NORTH CAROLINA COURT OF APPEALS REPORTS

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OF
NORTH CAROLINA

Chief Judge

WALTER E. BROCK

Judges

DAVID M. BRITT
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FRANK M. PARKER
R. A. HEDRICK
EARL W. VAUGHN
ROBERT M. MARTIN
EDWARD B. CLARK
GERALD ARNOLD
BURLEY B. MITCHELL, JR.[1]
JOHN WEBB[2]
RICHARD C. ERWIN[3]

Retired Chief Judge

RAYMOND B. MALLARD

Retired Judge

HUGH B. CAMPBELL

Clerk

FRANCIS E. DAIL

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ASSISTANT APPELLATE DIVISION REPORTER

SHERRY M. COCHRAN

1. Appointed 2 December 1977 and took office 7 December 1977.
2. Appointed 2 December 1977 and took office 21 December 1977.
3. Appointed 2 December 1977 and took office 4 January 1978.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

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	JOSHUA S. JAMES	Wilmington
6	RICHARD B. ALLSBROOK[4]	Roanoke Rapids
7	GEORGE M. FOUNTAIN	Tarboro
	FRANKLIN R. BROWN[5]	Tarboro
8	ALBERT W. COWPER	Wilson
	R. MICHAEL BRUCE[6]	Mount Olive

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	EDWIN S. PRESTON, JR.	Raleigh
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12	E. MAURICE BRASWELL	Fayetteville
	D. B. HERRING, JR.	Fayetteville
	COY E. BREWER, JR.[8]	Fayetteville
13	GILES R. CLARK	Elizabethtown
14	THOMAS H. LEE	Durham
	ANTHONY M. BRANNON[9]	Bahama
	JOHN C. MARTIN[10]	Durham
15A	D. MARSH MCLELLAND	Burlington
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16	Henry A. MCKINNON, JR.	Lumberton

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	CHARLES T. KIVETT	Greensboro
	W. DOUGLAS ALBRIGHT	Greensboro
19	THOMAS W. SEAY, JR.	Spencer
	HAL HAMMER WALKER	Asheboro
	JAMES C. DAVIS[12]	Concord
20	JOHN D. MCCONNELL	Southern Pines
	F. FETZER MILLS[13]	Wadesboro
21	WILLIAM Z. WOOD	Winston-Salem
	HARVEY A. LUPTON	Winston-Salem

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23	JULIUS A. ROUSSEAU	North Wilkesboro
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24	RONALD W. HOWELL	Marshall
25	SAM J. ERVIN III	Morganton
	FORREST A. FERRELL	Hickory
26	FRED H. HASTY	Charlotte
	WILLIAM T. GRIST	Charlotte
	FRANK W. SNEPP, JR.	Charlotte
	KENNETH A. GRIFFIN	Charlotte
	CLIFTON E. JOHNSON[15]	Charlotte
27	JOHN R. FRIDAY	Lincolnton
	ROBERT W. KIRBY	Cherryville
	ROBERT E. GAINES	Gastonia
28	HARRY C. MARTIN	Asheville
	ROBERT D. LEWIS	Asheville
29	J. W. JACKSON	Hendersonville
30	LACY H. THORNBURG	Webster

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DAVID I. SMITH	Burlington

EMERGENCY JUDGE

WALTER W. COHOON	Elizabeth City

1. Appointed 19 December 1977.
2. Appointed 23 November 1977.
3. Appointed 5 December 1977.
4. Appointed 10 February 1978 to succeed Perry Martin who resigned 13 November 1977.
5. Appointed 27 January 1978 to succeed John Webb who was appointed to the Court of Appeals effective 21 December 1977.
6. Appointed 5 December 1977.
7. Appointed 15 December 1977.
8. Appointed 30 November 1977.
9. Appointed 22 November 1977.
10. Appointed 7 December 1977.
11. Appointed 1 December 1977.
12. Appointed 28 November 1977.
13. Appointed 6 January 1978.
14. Appointed 6 January 1978.
15. Appointed 1 December 1977.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	JOHN T. CHAFFIN (Chief)	Elizabeth City
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	JOHN F. YEATTES	Greensboro
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20	DONALD R. HUFFMAN (Chief)[5]	Wadesboro
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	JAMES E. LANNING	Charlotte
	WILLIAM G. JONES	Charlotte
	WALTER H. BENNETT, JR.[8]	Charlotte
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	JOHN J. SNOW, JR.	Murphy

1. Deceased 8 May 1978.
2. Appointed 28 February 1978 to succeed Linwood T. Peoples who resigned 31 January 1978.
3. Appointed 11 January 1978 to succeed Coy E. Brewer, Jr. who was appointed to the Superior Court 30 November 1977.
4. Appointed 15 December 1977 to succeed George M. Harris who retired 31 October 1977.
5. Appointed Chief Judge 9 December 1977.
6. Appointed 28 December 1977 to succeed F. Fetzer Mills who was appointed to the Superior Court 21 November 1977.
7. Appointed Chief Judge 1 December 1977.
8. Appointed 5 December 1977 to succeed David B. Sentelle who resigned 13 November 1977.
9. Appointed 16 January 1978 to succeed Clifton E. Johnson who was appointed to the Superior Court 1 December 1977.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General

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DISTRICT	DISTRICT ATTORNEY	ADDRESS
1	THOMAS S. WATTS	Elizabeth City
2	WILLIAM C. GRIFFIN, JR.	Williamston
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4	WILLIAM H. ANDREWS	Jacksonville
5	WILLIAM ALLEN COBB	Wilmington
6	W. H. S. BURGWYN, JR.	Woodland
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27A	JOSEPH G. BROWN	Gastonia
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29	M. LEONARD LOWE	Caroleen
30	MARCELLUS BUCHANAN III	Sylva

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State v. Williams	34 N.C. App. 502	Appeal Dismissed, 294 N.C. 187
State v. Wilson	34 N.C. App. 474	Denied, 294 N.C. 188 Appeal Dismissed

Case	*Reported*	*Disposition in Supreme Court*
State v. Winstead	34 N.C. App. 750	Denied, 294 N.C. 445
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Vaughn v. County of Durham	34 N.C. App. 416	Denied, 294 N.C. 188
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Wiles v. Construction Co.	34 N.C. App. 157	Allowed, 293 N.C. 743

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Case	*Reported*	*Disposition on Appeal*
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State v. Hewitt	34 N.C. App. 109	294 N.C. 316
State v. Lee	34 N.C. App. 106	294 N.C. 299
State v. Sanders	34 N.C. App. 59	294 N.C. 337
State v. Schultz	34 N.C. App. 120	294 N.C. 281
State v. Walters	33 N.C. App. 521	294 N.C. 311
Thompson v. Ix & Sons	33 N.C. App. 350	294 N.C. 358

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

THELMA R. THOMPSON v. DR. CHARLES R. LOCKERT

No. 7619SC943

(Filed 7 September 1977)

1. **Physicians, Surgeons and Allied Professions § 15; Evidence § 50—malpractice—expert medical testimony—similar locality rule**

In a malpractice action against an orthopedic surgeon, the proper standard of care was not dictated by the standard of care customary among orthopedic surgeons who are Diplomates of the American Board of Orthopedic Surgeons regardless of the community of practice, since the "same or similar community" rule applies to health providers in this State; therefore, the trial court properly excluded the opinion testimony of a Diplomate of the American Board of Surgeons who practices orthopedic surgery in Smithtown, N.Y., concerning the standard of care exercised by defendant, a Diplomate of the American Board of Orthopedic Surgeons who practices orthopedic surgery in Salisbury, N.C., where there was no evidence showing whether the community in which the witness practices is similar to the community in which defendant practices or whether the witness was familiar with the standard of professional care and competence customary for Diplomates of the American Board of Orthopedic Surgeons practicing in a community similar to the one in which defendant practices. G.S. 8-93.

2. **Physicians, Surgeons and Allied Professions § 15; Evidence § 49.2—expert medical testimony—hypothetical questions—assumption of matters not in evidence**

The trial court in a medical malpractice case did not err in the exclusion of opinion testimony by plaintiff's expert medical witness where hypothetical questions asked the witness assumed the existence and use by the witness of hospital records, letters, a physician's report and x-rays which were not introduced into evidence.

3. **Physicians, Surgeons and Allied Professions § 16— malpractice action—inapplicability of res ipsa loquitur**

The doctrine of *res ipsa loquitur* was inapplicable in an action to recover damages allegedly resulting from defendant orthopedic surgeon's negligence in performing a laminectomy diskectomy on plaintiff.

4. Physicians, Surgeons and Allied Professions § 17— malpractice—departing from approved procedures

In this action against an orthopedic surgeon to recover for injuries sustained when plaintiff's left iliac artery and inferior vena cava were lacerated during a laminectomy diskectomy, plaintiff's evidence was sufficient to justify, though not to require, a jury finding that defendant did not exercise reasonable diligence in the application of his knowledge and skill in that he failed to follow the procedure of always placing the blunt end of a certain surgical instrument against the bony wall of the upper or lower vertebra before opening and closing it, and he allowed the instrument to extend three millimeters through the anterior opening of the disc space where he opened and closed the biting end and thereby lacerated the iliac artery and vena cava.

APPEAL by plaintiff from *Albright, Judge*. Judgment entered 6 July 1976 in Superior Court, ROWAN County. Heard in the Court of Appeals 8 June 1977.

This is a medical malpractice action seeking damages for medical and hospital expenses, pain and suffering, and permanent disability.

On 1 August 1973 defendant performed a laminectomy diskectomy on plaintiff at the L4-L5 level. This operation was performed in Rowan Memorial Hospital. During the operation plaintiff's left iliac artery and inferior vena cava were lacerated. Additional surgical assistance was obtained to perform emergency abdominal surgery and the lacerations of the left iliac artery and inferior vena cava were sutured. Later in the same day plaintiff was transferred to North Carolina Baptist Hospital in Winston-Salem. There she immediately underwent femoral catheterization and bilateral obstruction of the iliacs was found. Plaintiff was taken to the operating room where an aorta-iliac bypass bilaterally was grafted for obstruction of the right and left iliac artery. She was thereafter placed on physical therapy and discharged on 13 September 1973.

There is no evidence that plaintiff's catheterization and the graft of the aorta-iliac bypass bilaterally which were performed at Winston-Salem were in any way necessitated by reason of plaintiff's laminectomy diskectomy and emergency abdominal surgery at Salisbury.

At the close of plaintiff's evidence the trial judge directed a verdict for defendant. Plaintiff appealed.

Rutledge & Pruett, by W. Eugene Rutledge; Williams, Willeford, Boger & Grady, by John Hugh Williams and Samuel F. Davis, for the plaintiff.

Golding, Crews, Meekins, Gordon & Gray, by John G. Golding, for the defendant.

BROCK, Chief Judge.

This appeal presents two basic questions which we will discuss in the following order:

I. Did the trial court err in excluding the opinion testimony of Dr. Richard S. Goodman, a Diplomate of the American Board of Orthopedic Surgeons, who practices Orthopedic Surgery in Smithtown, New York, concerning the standard of care exercised by defendant, a Diplomate of the American Board of Orthopedic Surgeons, who practices Orthopedic Surgery in Salisbury, North Carolina?

II. Did the trial court err in granting defendant's motion for a directed verdict on the grounds that plaintiff's evidence did not disclose negligence by defendant in performing the laminectomy diskectomy on defendant?

I

The defendant, Dr. Lockert, received his B.A. degree in 1958 and his M.D. degree in 1962 from Vanderbilt University, Nashville, Tennessee. His professors in Vanderbilt University Medical School were from throughout the country and had been trained at different medical schools throughout the country. Defendant completed his internship at Toledo Hospital, Toledo, Ohio. The doctors training defendant at Toledo were from medical schools throughout the country. At Maxwell Air Force Base, Montgomery, Alabama, defendant studied under doctors who had been educated in various parts of the United States. Defendant studied and finished orthopedic residency at the University Hospital, Baltimore, Maryland, in 1968. He was trained there by doctors from medical schools from various parts of the country. Defendant has been certified by and is a Diplomate of the American Board of Orthopedic Surgeons. Defendant began his practice in North Carolina in 1968. In the operation on plaintiff Dr. Lockert employed the training he had received prior to the time he moved to North Carolina. The equipment used by defendant in the operation on plaintiff is manufactured on a national basis. Defendant receives and studies national medical journals, and he attends seminars all over the United States and the world.

Dr. Richard S. Goodman received his M.D. degree from Bellevue Medical School, New York, in 1960. He served his internship at Indiana University Medical Center. Thereafter Dr. Goodman had a year of general surgery at Jacobi Hospital in the Bronx, New York. After two years in the United States Air Force Medical Corps Dr. Goodman served a residency in orthopedics at New York University, Bellevue Medical Center from 1964 to 1967. Since 1967 he had been engaged in the practice of orthopedic surgery in Smithtown, New York. Dr. Goodman has been certified by and is a Diplomate of the American Board of Orthopedic Surgeons.

