a warrant to search defendant's automobile was defective, the search was lawful where the officer had probable cause to conduct the search and was not rendered invalid because it occurred after the automobile had been taken to the police station. *S. v. Frederick*, 503.

§ 3. Requisites and Validity of Search Warrant

Court committed prejudicial error in admitting into evidence an affidavit to obtain a search warrant which was based on hearsay and referred to other pending criminal charges against defendant. *S. v. Austin*, 20.

An affidavit upon which a warrant to search for liquor was based was insufficient to establish probable cause. *S. v. Guffey*, 515.

SHOPLIFTING

State's evidence was sufficient for the jury in a prosecution for unlawful concealment of merchandise by placing a box containing a chain saw into a larger box. *S. v. Watts*, 513.

STATE

§ 2. State Lands

In an action by the State for removal of cloud on its title to submerged lands and tidelands lying within the description of a tract of land claimed by defendants, trial court properly directed a verdict for the State. *S. v. Chadwick*, 398.

§ 2.1. Public Records

In an action to recover possession of bills of indictment issued in 1767 and 1768, the State met its burden of proving title in itself, and defendant, though a purchaser in good faith, was not entitled to the indictments. *S. v. West*, 431.

§ 4. Actions against State

Defense of sovereign immunity applied in an action for defamation against the N. C. Board of Medical Examiners, but was not available to individual members of the Board where plaintiff alleged the members acted maliciously and wantonly. *Mazzucco v. Board of Medical Examiners*, 47.

TAXATION

§ 29. Income Tax; Corporations

In determining the net income of a corporation, statute created an absolute prohibition of a deduction for interest in excess of 6% paid to an affiliated corporation. *Mortgage Corp. v. Coble*, 243.

TELEPHONE AND TELEGRAPH COMPANIES

§ 1. Control and Regulation

Utilities Commission acted within its authority in providing for a charge for local directory assistance. *Utilities Comm. v. Edmisten*, 552.

TORTS

§ 7. Release from Liability

Plaintiff's affidavit alleging he signed a release of claims arising from an automobile accident under a mutual mistake was insufficient to permit recovery. *Beeson v. Moore*, 507.

TRIAL

§ 5. Course and Conduct of Trial

Trial court did not err in requiring defendant's witnesses to be sequestered but allowing certain of plaintiff's witnesses to testify in the presence of each other. *Stanback v. Stanback*, 174.

§ 10. Trial Court's Expression of Opinion During Trial

Trial court did not express an opinion in limiting defendant's testimony. *Stanback v. Stanback*, 174.

TRUSTS

§ 19. Sufficiency of Evidence and Nonsuit

In an action to recover books or proceeds therefrom allegedly due plaintiff under an oral express trust, trial court erred in failing to grant defendants' motion for directed verdict since evidence did not show a sufficient intention to create a trust. *Williams v. Mullen,* 41.

UNIFORM COMMERCIAL CODE

§ 15. Warranties

Trial court erred in failing to give an instruction which would permit the jury to find that the seller's purported statement as to the ability of a concrete pump to handle a particular type of concrete was not an express warranty but merely the seller's opinion or a commendation of the goods. *Credit Co. v. Concrete Co.,* 450.

§ 20. Breach of Warranty, Repudiation and Excuse

In an action to recover a sum due upon a contract whereby plaintiff sold acetone to defendant, trial court did not err in failing to submit to the jury an issue as to whether defendant accepted the goods and, if so, whether defendant revoked its acceptance of the goods. *Chemical Corp. v. Paint Co.,* 221.

The buyer of a concrete pump accepted the pump where defects in the pump were observed at the beginning of its operation but the buyer retained and operated the pump for more than five months and attempted to sell the pump. *Credit Co. v. Concrete Co.,* 450.

In breach of warranty action, the price received by the buyer from the sale of its pump to a third party was only some evidence of the value of the goods at the time of acceptance. *Ibid.*

In an action to recover a sum for tractors furnished by plaintiff, summary judgment was improper where genuine issues of fact existed. *Electric Co. v. Pennell,* 510.

§ 21. Buyer's Remedies

The buyer of a concrete pump properly brought an action for breach of warranty after accepting the pump. *Credit Co. v. Concrete Co.,* 450.

§ 27. Rights of Holder of Notes

An alleged oral agreement that a note be paid only out of the proceeds from sale of certain apartment projects would be a defense to an action to recover a deficiency judgment on the note. *Mozingo v. Bank,* 157.

§ 28. Liabilities of Parties

In an action to recover on a promissory note, trial court erred in concluding that, since the signature of a partnership did not appear on the note, the partnership was not liable, and consequently defendants were not liable on their guaranty of the debt of the partnership. *Bank v. Wallens,* 721.

§ 71. Particular Transactions or Security Devices

Plaintiff's evidence was insufficient to show a valid and enforceable security interest in the assets of a motor company. *Little v. Orange County,* 495.

indicated an intent to exclude the son from an interest in the reversion. *Atkins v. Burden,* 660.

§ 48. Whether Adopted Children Take as Members of Class

Mere use of the word "issue" in a will drafted prior to the enactment of G.S. 48-23(3) did not reveal an intent to exclude adoptives from provisions of the will. *Stoney v. MacDougall,* 678.

§ 66. Lapsed Legacies

Where testator left his entire estate to his brother but the brother predeceased him, provisions of G.S. 31-42(a) did not apply so as to pass to the issue of the brother by substitution the devise made to him, and the court properly directed distribution of the estate to testator's surviving parent. *Forester v. Marler,* 84.

WITNESSES

§ 1. Competency of Witness

Evidence was sufficient to support the trial court's finding that the State's principal witness was mentally competent to testify. *S. v. Sink,* 726.

WORD AND PHRASE INDEX

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