[1] Plaintiff's evidence does not show whether the community in which Dr. Goodman practices is or is not similar to the community in which defendant practices. Plaintiff's evidence does not show whether Dr. Goodman is or is not familiar with the standard of professional competence and care customary for Diplomates of the American Board of Orthopedic Surgeons practicing in a community similar to the one in which defendant practices.

Plaintiff argues nevertheless that the proper standard of care in this case should be dictated by the standard of care customary among orthopedic surgeons who are Diplomates of the American Board of Orthopedic Surgeons regardless of the nature of the community of practice. Plaintiff argues, that the competence and standard of care of such a highly trained and certified specialist has no relation to the type of community in which he practices. Plaintiff's argument upon this point is both appealing and persuasive. However, there are at least two strong deterrents to its application.

In *Wiggins v. Piver*, 276 N.C. 134, 171 S.E. 2d 393 (1970), the Supreme Court of North Carolina abandoned the strict "locality" rule in favor of the "similar community" rule. This was further discussed and affirmed in *Dickens v. Everhart*, 284 N.C. 95, 199 S.E. 2d 440 (1973). We do not agree with plaintiff that *Rucker v. Hospital*, 285 N.C. 519, 206 S.E. 2d 196 (1974) further liberalized the application of the standard of care for physicians and surgeons. That case (Rucker) was applicable only to the standard of care of "accredited hospitals" in the treatment of a wound, the treatment for which was shown to be standard in "accredited hospitals" throughout the United States. While it is arguable that the reasoning in *Rucker* can be applied to Diplomates of the American Board of Orthopedic Surgeons we are confronted with a legislatively prescribed standard of care for "health care providers" in this State. Session Laws —1975, Chapter 977, added Article 13 to Chapter 8 of the General

Statutes entitled "Medical Malpractice Actions." Under § 8-93 of this new Article 13 of Chapter 8 it is provided:

> In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience *situated in the same or similar communities* at the time of the alleged act giving rise to the cause of action. (Emphasis added.)

Admittedly this legislation became effective on 1 July 1976 and does not apply to litigation pending on that date (the present action was instituted on 16 September 1974). However it clearly shows that the standard of care applicable to health providers in North Carolina as developed by case law is now adopted by the legislature. The case law and the legislation reflect the general policy of both the judicial and legislative branches of the government in North Carolina with respect to the standard of care to be imposed upon defendant in this case, *i.e.*, the "same or similar community" rule.

[2] In addition to plaintiff's failure to show that her expert witness, Dr. Goodman, was acquainted with the professional competence and care customary in communities similar to Salisbury, North Carolina, among Diplomates of the American Board of Orthopedic Surgeons, objections were properly sustained because of deficiencies in plaintiff's hypothetical questions as propounded to her expert witness.

Plaintiff's expert witness, Dr. Goodman, testified by deposition. With relation to his review of the plaintiff's condition and the operation on plaintiff Dr. Goodman testified:

> "I was requested to review certain records with regard to surgery performed by Dr. Charles R. Lockert on Mrs. Thelma R. Thompson on August 1, 1973. These were—hospital record, Rowan Memorial Hospital from 7/30/73 to 8/1/73; hospital record N.C. Baptist Hospital, an admission of 9/24/73; medical record Rowan Memorial Hospital, 7/30/73 to 8/12/73. The hospital record obviously has a conflict in their [sic] dates, but that's the best I can give you anyway.

"There is a report of Dr. Wise dated July 17 of '74 of four pages; a covering letter dated July 22, '75, a letter of 1, 2, 3 pages dated December 9, 1975; deposition of Dr. Lockert and three letters from Mr. Rutledge dated February 16, 1976, March 1, 1976, and—two letters from Mr. Rutledge. There is my letter to Mr. Rutledge dated March 4, 1976.

"In addition to that I have examined some x-rays which I have returned to you, Mr. Rutledge.

"I have never practiced medicine in North Carolina and I have never seen the plaintiff, Mrs. Thompson, as a patient personally."

Thereafter plaintiff propounded a hypothetical question to Dr. Goodman which, *inter alia*, assumed the following facts: "[T]hat the operation was as described in the records which have been made available to you, and which are to be attached to this deposition, and based on your study of those records. . . ."

The deposition of Dr. Lockert (defendant) and the Rowan Memorial Hospital records were introduced in evidence in their entirety. However, plaintiff introduced only the discharge report, a handwritten transfer note from defendant and a Roentgen Report from the North Carolina Baptist Hospital records. Plaintiff did not offer to introduce in evidence the full North Carolina Baptist Hospital records, the four page report of Dr. Wise, a cover letter, a three page letter, two letters from Mr. Rutledge (plaintiff's counsel) nor the x-rays which her expert witness examined. The hypothetical question assumed the existence and use of each of the foregoing records by plaintiff's expert in arriving at his opinion. "Since it is the jury's province to find the facts, the data upon which an expert witness bases his opinion must be presented to the jury in accordance with established rules of evidence." *Todd v. Watts*, 269 N.C. 417, 420, 152 S.E. 2d 448, 451, (1967); 1 Stanbury's North Carolina Evidence, Brandis Revision, § 136 (1973). To be competent, a hypothetical question may include only facts which are in evidence or those which a jury might logically infer therefrom. *Keith v. Gas Co.*, 266 N.C. 119, 146 S.E. 2d 7 (1966).

For either of the two reasons discussed above defendant's objections to plaintiff's hypothetical questions were properly sustained.

II

Plaintiff argues that even without the opinion testimony the evidence required submission of the case to the jury on one or more of three premises:

(1) Application of the doctrine of *res ipsa loquiter.*

(2) Going outside the operative field in causing the injury was evidence of negligence.

(3) Evidence that defendant failed to exercise reasonable care and diligence in the application of his knowledge and skill in other particulars.

[3] We think the first two premises are the same. Plaintiff's theory of the "operative field" is a field confined to an area in which no injury to an adjoining member of the body could occur. To apply such a theory would be to apply the doctrine of *res ipsa loquiter.* Without a discussion of the application of the doctrine of *res ipsa loquiter* in North Carolina we hold that the doctrine does not apply in this case. *See Starnes v. Taylor*, 272 N.C. 386, 158 S.E. 2d 339 (1968); *Boyd v. Kistler*, 270 N.C. 744, 155 S.E. 2d 208 (1967); *Lentz v. Thompson*, 269 N.C. 188, 152 S.E. 2d 107 (1967); *Watson v. Clutts*, 262 N.C. 153, 136 S.E. 2d 617 (1964); *Hunt v. Bradshaw*, 242 N.C. 517, 88 S.E. 2d 762 (1955). Plaintiff's reliance upon *Mitchell v. Saunders*, 219 N.C. 178, 13 S.E. 2d 242 (1941) in support of the application of the doctrine is not well placed.

[4] We come now to the question of whether plaintiff's evidence tends to show that defendant failed to exercise reasonable care and diligence in the application of his knowledge and skill to the plaintiff's case. There is no contention that the need for plaintiff's laminectomy diskectomy was not properly indicated. There is no contention that defendant did not possess the requisite knowledge and skill to perform the laminectomy diskectomy. However, a physician or surgeon cannot be absolved from liability by a showing that he possesses the required professional knowledge and skill. He must exercise reasonable diligence in the application of that knowledge and skill to the particular patient's case. *Ballance v. Wentz*, 286 N.C. 294, 210 S.E. 2d 390 (1974).

Plaintiff's evidence of the details of the examination and treatment of plaintiff; of the techniques employed in the performance of the laminectomy diskectomy on plaintiff; of the standard of professional competence and care customary for Diplomates of the American Board of Orthopedic Surgeons practicing in communities

similar to Salisbury, North Carolina; and of the manner in which plaintiff was injured comes from Dr. Lockert, the defendant, who was called by plaintiff as her witness. This evidence can best be recapitulated by following closely the testimony of Dr. Lockert as follows:

> I first saw Mrs. Thompson in 1970, I can't give you the exact date, with a problem in a toe on her left foot, that seemed to be a hammer toe deformity.
>
> On this visit, Mrs. Thompson also complained of pain in her back. When she came into the hospital for the first time, she had x-rays at Rowan Memorial Hospital, showing a narrowing of the L4 interspace.
>
> I operated on the toe to straighten it so the callus would go away. Later, I had to amputate the toe. During this period, in 1970, Mrs. Thompson was complaining of pain in her back.
>
> I re-examined Mrs. Thompson in June 1973 for pain in her back and down her right leg. She had tenderness in her back in the L4-L5 area posteriorally, a positive straight leg rising sign on the right, indicating she had pressure on the sciatic nerve, weakness in her right great toe extensor, weak pulses in both legs with complaints of pain in her legs when she walked. This is called claudication pain, that is poor circulation in the legs and so that walking two or three blocks causes the legs to start hurting. She also stated she had to wear socks, heavy socks in the wintertime because her feet were cold.
>
> Surgery was indicated because for several years she had back pain. However, I advised her to again attempt conservative treatment, and if this didn't work, to have a myelogram to determine if there was a definite ruptured disc. If such a disc were indicated, she would need a laminectomy diskectomy. A month after this advice, I admitted her to the Rowan Hospital.
>
> A myelogram indicated she had external pressure from a herniated disc at the L4-L5 level.
>
> The spine is made up of individual bones called vertebra, the largest portion of which is called the body. Between each vertebra is a disc that is enclosed in a thick capsule that goes around the peripherium. The body is not a perfect circle, but a semi-circular structure. Inside the capsule is the liquified material, a tissue the consistency of crab meat. The outside is

ligamentous, thick material, like you would see if you cut a tough steak. The white material in the steak is a ligament.

The function of the disc in the body is basically a shock absorber. It keeps the vertebral bodies separated. The disc capsule is made up of a tough material called the annulus fibrosus. Inside is another material the consistency of crab meat called the nucleus pulposus. When a disc develops a defect and there is more than one kind of defect it can develop, the tough covering, annulus fibrosus, could open up and the interior material, nucleus pulposus, comes out.

I discussed this operation with Mrs. Thompson and she consented to the surgery. At about 11:00 a.m. on August 1, 1973, she was brought to the operating room.

To perform this operation, the patient is laid on the stomach, and the body is entered from the back. The back is the posterior and the front is the anterior.

The procedure followed that morning is as follows: When I began my work, Mrs. Thompson had been put to sleep and a tube had been put in her trachea so that her breathing could be controlled. She had an electrocardiogram attached to show her heart rate and had on a blood pressure cup. The anesthesiologist had given her a general anesthetic. She was turned onto her stomach on a chest roll that allows the abdomen and chest room to breathe. The skin was prepped with a sterile solution. The surgeons were Dr. Watts and me. The incision was made in the midline of the back, running from the head toward the feet, starting at the L3 posterior spinous process down to the S1 process. The first incision was made, with a skin knife, down to the fatty tissue, approximately 2 centimeters or a centimeter and a half. The next incision is through a layer of muscle down to the posterior spinous processes of the vertebra, the portion closest to the back. The next structure is the posterior longitudinal ligament, a ligament inside the spinal canal and attached to the back of each of the vertebra and the disc space. It is not a protective ligament, per se, but runs the length of the spine to hold the vertebral bodies together and covers the opening to the disc space.

The posterior spinous processes is bone, which is bypassed to get to the inner space between L4-L5. The muscle is retracted, the spinal cord is moved out of the way as it is necessary to go through the canal.

The next structure is the lamina, the back of the spine, from which a portion of the bone must be removed using a carrison rongeur.

After removing the piece of bone there, there is a ligament inside of the spinal canal, but between these two interspaces called the ligament flavum. A ligament is a tissue that connects the bones and joints, made out of a cartilage or fibrous material. The best description I can give is that the white structure in meat is a ligament. To get through the flavum, a sharp knife section is made and the flavum is removed from the involved interspace.

The spinal canal is now directly visible. This contains the tip of the spinal cord and the nerve root at this interspace. The spinal canal is approximately 17 to 20 millimeters or 1-1/2 to 2 centimeters in depth. The spinal cord is about 1 centimeter. The spinal cord and the nerve root are retracted toward the opposite side from the operation. The nerve root and the spinal cord are crucially important and must not be damaged.

Mrs. Thompson had a calcified ridge across the back of this interspace where the disc had bulged out into the interspace and calcified. It had bulged out into the posterior longitudinal ligament which is the next obstacle you encounter in reaching the disc space. In this posterior longitudinal ligament a sharp incision is made with a knife blade. Normally, the posterior longitudinal ligament would not be calcified. At this point, I took a curet and removed this calcified ridge that ran the width of the spinal canal at the interspace of L4-L5. The disc space can now be visualized.

The disc space contains the material described earlier that looks like crab meat. The walls of the disc space are made up of circular fibrous ligament, the annulus fibrosus. It covers the entire exterior, not the interior. It's around the peripherium, not inside. When the disc material is removed, it is inside this disc covering. After the calcified ridge had been removed, I removed the loose fragments of this nucleus pulposus, the crab meat. The distance between the posterior and the anterior end of the disc space is approximately 1-1/8 to 1-1/2 inches, around 3 to 3-1/2 centimeters. These measurements are based on the average person.

The first tissue on the anterior side of the spinal column is the anterior longitudinal ligament which runs down the front of the spine, and crosses into the posterior longitudinal ligament.

The aorta is the main artery coming from the heart going to the lower extremities which lays right onto the anterior longitudinal ligament and, when it gets to the body of L4, it bifurcates. The vena cava lies right beside it. The diameter of the left iliac artery is approximately 15 to 20 millimeters, you could easily insert the tip of a small finger into it. The vena cava is larger, estimated size maybe 3/4 of an inch. A healthy blood vessel has a consistency of a piece of rubber tubing, a thin piece of rubber. (At this point the witness identified several instruments called pituitary rongeurs, Plaintiff's Exhibits C, D, & E, which were received as evidence.)

The red mark on Plaintiff's Exhibit C was placed on the instrument by me so that I could have some idea of the depth. This is the mark that was actually on that instrument on the date that I operated on Mrs. Thompson.

A diskectomy is done through a hole not much larger than the instrument being used. These instruments have a handle much like the carrison rongeur operated with the hand. There is one moveable part, a spoon. The other part remains stationary. The moveable part bites down to pinch or bite the tissues between the two parts. It is pulled out when it is closed. That is the instrument used to take the crab like material out. The objective in this operation is to get as much of the crab like material out of the capsule as possible.

There is no exact order of sequence in which these different rongeurs are used. I use them in no exact order that I know of. You have to use one to remove as much material as you can, then you use the second one and then you use the third, but you don't particularly use one before the other.

After reaching the point where I used the pituitary rongeurs, I used two rongeurs to remove as much material as I could. In removing the last instrument, I noticed bleeding in the space. I think I used the straight first but I don't know which I used second, third and so on. Bleeding in the disc space indicated to me that a major vessel had been injured. The bleeding was brisk. I did not know I had gone through the capsule. There is no major blood vessel located inside the disc capsule. I do not know whether I had to cut a blood vessel, I could

have pulled some scar tissue off of it and possibly injured the vessel that way. You asked me if I know whether I'd cut it or not. I didn't know that I'd gone through the capsule.

After I noticed the bleeding in the disc space, I packed off the wound, put a sterile dressing over it and asked for Dr. McKenzie and Dr. Black to come into the room. I turned the patient to her back and prepped her abdomen. I then had the laparotomy set up. Dr. McKenzie and Dr. Black performed the laparotomy and I only assisted in the operation. Mrs. Thompson had prior abdominal surgery, which left a great deal of scar tissue. We found that there was an injury to the left common iliac artery, there was a hole in it approximately the size of a 3/4 millimeter, maybe the size of a large match head and there was an incomplete hole on either side of the vena cava. There was an opening on either side where it had been pinched by the instrument. There were two holes in the vena cava and one in the artery. They were sutured up. We gave Mrs. Thompson a number of units of blood and other liquids which totaled about 46 hundred cc's of foreign liquids, that were introduced into her body.

I then accompanied Mrs. Thompson, by ambulance, to the North Carolina Baptist Hospital and wrote a transfer note, admitting her under the care of another doctor.

I was removing material with the pituitary rongeurs from inside the capsule holding the disc material, the annulus fibrosus which completely encases the nucleus pulposus, in a normal structure. The anterior longitudinal ligament intermingles with the capsule and it is between the inferior vena cava and the artery. In Mrs. Thompson's case, the disc had ruptured in the posterior portion of the capsule, although this would not necessarily indicate that this was the weakest point. It had come through the annulus fibrosus. I did not inspect for any material on the anterior side of the anterior longitudinal ligament. I did not see the anterior longitudinal ligament at the time of surgery.

I indicated that I put marks on the instruments so that I would have some idea of the depth it was in the space. The instrument, as it comes from the manufacturer, is not calibrated. I use it as a precautionary method for my own use.

Mrs. Thompson's x-rays prior to the time of the operation showed bony spurring on the inferior lip of the L5 vertebra.

This could have something to do with the width of the disc space, at the point where the spurring occurs. I stated in the deposition that I thought the disc space in Mrs. Thompson's x-rays was average.

The measurement from the end of this particular pituitary rongeur to the red line drawn on the instrument is just a little bit less than 1-1/8 inch. During the operation I did not disregard the red marks and stick them into the disc space further than the mark is indicated. The red mark did not go into the interspace between the annulus fibrosus at any time. The vessels are right up against and coherent with the anterior longitudinal ligament, and the anterior longitudinal ligament is approximately one millimeter in thickness. The two or three millimeters referred to in the deposition includes the width of the annulus fibrosus and the anterior longitudinal ligament. In the deposition, I testified that the most anterior disc space was about three millimeters from the vessel. The disc space is the space that includes the nucleus pulposus. You don't remove the annulus fibrosus when you do a diskectomy, and so the thickness of this is approximately 2 millimeters, the thickness of the anterior longitudinal ligament is about one.

If the instrument went through the structures and there was a defect there, they could have gone through very easily. They didn't have to go through and cause the damage. If there was scar tissue, the scar tissue could have been ripped from the vessels, without violating the disc space. The pituitary rongeurs probably snipped these two blood vessels.

I never visualized or saw the anterior longitudinal ligament. I did testify that the posterior longitudinal ligament was calcified, there wasn't any defect or hole there. I did not visualize the anterior portion of the annulus fibrosus. I did know that it was ruptured on the posterior, I cannot testify to the anterior.

The term "operative field" means the field that you are working in. There is no such thing as defining the perimeter of any operative field, it isn't defined by borders or boundaries. It is just a general term and has no descriptive value. The number of obstacles between where you are supposed to be working and other areas has nothing to do with the determination of the operative field.

In removing disc material, I put the pituitary rongeurs in with the blunt end closed, feel of the structure, open them up and then clamp down on the tissue, then pull it out. Usually, I open them only once. I then take the instrument out of the wound, clean it off with a sponge and then go back in for another bite. While operating on Mrs. Thompson, I did not open and close the pituitary rongeurs twice without retracting them.

You can tell the difference between the blood vessels and the nucleus pulposus with your fingers. You can't tell it when you touch it with metal. You can only feel the difference between a hard, solid substance and a soft substance. In the deposition, I did testify that the operation was done entirely by feel. I described the vessel as being rubbery because you could pinch it together like a rubber tubing. You cannot distinguish the difference between the resilient blood vessel and the soft crab meat like material that constitutes the nucleus pulposus with an instrument. The entire operation is not done by feel. The portion of the operation inside the disc space is done by feel.

In the longitudinal ligament, I have an opening maybe 4 or 5 millimeters wide. I go down into the space and feel tissue. You have to put some pressure but you don't put very much pressure. You open the pituitary rongeurs against the tissue and pull back and remove the tissue, all in the same motion.

In Mrs. Thompson's operation, I slid the blunt nose of this instrument down the edge of the bone, and I felt the bone when I opened and closed the rongeur. The inferior vena cava and left iliac artery are one millimeter beyond the edge of the bone. The patient had a lot of scar tissue, a lot of spur formation in this area and it's a possibility that I felt the bone spur itself.

These rongeurs are bent for a purpose. That purpose is to make it more accessible to get to a certain area inside the disc space. The disc space is formed by the walls of the vertebra above and below. The other parts of the wall are formed by the annulus fibrosus. I felt the rongeur touch the bony wall of the disc space, not the fibrosus wall of the disc space, but it's a possibility you didn't have to, you could pull it off the scar tissue. If the blood vessels were actually bitten by the rongeurs, they would have been required to extend beyond the wall of the disc space. I wouldn't have had to push them through due to the fact that there was a diseased area here and there wasn't any wall there.

The hole in the iliac artery was a ragged hole, not a sharp or distinct cut. I did not scrape along the annulus fibrosus, I scraped along the bone.

There is no way to calculate the approximate amount of the disc material that is inside, it depends on the state of the tissue. The only thing I wanted to accomplish, outside of the annulus fibrosus of this disc space, was to take care of the calcified posterior longitudinal ligament outside of the disc space.

The posterior longitudinal ligament did not appear to have any defect other than it had calcified where the disc had ruptured. The material had probably been ruptured for a while and had degenerated and become hardened. I know that it had ruptured posteriorly, and was probably ruptured anteriorly also.

The first evidence of blood that I saw was after I had removed the rongeur, not at the time I had closed it. I do not know what was caught in the spoons of the rongeur at that point. The bleeding occurred immediately upon the retraction of the rongeur from the disc space. I knew this was to be the last rongeuring because we had used all three instruments and I was going back with the straight instrument which I do to make sure that no material had been pushed into the center of the disc space after using the curved instrument.

When the bleeding occurred, I was scraping the inside of the disc wall, the bottom of the disc capsule. I felt the bony wall when I put the blunt instrument against it, slid it down the bony wall, but did not feel it go past the end of the bony wall. As long as I feel the bone, I feel safe in opening and closing the pituitary rongeurs, as this is the only reference I have.

The inferior vena cava and the iliac artery are located anterior to the anterior longitudinal ligament.

From x-rays we knew that there was calcification in the main artery coming from the heart going towards the legs, called the aorta. It is demonstrated on the x-rays. We also knew that there was some calcification extending further down into the iliac artery here and here. The aorta separates into the iliac artery at a level approximately anterior to the body of the fourth lumbar vertebra.

The people participating in the operation until the time of the emergency were Dr. Watts, an anesthetist, a scrub nurse, a circulating nurse and I.

Dr. Watts is also a board certified orthopedic surgeon.

It is not customary in the Salisbury area for one of the members of an operating team performing a laminectomy diskectomy to be a neurosurgeon. There is not a neurosurgeon in Salisbury, North Carolina. Neither, is there a generalized custom in North Carolina for a neurosurgeon to be one of the members of an operating team doing a laminectomy disc removal operation.

Now, you can either use the curved or the straight rongeur, but as you go down, you always feel bone whether you go over on the lateral side or the medial side or anterior, you always feel bone and then open up your rongeur. You can feel resistance from the annulus fibrosus if there is resistance there to feel. You put the blunt end of the instrument to go into the disc space with your clamp, and once you feel it on bone, then you can open it up, bite the tissue and then remove the tissue out of the wound.

The surfaces of these two vertebral bones between which the operation is conducted is coated with a cartilaginous end plate. The vertebra itself is hard bone and the end plate, the inside of the covering on the bottom side of this bone and the bottom side of this bone is a cartilaginous thinner, softer material that's not calcified but it's a little bit harder than, say, muscle tissue. And it's the type of tissue that you'd probably see in an animal if the joint had been open, you'd see the smooth, kind of cartilaginous material on the end of the joint. Once we have started the operation and isolated the nerve root and the spinal cord, I never take my eyes off of this area that I'm working in. My assistant, and in this case, Dr. Watts, has the nerve root and spinal cord pulled away from me so that I can see this hole. When I go in with my rongeur to get a piece of tissue, to clean out the disc space, when I take this out I hand it over to my scrub nurse or Dr. Watts, my assistant, open it up and let them clean it out with a sponge. I never take my eyes off of this area because I do not want to lose my vision of the spinal cord and the nerve root.

We do not want to cause any injury at that point. So I never look at this instrument once it's outside of the body. They'll automatically clean my instrument and take the material away from me that I hand them, and then I can go back in for another piece.

In the operation you do take some of the cartilaginous plate, but you do not attempt to take the whole thing. It is soft, but you use it purposely for the touch of the instrument to know that you're in the disc space.

In doing this disc surgery, you always use the technique, with either the curved or the straight rongeur, you slide it down to the bone, whether you're over on the lateral side or the medial side or — when I say over on either side of the disc space — you feel a bone and you can also feel some resistance of the annulus fibrosus, but you don't try to push through that annulus fibrosus to see what's there, you use the bone primarily at all times whether you're up, which would be posterior her body or anterior to me, or whether you're anterior in her body or which would be posterior away from me. You use the bone as your feel. If there is an annulus fibrosus, you can feel the resistance to it. Obviously, if it wasn't there, you wouldn't feel it. We do use this mark, on this instrument, you can see came from and is made as it is that we've demonstrated here, is not calibrated in any way, and because of the fact that there's not much difference in the width of this stem of this instrument we use, when it's in the wound, if you didn't have some type mark, you could not really tell when you got past this point, so for that reason, we do put a mark on it to give us an indication of the depth of the instrument as it is in the disc space, because, as I've said we do not see inside the disc space because the end of this instrument is completely blocking our view of this disc space.

As you look at the body of the vertebra, you notice that they are not a perfect circle whatsoever. At this point here, the furtherest away at this point here, the vertebra starts curving back, not in a real circle, not a complete circle. I guess it's more like the shape of an egg if you look at it from that aspect. If you look at it from that aspect you see that it tapers off to either side. On this aspect of it, it's fairly well straight across in the canal. It's rounded in front and on the sides. The annulus fibrosus that goes around the crab meat like part of the disc does not project in any manner out forward of the lower surface of the vertebra on top of it or the upper surface of the vertebra that's below it. The annulus fibrosus is part of the disc that's the outer program of the disc, but it's at the edge of the bone. It doesn't protrude out away from the bone. It attaches to this bone here and runs all the way around in a strip and acts just

like a shell. You could not see the nucleus or the crab like material inside.

As to how using the bone as a guide as I've described gives assistance in attempting to avoid getting out past the area where the annulus fibrosus would be—well, in doing this procedure and in your training, you're trained to use the blunt end of the instrument. You never go in with the instrument opened up. You always go in with it closed and you use the bone as a guide. When you feel bone, you feel that you should be safe inside the disc space. I did employ that technique in doing the operation on Mrs. Thompson.

As to what visibility during the operation I had of the forward portion of the annulus fibrosus—you cannot see the forward portion. You're talking about the body, you cannot see this disc space. The only portion of the disk space that you can see is the incision you made in the posterior part here. Everything anterior to that you do not visualize. The hole is only about 4 millimeters, enough to introduce this instrument, and once this instrument is in there, you can't see into the hole. It actually plugs it. In a laminectomy diskectomy you never see the anterior longitudinal ligament because the anterior longitudinal ligament runs up the front of the spine and is enclosed inside of the body cavity the abdominal cavity. It is not part of the disc.

As to what complications there are that can occur during a disc operation such as that which Mrs. Thompson had—well, the primary problems in a disc surgery that the surgeon worries about is going. . .is in three categories. You worry about damage to the neural tissue, meaning that you worry about damage to the nerve root or you worry about damage to the spinal cord. You worry about vascular injuries, and you worry about infections. Primarily, during the surgery, you're worrying about the two. . .the vascular injuries and the injury to your neural tissue because you do everything possible that you can to make everything sterile and scrubbed so that you don't worry about the infection, just so that you keep the instruments sterile and do not contaminate your field. Everytime we're doing this operation, we worry about it in any particular case, whether it be Mrs. Thompson or what. We worry about the injury to the nerve root or to the spinal cord, or we worry about any injury to any vessel.

At the time the complication occurred in her case I was taking the precaution of protecting the neural or nervous tissue. We had isolated it, identified it and had it retracted and had Dr. Watts holding it toward the midline, and I was watching to make sure it stayed in that position. In trying to prevent vascular injury, the protection we used was just carrying out our usual and customary technique of doing the rongeuring inside the disc space. The aspects of the technique that were designed to attempt to avoid these injuries were to use the blunt nose of the pituitary rongeur, to make sure you're touching bone before you open and close your rongeurs, and we had put the precautionary mark on the instrument so that we made sure we were not more than one and one-eighth inches in the wound. One and one-eighth inches, meaning from the back part of the vertebral body. That's the measurement we used.

Just before I noticed the bleeding I have described, I did not feel any type of resistance that indicated to me that I was in contact with the annulus fibrosus. I used the instrument to slide down the bone, but I had not felt any resistance to the annulus fibrosus. I felt like I was still in the disc space because I could feel bone. The mark that I had put on the instrument as a precaution indicated that we could still see it. It was well outside out of the posterior part of the body, and I could definitely see the mark on the instrument.

It is my opinion, since I felt no resistance in doing this procedure, that the annulus fibrosus was diseased anterioraly and therefore the point of the rongeur was allowed to go through without any resistance. My opinion, as to the condition of the anterior longitudinal ligament in the vicinity where the injury to these vessels took place, is that the anterior longitudinal ligament, along with the annulus fibrosus, was weakening with disease, or actually non-resistant at that point. I feel this because I did not feel any resistance there, and I knew previously on x-rays that there was some spurring and disease in the anterior aspect of the vertebral bodies.

It is my opinion that I did not have to penetrate the disc space, there was enough disease and scar tissue, that when I pulled the last bit out, the scar tissue tore the vessels instead of cutting the vessels. The reason I think this could have been a possibility is that they were ragged edges and not sharp edges on the vessels.

In determining the manner in which I proceeded in this operation, I used the best judgment that I knew how to do in this surgery as I do in all surgery that I do. I used the best skill and technique. My hand did not at any point in the operation slip in any respect. I did not at any point up until the time I saw the blood have any indication that injury was being done or about to be done to these vessels.

I do not know definitely what happened to the vessels, but they probably were cut with the pituitary rongeur.

I feel like there must have been some disease in the anterior portion of the annulus fibrosus in the anterior longitudinal ligament in order to allow the instrument to penetrate without any resistance felt, however, it would be necessary for the spoon of the pituitary rongeur to pass out of the bony portion of the disc space in order to pass through a hole in the anterior longitudinal ligament. When it did it'd be right against the vessels at that time.

From the above testimony it can be seen that the standard of professional competence and care customary for Diplomates of the American Board of Orthopedic Surgeons practicing in communities similar to Salisbury, North Carolina, requires: in removing the nucleus pulposus from the disc space pituitary rongeurs are used; the pituitary rongeur is introduced into the disc space with the spoon-like blunt end closed; the blunt end is used to feel the bone of the upper or lower vertebra to make sure the instrument is used to scrape along the bone, not the annulus fibrosus; the instrument is not opened and closed unless it is first determined that it is safely inside the disc space by touching the bony wall of the upper or lower vertebra; the instrument is never inserted more than 1-1/8 inches into the disc space; the instrument is never inserted beyond the red mark on the handle.

The purpose of the above described technique which should be employed in the removal of the nucleus pulposus from the disc space is to avoid vascular injury.

Dr. Lockert testified that the blunt end of the rongeur was against the bony wall of the vertebra each time he opened and closed it; that he never inserted the instrument into the disc space beyond the red mark on the handle; and that the inferior vena cava and the left iliac artery may have been lacerated by the pulling of scar tissue which extended from them into the inside of the disc

space and which he clamped with the rongeur inside the disc space; and that his hand did not slip at any time during the procedure.

However, when all of the evidence is viewed in the light most favorable to the plaintiff, it tends to show the following: Dr. Lockert, from viewing x-rays, was aware that there was some spurring and disease in the anterior aspect of the vertebral bodies. Dr. Lockert knew that the most anterior disc space was only about three millimeters from the left iliac artery and the inferior vena cava. He knew that the disc had ruptured posteriorly and that it was probably ruptured anteriorly also. Dr. Lockert knew that he should always work along the bony wall of the upper and lower vertebra with the blunt end of the rongeur before opening and closing it to remove the nucleus pulposus from the disc space. He knew that the anterior annulus fibrosus was diseased and would offer no resistance to the rongeur. He knew that a defect in the anterior annulus fibrosus would allow the instrument very easily to pass through the anterior limit of the disc space. Dr. Lockert knew that the removal of the nucleus pulposus from within the disc space was done entirely by feel. He knew that one cannot feel with the instrument the difference between the nucleus pulposus and the blood vessels.

Further testimony from Dr. Lockert tended to show: The injury to the left common iliac artery was one hole about the size of a large match head. There were openings on either side of the vena cava where it had been pinched by the instrument. The pituitary rongeurs probably snipped these two blood vessels. If the blood vessels were bitten by the rongeurs, the rongeurs would have been required to extend beyond the wall of the disc space. Dr. Lockert did not feel any type of resistance that indicated to him that he was in contact with the annulus fibrosus. It was Dr. Lockert's opinion that the annulus fibrosus was diseased anteriorly and therefore the point of the rongeur was allowed to go through without any resistance. Dr. Lockert testified: "I do not know definitely what happened to the vessels, but they probably were cut with the pituitary rongeur."

[4] The evidence in this case would justify, though not require, the jury in finding that Dr. Lockert did not exercise reasonable diligence in the application of his knowledge and skill in the following respects: he failed to follow the procedure of always placing the blunt end of the rongeur against the bony wall of the upper or lower vertebra before opening and closing it; that he allowed the rongeur to extend beyond the 1-1/8 inch mark on the handle; that he allowed the instrument to extend three millimeters through the anterior

opening of the disc space where he opened and closed the biting end thereby lacerating the iliac artery and vena cava.

It is true that there is a conflict in plaintiff's evidence, and that there is evidence which would justify, though not require, the jury in finding that Dr. Lockert exercised reasonable diligence in every respect. However, the resolution of conflicting evidence is for the jury and not the court. In our opinion plaintiff was entitled to have the jury pass upon her evidence. The directed verdict for the defendant was erroneously entered.

New trial.

Judges HEDRICK and MARTIN concur.

MYRTIE ARNOLD, HARLEY EVANS, J. D. LARSON, W. E. LESH, SR., JOSEPH MONROE, AND R. E. SELLERS, CITIZENS AND TAXPAYERS OF SMITHVILLE TOWNSHIP, BRUNSWICK COUNTY, PLAINTIFFS v. STEVE J. VARNUM, WILLIE E. SLOAN, FRANK THOMAS, IRA D. BUTLER, AND W. T. RUSS, JR., COUNTY COMMISSIONERS OF BRUNSWICK COUNTY, AND BRUNSWICK COUNTY, A POLITICAL SUBDIVISION, DEFENDANTS; THE CITY OF SOUTHPORT, A MUNICIPAL CORPORATION, EUGENE B. TOMLINSON, JR., MAYOR, AND MARY McHOSE, JAMES HAROLD DAVIS, CONLEY D. KOONTZ, W. P. HORNE, DOROTHY GILBERT, WILLIAM FURPLESS, ALDERMAN; THE BOARD OF TRUSTEES OF SMITHVILLE TOWNSHIP J. ARTHUR DOSHER MEMORIAL HOSPITAL, LORRAINE BELLAMY, GEORGE MILLIGAN, HAROLD CRAIN, CHARLOTTE B. WILSON, EUGENE TOMLINSON, JR., KENNETH BELLAMY AND HERBERT SHAW, TRUSTEES; AND MARK P. CONNAUGHTON AND WIFE, MARGARET S. CONNAUGHTON; JACKIE HERRING; OTTO K. MAEHL; JUNE BROWN AND CORA DAVIS, RESIDENTS, FREEHOLDERS AND TAXPAYERS OF SMITHVILLE TOWNSHIP, INTERVENOR, DEFENDANTS

No. 7713SC206

(Filed 7 September 1977)

1. **Appeal and Error §§ 14, 16; Rules of Civil Procedure § 60— judgment entered through clerical error—notice of appeal in apt time—correction of judgment**

The trial court properly denied intervenors' and defendants' motion that plaintiffs' appeal be dismissed on the ground that plaintiffs failed to file notice of appeal in apt time where the evidence disclosed that the trial judge stated his decision in court on 24 November and on the same day instructed counsel to prepare a judgment for approval and instructed the clerk to inform the public of the decision; the clerk improperly entered judgment on that day on his own accord; the judge subsequently entered judgment which was filed on 6 December and plaintiffs filed notice of appeal on 8 December; and the judge thereafter, on his own motion, ordered that any entry of judgment made by the clerk on 24

November be stricken as a clerical error and that the judgment be corrected to read 3 December. G.S. 1A-1, Rule 60.

2. **Counties § 3.1; Hospitals § 2.1— township—establishment of hospital—county commissioners as governing body**

The statutory scheme set forth in G.S. 131-4 *et seq.* is a constitutional delegation of authority for a board of county commissioners to assume the role of "governing body" of a township for the purpose of establishing a township hospital and levying a tax to support that hospital.

3. **Counties § 3.1; Hospitals § 2.1— township—power to establish hospital—supervision of county commissioners**

Plaintiffs' contention that county commissioners cannot act as the governing body of their township for the reason that in this State the township is only a geographical subdivision and not a governing unit with corporate powers is without merit, since the General Assembly by Session Laws of 1917, Ch. 268, amended Chapter 42 so as to confer upon townships the power to establish and maintain public hospitals, that power to be exercised under the supervision of the board of county commissioners.

4. **Hospitals § 2— township hospital—taxation of township residents—no non-uniform tax**

Plaintiffs' contention that G.S. 131-4 *et seq.* providing for the establishment of public hospitals is unconstitutional because the levy of taxes within a township unit leads to non-uniformity in taxation is without merit.

APPEAL by plaintiffs from *McKinnon, Judge.* Judgment originally dated 24 November 1976 but subsequently entered 6 December 1976. Appeal by Intervenors from McKinnon, Judge. Judgment entered 13 December 1976. Heard in the Court of Appeals 9 June 1977.

Plaintiffs, who bring this action as a class action, are residents of Brunswick County and taxpayers of Smithville Township within Brunswick County. The individual defendants are the County Commissioners of Brunswick County. Plaintiffs alleged, *inter alia*:

> "On or about January 5, 1976 the aforementioned Commissioners purporting to act as the governing body of Smithville Township and under the purported authority of N.C.G.S. 131-4, et seq., accepted a petition and ordered an election held in Smithville Township on the question of an ad valorem tax on the residents of said Township to support the issuance of bonds for a public hospital in Smithville Township. Thereafter an election was held on August 17, 1976, which apparently passed in favor of a tax levy and issuance of bonds for the purpose expressed. Presently, the County Commissioners have expressed their intention of implementing their action up to now by imposing a tax on properties in Smithville Township and issuing

bonds for such purposes and in general by proceeding to carry out the terms of N.C.G.S. 131-4 through N.C.G.S. 131-28. In summary said Commissioners are threatening to tax the property owners of Smithville Township and to issue bonds for creating and maintaining a hospital to be located in said Township."

Plaintiffs further alleged that G.S. 131-4 *et seq.*, "as it would relate to and be applied to" Smithville Township, is unconstitutional, and that even if the constitutionality of the statute should be upheld, the election of 17 August 1976 is a nullity. They prayed that the County Commissioners and the County of Brunswick be permanently restrained from proceeding to assess ad valorem tax on the taxpayers of Smithville Township, appoint trustees or issue bonds under the authority of G.S. 131-4 *et seq.*

Upon motion, the City of Southport, its Mayor, and Board of Aldermen, the Board of Trustees of Smithville Township Hospital, and some of the residents, freeholders and taxpayers of Smithville Township were allowed to intervene. They filed answer in which they denied all allegations relating to the unconstitutionality of the statute and the nullity of the election, and moved for judgment on the pleadings.

Defendants, in their answer, also denied the material allegations of the complaint and moved for summary judgment. Intervenors also filed a motion for summary judgment. The parties stipulated that there were no justiciable issues of fact and that the matter could be heard on the motions for summary judgment based upon issues of law raised by the pleadings.

The court entered judgment for defendants and intervenors and plaintiffs appealed. Intervenors subsequently moved that plaintiffs' appeal be dismissed, and from order denying that motion, intervenors appealed.

Lee and Lee, by J. B. Lee, for plaintiff appellants.

Prevatte, Herring, Prevatte & Owens, by James R. Prevatte, for defendant appellees.

Murchison, Fox and Newton, by Carter T. Lambeth and Michael R. Isenberg, for intervenor appellees.

MORRIS, Judge.

Intervenors appeal from the denial of their motion that plaintiffs' appeal be dismissed.

[1] The judgment entered by Judge McKinnon bears the date of 24 November 1976. The record indicates that it was filed 6 December 1976. Appeal entries of plaintiffs are dated 6 December 1976 and bear the filing date of 8 December 1976. On 9 December 1976, defendants and intervenors moved to dismiss the appeal. The motion recites, *inter alia*, the following:

Oral arguments on the motions for summary judgment took place on the afternoon of Monday, 22 November 1976. At the conclusion of the arguments, the court notified counsel for all parties that he would render a decision on Wednesday, 24 November 1976. On 24 November 1976, the court granted defendants' and intervenor-defendants' motions for summary judgment and denied all of plaintiffs' claims for relief in open court "which was noted by the Clerk in the minutes of the Superior Court of Brunswick County for the November 22, 1976 session, as directed by Judge Henry McKinnon . . . ." The court directed counsel for defendants to prepare and submit a judgment for approval. Entry of judgment took place on 24 November 1976 in open court. Plaintiffs did not give oral notice of appeal and under Rule 3(a)(2), North Carolina Rules of Appellate Procedure, had only 10 days from 24 November 1976 within which to file notice of appeal with the clerk, which time expired 6 December 1976 at 5:00 p.m. Plaintiffs failed to file notice of appeal with the clerk within the time limit, and counsel for defendants and intervenor-defendants were not notified of an appeal within the time limit. On 8 December 1976, plaintiffs purported to file notice of appeal with the clerk.

On 13 December 1976, plaintiffs filed a verified motion to amend judgment. The motion was signed by J. B. Lee, of counsel for plaintiffs. He averred that following the Monday afternoon hearing, he returned to Whiteville. On Wednesday, 24 November 1976, he called Mr. Carter Lambeth and asked Mr. Lambeth to inquire of Judge McKinnon whether his (Lee's) presence in court for the rendering of decision would be required. If the Judge answered affirmatively, Mr. Lambeth was requested to call Mr. Lee so Mr. Lee could leave his office in Whiteville and return to Southport. Mr. Lambeth did not call back, but later that day Mr. James Prevatte did call Mr. Lee's office and leave word with Mr. Lee's secretary that the court's decision had been "announced". Mr. Lee averred that he was informed and believed that Mr. Prevatte also stated that he would prepare judgment for approval prior to submission to Judge McKinnon. On 2 December 1976, Mr. Lee received in the mail a photocopy of the judgment and a photocopy of a letter to Judge

McKinnon stating that Mr. Lee had been furnished a copy with the request that he review it and notify either Mr. Prevatte or Mr. Lambeth if changes were requested. Mr. Lee intended to file his appeal entries on Friday when Judge McKinnon was to hold criminal court in Whiteville. However, when he went to the courthouse, he found that court had broken down and there was no Friday court. On Monday he submitted appeal entries to Judge McKinnon. At that time, Mr. Lee discovered that the judgment had been signed and was dated 24 November 1976. Copies of appeal entries were forwarded to Mr. Lambeth and Mr. Prevatte. Counsel had discussed the matter of appeal, and it was understood that regardless of the decision, an appeal would be taken. The course of dealings among counsel had been informal and Mr. Lee assumed that adequate notice to all parties would be sufficient compliance with the rules. On Wednesday, 8 December 1976, Mr. Lee was informed that there was some question with respect to whether an appeal had actually been taken. In that morning's mail, he received a photocopy of the judgment, marked "a true copy", and this was the first time he had seen a signed copy of the judgment. It bore filing date of 6 December 1976. On 10 December 1976, he received copy of motion to dismiss appeal and on the same date prepared and filed new appeal entries and served them on Mr. Lambeth and Mr. Prevatte. The motion requested "... that the judgment be amended under Rule 59 of the North Carolina Rules of Civil Procedure and the court on its own motion correct and declare what its intentions were in entering same."

On 14 December 1976, there was filed a "Memorandum and Order Amending Judgment" which had been signed by Judge McKinnon on 13 December 1976. In this order, the court noted that he was not advertent to any controversy with respect to the date of entry of judgment until Wednesday, 8 December 1976, when so advised by Mr. Lee. The order further recited:

> "Because of considerable public interest expressed, the undersigned stated in court the conclusions of his decision and furnished to Mr. Prevatte a memorandum of certain conclusions that the court felt appropriate to be included in the judgment, and directed him to see to the preparation of a judgment for submission to other counsel and the court. Because of the Thanksgiving holiday, this session of court adjourned on November 24, 1976. The undersigned did not consider these actions to be entry of judgment and made no direction to the clerk with respect to entry of judgment. A handwritten memoran-

dum of the conclusions made was furnished to Mr. Louis Hazel, Clerk, for his use in advising the press and others interested of the rulings and not as an official court record."

"It was not the intention of the undersigned that the instructions to Mr. Prevatte on November 24, 1976, to prepare a judgment, or the public statement of the decision of the court, on that date, be an entry of judgment, and any clerical entry based on the undersigned's actions on that date was a clerical error. It was the intention of the court that judgment be entered when the judgment was signed after attorneys for all parties had had an opportunity to inspect the form of the judgment, and the signing of the judgment with the typed date of November 24, 1976, was an inadvertence and clerical error on the part of the undersigned."

The court then, on its own motion, ordered ". . . that any entry of judgment made by the Clerk in this cause on November 24, 1976, be stricken as a clerical error, and that the date of the judgment heretofore signed be corrected to read December 3, 1976." The court, in this order, denied the motion to dismiss the appeal.

Plaintiffs concede that notice of appeal was not given in open court. Therefore, appeal must be taken within 10 days after the rendition of a judgment which is rendered in session. G.S. 1-279; Rule 3(c), North Carolina Rules of Appellate Procedure. Filing by mail with the clerk is timely only if received by the clerk "within the time fixed for filing". Rule 26(a), North Carolina Rules of Appellate Procedure.

G.S. 1A-1, Rule 58, provides:

"Upon a jury verdict that a party shall recover only a sum certain or costs or that all relief shall be denied or upon a decision by the judge in open court to like effect, the clerk, in the absence of any contrary direction by the judge, shall make a notation in his minutes of such verdict or decision and such notation shall constitute the entry of judgment for the purposes of these rules. The clerk shall forthwith prepare, sign, and file the judgment without awaiting any direction by the judge.

In other cases where judgment is rendered in open court, the clerk shall make a notation in his minutes as the judge may direct and such notation shall constitute the entry of judgment

for the purposes of these rules. The judge shall approve the form of the judgment and direct its prompt preparation and filing.

In cases where judgment is not rendered in open court, entry of judgment for the purposes of these rules shall be deemed complete when an order for the entry of judgment is received by the clerk from the judge, the judgment is filed and the clerk mails notice of its filing to all parties. The clerk's notation on the judgment of the time of mailing shall be prima facie evidence of mailing and the time thereof."

Intervenor appellees argue that the first paragraph of Rule 58 is applicable here because the judge denied all claims for relief of the plaintiffs and the clerk made notations in the minutes of the decision of the court, the court having made no contrary direction.

The matter was being heard upon the motion of plaintiffs for directed verdict based on the pleadings and motions of defendants and intervenor-defendants for summary judgment. In effect, the trial court denied the motion of plaintiffs and allowed the motions of defendants and intervenors. The judge directed the preparation of judgment but did not direct the clerk to enter judgment in the minutes. Judge McKinnon, whose circumspection and reputation for veracity cannot be questioned and are not questioned by appellants, stated unequivocally that it was not his intention that his instructions to Mr. Prevatte in open court on 24 November 1976 to prepare a judgment or the public statement of the court's decision constitute an entry of judgment. He further stated in his order that he did not direct entry of judgment and that any entry in the minutes based on his actions was a clerical error.

It is clear that Judge McKinnon purposely did not direct entry of judgment but directed that a judgment be prepared for submission to opposing counsel and to him for approval. It is also clear that under G.S. 1A-1, Rule 60, "Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative. . . ." This Judge McKinnon has done, and in his denial of appellant's motion to dismiss we find no reversible error.

[2] As to plaintiffs' appeal, in the judgment entered allowing the motions for summary judgment, the court made the following conclusions of law:

"1. That the statutory scheme of Article 2, Chapter 131 of the General Statutes of North Carolina is a constitutional delega-

tion of authority for the Board of Commissioners of Brunswick County to assume the role of 'governing body' of Smithville Township for the purposes specified in that article.

2. That the provisions of Article 2, Chapter 131 of the General Statutes of North Carolina and the actions of the Board of Commissioners of Brunswick County pursuant thereto in accepting the petition calling for the election and proceeding to levy a tax on property in Smithville Township are not unconstitutional in any respect as alleged or suggested by the plaintiffs.

3. That the County Commissioners of Brunswick County are empowered by virtue of North Carolina General Statute 131-5 and the referendum election of August 17, 1976 to levy a four cent (4¢) tax per hundred-dollar valuation on property in Smithville Township for the year 1976 and subsequent years for the support and maintenance of a township hospital."

Plaintiffs' sole assignment of error is to the court's conclusions of law and to the signing and entry of the judgment. By this assignment of error plaintiffs ask us to determine two specific questions: (1) Whether the County Commissioners of Brunswick County can act as the governing body of Smithville Township and establish a township hospital pursuant to G.S. 131-4 *et seq.*, and (2) whether a township in North Carolina may constitutionally become a governing unit and a taxing base for supporting a township hospital. Determination of whether the statutory scheme of G.S. 131-4 *et seq.* is a constitutional delegation of authority for a county board of commissioners to assume the role of a "governing body" of a township for the purpose of implementing the enabling legislation will, we think, necessarily answer the questions raised by plaintiffs.

The pertinent portions of Article 2, Chapter 131 of the General Statutes of North Carolina are:

"Any county, township, or town may establish a public hospital in the following manner:

(1) Petition Presented. — A petition may be presented to the governing body of any county, township, or town, signed by 200 resident freeholders of such county, township, or town, 150 of whom, in the case of a county, shall not be residents of the city, town, or village where it is proposed to locate such hospital, asking that an annual tax may be levied for the establishment and maintenance of a public hospital at a place in the county, township, or town named therein, or to be thereafter selected

by the governing body of such county, township or town, and specifying the maximum amount of money proposed to be expended in purchasing or building such hospital.

(2) Election Ordered. — Upon the filing of such petition the governing body of the county, township, or town shall order a new registration and shall submit the question to the qualified electors at the next general election to be held in the county, township, or town, or at a special election called for that purpose, first giving 90 days' notice thereof by publication once a week for four successive weeks beginning 90 days before the day of said election in one or more newspapers published in the county, township, or town, if any be published therein, and by posting such notice, written or printed, in each township of the county, in case of a county hospital, which notice shall include the text of the petition and state the amount of the tax to be levied upon the assessed property of the county, township, or town. The election shall be held at the usual places in such county, township or town for electing officers, the election officers shall be appointed by the board of county commissioners and the vote shall be canvassed in the same manner as in elections for officers for such county, township, or town.

No action to question the validity of any such election shall be brought or maintained after the expiration of 60 days from the canvassing of said vote, and after the expiration of said period it shall be conclusively presumed that said election has been held in accordance with the requirements of this section, unless within said period such action is instituted.

(3) Tax to Be Levied. — The tax to be levied under such election shall not exceed one fifteenth of one cent (1/15 of 1¢) on the dollar ($1.00) for a period of time not exceeding 30 years, and shall be for the issue of county, township, or town bonds to provide funds for the purchase of a site and the erection thereon of a public hospital and hospital buildings."

The statute further (1) requires the governing body to submit to the qualified electors the question of whether such a tax shall be levied and, if the majority of the qualified voters favor the levying of such a tax, the governing body shall levy the tax to be collected in the same manner as other taxes, credited to the "Hospital Fund" and paid out on the order of the hospital trustees only for the purposes authorized by the statute; (2) requires the governing body to appoint seven trustees and provides for their terms and subsequent

election; and (3) sets forth the duties and powers of the trustees, manner of filling vacancies, meetings, and reports required to the governing body.

[3] Plaintiffs do not contend that the Commissioners of Brunswick County have failed in any respect to follow the statutory procedures. Their contention is that they cannot act as the governing body of Smithville Township for the reason that in this State the township is only a geographical subdivision and not a governing unit with corporate powers.

Unquestionably the township as established by the Constitution of 1868 has disappeared from the scene in this State. Section 5 of Article VII of that Constitution provided for the election of a clerk and justices of the peace and set out their powers. Sections 3 and 4 of Article VII provided for the counties to be divided into special districts known as townships which would have corporate powers for the necessary purposes of local government. The General Assembly, in order to give effect to the constitutional provisions, provided by statute that all actions by and proceedings against a township should be in the name of its board of trustees, who were also given the power to levy and collect taxes. Bat. Rev. Ch. 112, §§ 2 and 19. History has revealed, as plaintiffs point out, that this type of government was not cognate to the traditional subdivisions of government in the South and was totally unsuccessful and short lived.

The statutory provisions giving trustees certain powers were expressly repealed by Session Laws of 1873-74, Ch. 106. *See also Wallace v. Trustees*, 84 N.C. 164 (1881). In *Wallace*, the Supreme Court noted that the General Assembly of 1876-77 ". . . under the power given it in the amended Constitution of 1875, enacted what is generally known as the 'County Government Act', whereby all the provisions of the Constitution of 1868, in regard to township board of trustees were abrogated, and the provisions of the act substituted in place thereof." *Id.* at 165. After further discussion of the provisions of the County Government Act, the Court, speaking through Ruffin, J., said:

> "Hence we conclude that there can be no doubt of the purpose of the Legislature to take away from the township board of trustees all corporate powers; and that it has not only done so in express words, but has destroyed their very existence as corporate bodies." *Id.* at 167.

Plaintiff argues that if a township has no corporate existence, it is not a governmental unit and has no governing body. This argument, however, fails to recognize that

> "... it is within the power and is the province of the legislature to subdivide the territory of the state and invest the inhabitants of such subdivisions with corporate functions, more or less extensive and varied in their character, for the purposes of government.... Indeed, it seems to be a fundamental feature of our system of free government, that such a power is inherent in the legislative branch of the government, limited and regulated, as it may be, only by the organic law....
>
> It is in the exercise of such power that the legislature alone can create, directly or indirectly, counties, townships, school districts, road districts, and the like subdivisions, and invest them, and agencies in them, with powers corporate or otherwise in their nature, to effectuate the purposes of the government, whether these be local or general, or both. Such organizations are intended to be instrumentalities and agencies employed to aid in the administration of the government, and are always under the control of the power that created them, unless the same shall be restricted by some constitutional limitation. Hence, the legislature may, from time to time, in its discretion, abolish them, or enlarge or diminish their boundaries, or increase, modify or abrogate their powers. It may provide that the agents and officers in them shall be elected by the electors, or it may appoint them directly, or empower some agency to appoint them, unless in cases where the constitution provides otherwise, and charge them with duties specific and mandatory, or general and discretionary in their character. Such power in the legislature is general and comprehensive, and may be exercised in a great variety of ways to accomplish the ends of the government." (Citations omitted.) *McCormac v. Commissioners*, 90 N.C. 441, 444-45 (1884).

While it is true that the General Assembly did, by the County Government Act, abolish the corporate powers theretofore conferred upon townships, section 3 of that act provided:

> "The townships heretofore created or hereafter established shall be distinguished by well defined boundaries, and may be altered, and additional townships created by the board of county commissioners, but no township shall have or exercise any corporate powers whatever, *unless allowed by act of general*

assembly, to be exercised under the supervision of the board of county commissioners." (Emphasis supplied.)

So it appears that the General Assembly, while not abolishing townships, did abolish their broad corporate powers. At the same time, it recognized that it could very well be necessary to vest townships with governmental powers to be supervised by the county commissioners of the county in which the township lies.

In *Brown v. Commissioners*, 100 N.C. 92, 97-98, 5 S.E. 178, 181 (1888), the Court, speaking through Merrimon, J., said:

> "Townships are, therefore, within the power and control of the General Assembly, just as are counties, cities, towns and other municipal corporations. It may confer upon them, or any single one of them, corporate powers, with the view to accomplish any lawful purpose, to promote the prosperity, safety, convenience, health, and common good of the people residing within them, and resorting thither, from time to time. And we can see no good reason why it may not confer such power for a single purpose, as well as many. There may be enterprises important to the people of localities—such as townships, road districts, school districts, and the like— that may be promoted by the exercise of corporate powers, to a limited extent, by such communities."

With these principles in mind, we now look at the statute under which defendants acted. Article 2 of Chapter 131 of the General Statutes, entitled "Hospitals in Counties, Townships, and Towns," was enacted in its original form by the General Assembly as Public Laws of 1913, Chapter 42. It was entitled "An Act to Enable Counties to Establish and Maintain Public Hospitals, Levy a Tax and Issue Bonds Therefor, Elect Hospital Trustees, Maintain Training Schools for Nurses, Etc." Section 1 provided: "Any county may establish a public hospital in the following manner. . . ." The act referred to counties and boards of commissioners throughout. The General Assembly, by Session Laws of 1917, Ch. 268, amended Chapter 42. The amending statute was entitled "An Act to Amend Chapter 42, Public Laws of 1913, so as to Extend Privileges for the Construction and Maintenance of Public Hospitals to Townships and Towns." That act was brief and simple. It provided

> "[t]hat the word 'county' wherever it occurs in chapter forty-two, Public Laws of one thousand nine hundred and thirteen, shall be followed by the words 'township and town', and

> wherever the word 'counties' appears it shall be followed by the words 'townships and towns', and wherever the words 'board of county commissioners' appears they shall be stricken out and the words 'governing body' shall be inserted in lieu thereof."

There can be no doubt that the General Assembly intended to confer upon townships the power to establish and maintain public hospitals. Under section 3 of the County Government Act, the power so conferred would be exercised under the supervision of the board of county commissioners.

Jones v. Commissioners, 107 N.C. 248, 12 S.E. 69 (1890), is particularly helpful in analyzing the case *sub judice*. The action there was brought to test the validity of an election held in Holloway's Township of Person County to ascertain whether a majority of the votes cast would favor subscribing to the capital stock of the Roxboro Railroad Company. The county commissioners, having ascertained that the majority of the votes cast were in favor of the subscription, appointed an agent to subscribe for the stock in the amount specified on the ballot. Thereafter, bonds were issued and taxes levied to pay the interest accruing thereon and to provide a sinking fund. The statute provided that the County of Person, or any township therein, could subscribe for the capital stock of the Railroad Company up to $10,000, and if the majority of the votes held at an election to be held as provided in the statute should be in favor of the subscription, the county commissioners should, in addition to the other taxes levied, levy upon all the property in the township a tax sufficient to pay the interest on the bonds issued on account of the subscription and provide a sum equal to one-tenth of the subscription for the purpose of a sinking fund. One of the contentions of the plaintiffs was that a township had no corporate existence, and the statute was, therefore, void as to it. In disposing of this contention, the Court said:

> "This contention is unfounded. Townships have a distinctive existence for specified purposes created by statute (The Code, sec. 707, pars. 13 and 14), and the Legislature may confer upon and invest them with corporate powers for a particular pertinent purpose, as to subscribe for the capital stock of a railroad company, to issue its bonds to raise money to pay for the same, to levy taxes upon the property of the taxpayers therein to pay the accruing interest upon such bonds, and to pay the same at their maturity. And there is no reason why the statute may not require the county commissioners to order the election, ascertain the result thereof, issue bonds and levy taxes in the

township, as was done in this case. Indeed, such provision was convenient and expedient. The townships are constituent parts of the county organization, and county officers may well be charged with duties and authority in respect to debts they may be allowed by statute to contract. It is settled that townships may subscribe for the capital stock of railroad companies when empowered for that purpose by statute. *Wood v. Oxford*, 97 N.C., 227; *Brown v. Comrs.*, 100 N.C., 92 and cases there cited." *Id.* at 265, 12 S.E. at 74.

While admittedly the statutes under consideration in *Jones* and *Brown* contain more particular directions as to the functions of the county commissioners, we think the principle is the same. Indeed, in *Wittkowsky v. Commissioners*, 150 N.C. 90, 94-95, 63 S.E. 275, 277 (1908), the Court said:

"This Court has held in several cases, and it is not now an open question, that townships may, by observing the constitutional requirements, issue bonds to aid in the construction of railroads. (Citations omitted.) We have also held that the Legislature may establish fence districts and school districts and confer upon them power to contract debts and issue bonds to raise money for the purpose of erecting fences, schoolhouses, etc., levying, through the county commissioners, taxes to pay the interest, provide a sinking fund and, at maturity, pay the principal of the bonds. As said by *Merrimon, C. J.*, in *Jones v. Commissioners, supra*, 'The townships are constituent parts of the county organization.' While townships and other taxing districts are sometimes referred to as *quasi* municipal corporations, they are but territorial sections of counties, upon which, for appropriate purposes, power is conferred to perform functions of government of local application and interest."

[4] Plaintiffs further contend that the statute is unconstitutional because the levy of taxes within a township unit leads to nonuniformity in taxation. They do not urge that there cannot be two taxing units. They do argue, however, that the second taxing unit must be a uniform division where there is a "community of interest", which, they say, is unknown to townships.

Since the General Assembly has the power to confer upon townships corporate powers to enable the township to accomplish the purpose of promoting the prosperity, safety, convenience, health and common good of the people residing within that township, it is entirely appropriate that only the township itself

may act to finance and pay for the specific purpose. *See Commissioners v. State Treasurer*, 174 N.C. 141, 93 S.E. 482 (1917). In the present case, 84% of the voters in Smithville Township voted for the levy of a tax to support a township hospital. It is completely obvious that the large majority of voters banded together to tax themselves to pay for a health service they felt was needed to promote the health, safety, convenience, and common good of all the people in the township. That this tax levy would not constitute double taxation has been well settled in this State. *E.g., Jamison v. Charlotte*, 239 N.C. 682, 80 S.E. 2d 904 (1954). Nor does plaintiffs' argument that G.S. 131-4 *et seq.*, is a local act prohibited by N.C. Constitution, Art. II, § 24, have any efficacy. The statute is clearly a general law. *Sides v. Hospital*, 287 N.C. 14, 213 S.E. 2d 297 (1975).

Plaintiffs further contend that to allow the county commissioners to act as the "governing body" under the statute creates a hiatus involving certain vital situations enumerated by plaintiffs as follows:

1. How can corporate powers be conferred on a township except through its governing body?
2. Who is to sue or be sued?
3. Who assumes the governmental authority or supervision of the township hospital?
4. Who can enter into a contract?
5. Who protects the properties of the hospital?
6. Who answers to the electorate?
7. Who exercises police powers?

We deem it unnecessary to discuss these seriatim. Suffice it to say that in our opinion the statute provides for the appointment of trustees and, in other respects, adequately sets out the procedures for the operation of the hospital together with the duties and responsibilities of the trustees and commissioners.

Finally, plaintiffs argue that the statute is violative of N.C. Constitution, Art. VI, § 9(1), which prohibits the concurrent holding by any one person of any two elective offices in this State. We fail to see the applicability of this argument to the present situation. G.S. 131-7 merely requires the county commissioners to appoint the trustees to hold office until the next general election when the electorate shall elect the trustees. Nothing in Article 2 of Chapter 131

requires the commissioners to act as trustees, either by appointment or election.

[2] For the reasons stated herein, we hold that the statutory scheme set forth in G.S. 131-4 *et seq.* is a constitutional delegation of authority for a board of county commissioners to assume the role of "governing body" for the purpose of implementing that enabling legislation, including, of course, the levying of a tax to support a township hospital.

The orders from which plaintiffs and intervenors appeal are both affirmed.

Judges PARKER and CLARK concur.

STATE OF NORTH CAROLINA v. DIXON LOCKLEAR

No. 7716SC216

(Filed 7 September 1977)

1. **Criminal Law § 138.7— sentencing— evidence considered**

In sentencing, the trial court is not confined to the evidence relating to the offense charged but may inquire into such matters as defendant's age, character, education, environment, habits, mentality, propensities, record and alleged acts of misconduct in prison.

2. **Criminal Law § 138.8— sentencing hearing— opportunity to rebut evidence in aggravation of punishment**

While a presentence report considered by the trial court in determining a sentence may properly contain hearsay and formal rules of evidence do not apply to the testimony of witnesses in a sentencing hearing, the sentencing hearing must be fair and just, and the trial court must provide the defendant with a full opportunity to controvert hearsay and other representations in aggravation of punishment.

3. **Criminal Law § 138.7— sentence based on hearsay testimony**

Defendant is entitled to be resentenced for the offenses of possession of marijuana with intent to sell and sale and delivery of marijuana where it appears from the record that the trial court's finding that defendant would not benefit from sentencing as a committed youthful offender and the court's imposition of maximum consecutive sentences for the offenses were based solely (except for the circumstances of the offenses) on an officer's hearsay testimony at the sentencing hearing that an unidentified but reliable confidential informant told him that defendant "was doing between $500 and $1,000 worth of grass a week."

Judge MORRIS concurring as to verdict and dissenting as to sentencing.

State v. Locklear

APPEAL by defendant from *Canaday, Judge*. Judgment entered 20 October 1976 in Superior Court, ROBESON County. Heard in the Court of Appeals 29 June 1977.

Defendant pled not guilty to charges of (1) possession of marijuana with intent to sell, and (2) sale and delivery of marijuana.

The evidence for the State tended to show that on 22 April 1976, undercover agent Max Boliek purchased less than one ounce of marijuana from the defendant for $20.00. Boliek was accompanied to defendant's home by Clarence Leonard, to whom Boliek gave the $20.00. Leonard went behind defendant's house and shortly thereafter came back with the defendant. Leonard had a plastic bag in his hand and gave it to Boliek. Boliek remarked that it "wasn't real good stuff" whereupon defendant took the bag from him and stated

> "Hey, man you don't have to buy it if you don't want it. There's no trash in that pot. It's just like all the others I got and I haven't had any complaint."

Boliek retrieved the bag, took Leonard home, and delivered the bag to Detective Joel Locklear. The material in the bag was analyzed in an S.B.I. laboratory as 80% marijuana.

Defendant offered the testimony of Clarence Leonard and himself. This evidence tended to show that Leonard had sold the marijuana to Boliek and that defendant had never sold marijuana to anybody. Defendant denied that he had grabbed the bag from Boliek or that he had made the statements Boliek said he made.

The jury found defendant guilty as charged.

After sentencing hearing the trial court found that defendant would not benefit from sentencing as a committed youthful offender. The defendant appeals from judgment imposing consecutive five-year terms of imprisonment.

Attorney General Edmisten by Associate Attorney Jane Rankin Thompson for the State.

James D. Little for defendant appellant.

CLARK, Judge.

We find no merit in the assignments of error relating to trial and verdict. The sole assignment of error which merits discussion concerns the sentencing procedure.

After verdict the State called as a witness a deputy sheriff. He testified, over defendant's objection, that he had developed a reliable, confidential informant, who had told the witness that he had purchased marijuana from defendant on numerous occasions, and that defendant "was doing between $500 and $1,000 worth of grass a week." Defense counsel and the District Attorney made statements to the court. Thereupon, the trial court found that defendant (under 21 years of age) would not benefit from sentencing as a committed youthful offender under G.S. 148-49.4. The court then imposed two consecutive five-year prison terms.

The record on appeal does not disclose that defendant had any record of prior convictions nor does the record disclose that any other evidence or information was offered and considered by the court in aggravation of punishment.

[1] The importance of sentencing, both to the defendant and the State, demands that the trial judge have adequate information as the basis for a proper sentence. Under G.S. 15-198 the trial court may require a probation officer to make a presentence investigation and report, which should be received and disclosed in open court. See G.S. 15A-1332, a part of the Trial State and Appellate Procedure Act of 1977 (Criminal Code Commission), effective 1 July 1978; *State v. Pope*, 257 N.C. 326, 126 S.E. 2d 126 (1962). In sentencing, the trial court is not confined to the evidence relating to the offense charged. It may inquire into such matters as age, character, education, environment, habits, mentality, propensities, and record of the person about to be sentenced. *State v. Cooper*, 238 N.C. 241, 77 S.E. 2d 695 (1953). And the court may inquire into alleged acts of misconduct in prison. *State v. Thompson*, 267 N.C. 653, 148 S.E. 2d 613 (1966).

[2] Different evidentiary rules govern trial and sentencing procedures. See G.S. 15A-1334, Act of 1977, *supra*; *State v. Pope*, *supra*; *State v. Dawson*, 23 N.C. App. 712, 209 S.E. 2d 503 (1974). It would be unreasonable to require that all information in a presentence report be free of hearsay. Nor should the formal rules of evidence apply to the testimony of witnesses in a sentencing hearing. But the sentencing hearing must be fair and just, and the trial court must provide the defendant with full opportunity to controvert hearsay and other representations in aggravation of punishment.

[3] In *State v. Pope*, *supra*, at page 335, we find a statement often quoted in other decisions: "Unsolicited whispered representations and rank hearsay are to be disregarded." We shy from attempting to define the term "rank hearsay." But in the case before us it ap-

pears from the record on appeal that defendant was under 21 years of age and that no record of prior convictions was offered by the State. The only evidence in aggravation of punishment was the testimony of a law officer that an unidentified but reliable informant told him that defendant "was doing between $500 and $1,000 worth of grass a week." Whereupon, the trial court found that defendant would not benefit from sentencing as a youthful offender under G.S. 148-49.4, and the court then imposed maximum consecutive prison sentences of five years on each of the two counts. Since the informant, referred to by the law officer witness as the one who informed him that defendant was dealing in drugs, was not identified, the defendant not only had no opportunity to confront the witness but had as well no effective way of contradicting the damaging and prejudicial information. Further, this prejudicial hearsay information was the only evidence in aggravation of punishment which, according to the record on appeal, was presented to and apparently considered by the trial court in imposing punishment.

The State contends that hearsay evidence is not ground for disturbing the sentence in the absence of prejudice, relying on *State v. Perry*, 265 N.C. 517, 144 S.E. 2d 591 (1965). In *Perry*, the defendant, charged with two counts of burglary, entered pleas of guilty to breaking or entering rooms in a girls' dormitory. At sentencing hearing the investigating officer testified as to statements made to him by the occupants of the dormitory. Parker, J. (later Chief Justice), for the Court, wrote: "While the procedure in the instant case of the court's hearing testimony of officers as to what witnesses said instead of having the witnesses present in court to testify is not approved, under the facts of this case it cannot be said that the hearing of such testimony by the judge before sentencing the defendant was prejudicial to the defendant, or that it manifested inherent unfairness or injustice, or that it was conduct which offended the public sense of fair play." 265 N.C. at 520-521.

It is noted that in *Perry, supra*, the hearsay evidence in the sentencing hearing related to circumstances of the offenses to which defendant pled guilty, and the defendant, who was present with counsel, had full opportunity to offer any evidence in mitigation of the offenses. *Sub judice*, the hearsay evidence offered by the State, over the objection of defendant, related not to the offenses of which the jury found him guilty but to information in aggravation of punishment other than the offense charged. Too, the defendant in *Perry* pled guilty, and in so doing " 'waives the right to trial and the

incidents thereof.' " *Perry, supra,* at page 520, citing 21 Am. Jur. 2d, Criminal Law, § 495, p. 484.

A trial judge should not be unduly limited in sentencing by restrictive procedure. Nor should he be required to justify the sentence imposed by designating the basis for his punishment. He must be allowed to exercise wide discretion in determining appropriate punishment for the protection of society and rehabilitation of defendant. 4 Strong, N.C. Index 3d, Criminal Law, § 138. But the trial judge should not base his sentence solely (except for the circumstances of the offense) on "unsolicited whispered representations" or "rank hearsay."

We find no error in the verdict, but the judgment is vacated and the cause remanded for resentencing.

Vacated and remanded.

Judge PARKER concurs.

Judge MORRIS concurs as to verdict and dissents as to sentencing.

Judge MORRIS dissenting.

Although I concur in the result reached as to the verdict, I cannot agree with the result the majority reaches with respect to the sentencing. I am not willing to tie the hands of our trial judges to this extent. Although the majority opinion agrees that a trial judge should not be "unduly limited in sentencing by restrictive procedure," and that he should not be required to "justify the sentence imposed by designating the basis for his punishment," and that he should be "allowed to exercise wide discretion in determining appropriate punishment for the protection of society and rehabilitation of defendant," the result reached belies the words and leaves them empty and meaningless. For the most part all presentencing reports to the judge contain a great deal of hearsay. In all other areas of the law, when a matter is heard by a judge without a jury, we are willing to accord to the judge the ability and duty to cull out the incompetent evidence and not rely upon it in reaching his judgment or in finding facts. He passes upon the competency and admissibility of the evidence as a judge and determines its weight and sufficiency as a jury. *Everette v. Lumber Co.*, 250 N.C. 688, 110 S.E. 2d 288 (1959); *Laughter v. Lambert*, 11 N.C. App. 133, 180 S.E. 2d 450 (1971). Yet, after a defendant has been convicted by a jury of his

peers, we are not willing to accord to the trial judge the same ability on a sentencing hearing. If only hearsay evidence is presented at the sentencing hearing, the judge *must* justify a maximum, perhaps even less than maximum, sentence or the matter will be remanded for sentencing. The sentencing judge is the one who presided at the trial; who witnessed the attitude and demeanor of the defendant throughout the trial. Where, as here, the defendant is a young man and the record is barren of prior convictions, the judge who pronounces judgment after a sentencing hearing at which only hearsay evidence was presented, despite his firm convictions as the result of his observations at trial, finds himself in the untenable position of having the matter remanded for sentencing should the defendant deem the punishment too harsh and raise the question on appeal. Unquestionably, had the court entered the judgments without having conducted any sentencing hearing at all, we would have refused to review the sentences since the matter of sentencing is within the discretion of the court and each sentence is within the statutory maximum.

In *Williams v. New York*, 337 U.S. 241, 93 L.Ed. 1337, 69 S.Ct. 1079 (1949), Mr. Justice Black spoke to the necessity of allowing trial judges wide discretion in sentencing:

> "In addition to the historical basis for different evidentiary rules governing trial and sentencing procedures there are sound practical reasons for the distinction. In a trial before verdict the issue is whether a defendant is guilty of having engaged in certain criminal conduct of which he has been specifically accused. Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged. These rules rest in part on a necessity to prevent a time-consuming and confusing trial of collateral issues. They were also designed to prevent tribunals concerned solely with the issue of guilt of a particular offense from being influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct. A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punish-

ment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

. . . We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. And the modern probation report draws on information concerning every aspect of a defendant's life. The type and extent of this information make totally impractical if not impossible open court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues.

The considerations we have set out admonish us against treating the due process clause as a uniform command that courts throughout the Nation abandon their age-old practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence. . . . In determining whether a defendant shall receive a one-year minimum or a twenty-year maximum sentence, we do not think the Federal Constitution restricts the view of the sentencing judge to the information received in open court. The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due process clause would hinder if not preclude all courts—state and federal—from making progressive efforts to improve the administration of criminal justice." Pp. 246-251.

In *State v. Pope*, 257 N.C. 326, 126 S.E. 2d 126 (1962), Justice Moore, speaking for a unanimous Court, noted that G.S. 15-198 establishes the policy that full investigation may be made before sentencing, and said:

". . . The investigation may adduce information concerning defendant's criminal record, if any, his moral character, standing in the community, habits, occupation, social life, responsibilities, education, mental and physical health, the specific charge against him, and other matters pertinent to a proper judgment. The information obtained by investigation may be received and considered. It is discretionary with the judge whether or not the sources of information are divulged, else it

might prove difficult to obtain information in many instances, and the time required in sentencing procedure might be unreasonably extended. Unsolicited whispered representations and rank hearsay are to be disregarded. It is better practice to *receive* all reports and representations from probation officers in open court. All information coming to the notice of the court which tends to defame and condemn the defendant and to aggravate punishment should be brought to his attention before sentencing, and he should be given full opportunity to refute or explain it.

In our opinion it would not be in the interest of justice to put a trial judge in a straightjacket of restrictive procedure in sentencing. He should not be put in a defensive position and be required to sustain and justify the sentences he imposes, and be subject to examination as to what he has heard and considered in arriving at an appropriate judgment. He should be permitted wide latitude in arriving at the truth and broad discretion in making judgment. Pre-sentence investigations are favored and encouraged. There is a presumption that the judgment of a court is valid and just. The burden is upon appellant to show error amounting to a denial of some substantial right. *State v. Poolos*, 241 N.C. 382, 85 S.E. 2d 342. A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play." P. 335.

In the case before us, a plainclothes detective testified at the sentencing hearing. He testified that he had been assigned to the narcotics detail for six and one-half years and in that period of time had developed confidential sources of information on the inside of the drug traffic in Robeson County; that in the past two months he had developed a confidential source of information in a certain part of the county; that this source had proved to be reliable; that it had produced cases which had not yet been tried; that that source had named defendant in a list of people "heavy in the drug traffic" and had told the witness that defendant was "doing between $500 and $1000 worth of grass a week." Counsel for defendant conducted a searching cross-examination of the witness. After the showing by the State, defendant was heard by the court and allowed to make such statements as he wished. After the defendant was heard, the court announced that he did not feel the case was an appropriate one

for probation. He further stated that the testimony of defendant's witness, in his opinion, lacked plausibility and he felt that the evidence indicated collusion between that witness and defendant for the purpose of the trial.

If the majority opinion is based upon the premise that the court erroneously based its sentence solely on rank hearsay, it appears that the record itself indicates clearly that this is just not the case.

In the sentencing of defendant in this case, I perceive no abuse of discretion, no procedural conduct prejudicial to defendant, no circumstances which manifest inherent unfairness and injustice, no conduct which offends the public sense of fair play, and I vote to find no error in the trial and in the sentencing.

ROBERT DEAN ASHLEY v. REX ALLEN ASHLEY AND VONDA FAYE WADDELL ASHLEY

No. 7617SC977

(Filed 7 September 1977)

Automobiles § 90.4— pedestrian stepping into traffic—instruction supported by evidence

In an action to recover for damages sustained when plaintiff pedestrian was struck and injured by an automobile driven by defendant, evidence was sufficient to support the trial court's instruction that plaintiff "stepped out" into the road.

APPEAL by plaintiff from *Fountain, Judge*. Judgment entered 2 June 1976 in Superior Court, SURRY County. Heard in the Court of Appeals 25 August 1977.

Plaintiff's complaint alleged that plaintiff, a pedestrian, was negligently struck and injured by an automobile driven by defendant Rex Allen and owned by defendant Vonda Faye. Defendants answered, denying negligence and asserting that plaintiff was contributorily negligent in that he "was under the influence of alcohol and staggered or ran" into the path of defendants' car.

Plaintiff's evidence tended to show the following: He and Johnny Sprinkle were riding with defendant (plaintiff's brother) on the afternoon of 9 July 1974. Defendant was angry with him and so he and Sprinkle got out of the car and began walking. They walked along the street on the left-hand side and they were "right at the

edge" of the street. At that time, defendant turned his car around and came back toward them from their rear in the right lane of the street. Plaintiff heard a noise and turned around to find defendant's car about 5 yards from him. He started to step back but defendant's car struck him on the left leg. On cross-examination plaintiff admitted that he and his brother had been drinking beer on the day of the accident and that in an earlier deposition he had stated that at the time of the accident he "turned to my right and see, I just stepped out, I thought he was going to pick us up, then I turned away." Plaintiff also presented two police officers, one of whom witnessed the accident. Together their testimony tended to show that after letting plaintiff and Sprinkle out of his car, defendant drove away and then turned around and headed toward them; that they were walking away from defendant on the left side of the road and defendant was driving in the right lane; that defendant "slung over to the left-hand side" and struck plaintiff; that plaintiff was on the shoulder at the time of the accident; that defendant did not stop or slow down after the accident; that plaintiff was found lying on the ground partly on the street and partly on the shoulder after the accident; that defendant then returned to the scene and stated, "my God, Robert, what have I done?"; and that defendant had an odor of alcohol on his breath. Plaintiff also presented medical testimony concerning his injuries.

Defendant then testified as follows: The three men had drunk over three six-packs of beer on the day of the accident and the defendant himself was drunk. He and plaintiff began arguing and he pushed plaintiff out of his car and drove away. He then turned around and went back to pick up Johnny Sprinkle. As he approached plaintiff he "hit the brakes on the car and it pulled me right beside of him and pulled me into him and I hit him." He blacked out at some point during the incident and did not realize that he had hit plaintiff.

The jury answered the first two issues affirmatively finding both negligence and contributory negligence and judgment was entered denying relief to plaintiff.

Finger & Park, by M. Neil Finger and Raymond A. Parker II, for the plaintiff.

Hudson, Petree, Stockton, Stockton & Robinson, by William F. Maready and Jackson N. Steele, for the defendants.

MARTIN, Judge.

Plaintiff contends in his second assignment of error that the trial court erred in its instructions to the jury by making a statement of fact not in evidence. Specifically, while setting forth the contentions of the parties, the trial court summarized the contentions of the defendant as to the plaintiff's contributory negligence and stated, in pertinent part, as follows:

> "[T]hat the plaintiff . . . *stepped out in front of the vehicle*, and put himself in a position where he would necessarily be struck . . . . [T]hat the plaintiff was negligent, being out in the roadway, in an intoxicated condition, and not paying attention to his own safety, and by *stepping into the automobile*. (Emphasis added.)
>
> * * *
>
> "[T]hat the plaintiff rather than taking any action for his own safety, *stepped out further into the roadway*; so as to make a collision with the vehicle inevitable." (Emphasis added.)

Plaintiff contends that the references to his "stepping out" into the pathway of defendant's vehicle constitute statements of a fact not in evidence resulting in prejudice to the plaintiff. After a careful examination of the trial record, we disagree.

It is true that a trial court commits error in its instructions to the jury by stating contentions not supported by evidence in the record. *Green v. Barker*, 254 N.C. 603, 119 S.E. 2d 456 (1961). However, the record of this case as presented on appeal reveals that the contention that plaintiff "stepped out" in front of the vehicle was alleged in defendant's answer and was supported by evidence elicted on cross-examination of plaintiff. In his "second defense" defendant alleged that plaintiff was guilty of negligence in that "the plaintiff was under the influence of alcohol and staggered or ran into the roadway directly in front of the automobile. . . ." Evidence clearly supporting the trial court's statement of defendant's contention appears in testimony of the plaintiff on cross-examination. Plaintiff testified that in his deposition in response to a question concerning the accident he answered: ". . . I turned to my right and see, I just *stepped out*, I thought he was going to pick us up. . . ." (Emphasis added.) The substance of this evidence and defendant's allegation is clearly of the same import as the statement of defendant's contention in the trial court's charge to which plaintiff assigns error. In our judgment there is ample support in the record for the trial court's statement of defendant's contention; therefore, we find no error.

On the authority of *Ingle v. Roy Stone Transfer Corp.*, 271 N.C. 276, 156 S.E. 2d 265 (1967), plaintiff's first assignment of error is overruled.

We find no merit in plaintiff's remaining assignment of error.

No error.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. NORMAN HARGROVE

No. 7711SC269

(Filed 7 September 1977)

Criminal Law § 73.1— admission of hearsay—prejudicial error

In a prosecution for possession and sale of marijuana, testimony by an SBI agent that he told an undercover agent who allegedly purchased marijuana from defendant that he had information from different reliable sources that defendant was dealing in narcotics out of his vehicle and his residence and that it was possible for an undercover agent to make a buy from defendant was hearsay and erroneously admitted by the court. Furthermore, such error was not cured by the admission without objection of the undercover agent's testimony that he had heard the SBI agent testify at the preliminary hearing that an unidentified black male indicated to him that marijuana could probably be purchased at defendant's, since the evidence was not of the same import as the SBI agent's trial testimony.

APPEAL by defendant from *James, Judge*. Judgment entered 16 November 1976 in Superior Court, HARNETT County. Heard in the Court of Appeals 25 August 1977.

Defendant was indicted for possession of marijuana with intent to deliver, and for sale of marijuana. State's evidence tended to show the following: W. J. Brewington testified that on 17 March 1976 he was a member of the Tri-County Bureau of Narcotics. He went to Harnett County at the request of another agent, Randy Sturgill. At 1:15 p.m. he went to the house of defendant, talked to defendant, and told defendant that he wanted to buy some marijuana. After defendant told Brewington that he could get anything Brewington wanted, Brewington asked for two ounces of marijuana. Defendant then went into the house in the kitchen and Brewington saw him with two plastic bags containing vegetable matter. Defendant handed the bags to a young black male and the black male gave

the bags to Brewington in exchange for two $20 bills. Brewington then met Agent Sturgill and gave Sturgill the two plastic bags. Randy Sturgill was then called to testify that he is an agent with the Tri-County Bureau of Narcotics. He testified over objection that on 17 March 1976 he had a conversation with Agent Brewington in which he told Brewington that he had information from different reliable sources that defendant was dealing in narcotics out of his vehicle and his residence and that it was possible for an undercover agent to make a buy from defendant. Sturgill further testified over defendant's objection that he and Brewington did not communicate with one another by walkie-talkie because they had information from a confidential reliable source that defendant monitored police calls on scanners that he had.

Defendant testified in substance that he was on probation for a prior conviction of possession of marijuana but that he had never seen Brewington and did not sell anyone any marijuana or possess any marijuana on 17 March 1976. Defendant was convicted of possession with intent to sell and sentenced to 3 to 4 years. He appealed.

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

Stewart & Hayes, P.A., by Gerald W. Hayes, Jr., for the defendant.

MARTIN, Judge.

In his first assignment of error, the defendant contends that the trial court erred in overruling his objection to testimony by Agent Sturgill concerning the information obtained from reliable sources. Sturgill was allowed to testify, over defendant's objection, to a conversation with Agent Brewington in which Sturgill related that someone else told him that defendant "was dealing in narcotics out of his vehicle and out of his residence in Erwin," and that "it was possible for an undercover agent to possibly go in and make a buy from [defendant]." Defendant contends that this evidence constituted hearsay and that its introduction at trial was prejudicial. We agree.

An extrajudicial statement offered to prove the truth of the matter asserted therein constitutes hearsay. The probative force of such evidence, in whole or in part, depends upon the credibility and competence of the declarant—a person other than the witness from whom the information is sought—who is neither under oath nor sub-

ject to cross-examination; consequently, such evidence, with certain recognized exceptions not presently applicable, is incompetent. *State v. Kluttz*, 206 N.C. 726, 175 S.E. 81 (1934); *State v. Humphrey*, 13 N.C. App. 138, 184 S.E. 2d 902 (1971); 1 Stansbury's N.C. Evidence § 138 (Brandis Rev. 1973). In the case at bar, introduction of Agent Sturgill's statements to Agent Brewington relating to "information from different reliable sources of information" was tantamount to the introduction of the extrajudicial statements of the original informers and therefore inadmissible hearsay.

The Court recognizes the well established rule in North Carolina that prejudice created by the admission of incompetent evidence over objection is "cured" by the subsequent admission without objection of evidence of similar import. See *State v. Wright*, 270 N.C. 158, 153 S.E. 2d 883 (1967). However, we hold that the facts of the instant case do not warrant the application of this rule. In his subsequent testimony, defendant merely stated that he had heard Agent Brewington testify at the preliminary hearing to a conversation with an unidentified black male who indicated that marijuana could be purchased "probably over to Norman Hargrove's." This evidence is clearly not of the same import as Agent Sturgill's testimony. Agent Sturgill's testimony related to information from "different reliable sources" and concerned defendant's "dealing in narcotics out of his vehicle and his residence." Moreover, defendant was not testifying to these facts so as to put them into evidence; rather, he simply repeated what Agent Brewington had testified to at the preliminary hearing.

We hold that the trial court's admission of prejudicial hearsay entitles defendant to a new trial.

As defendant's other assignments of error may not arise on a retrial, we refrain from any discussion thereof.

New trial.

Judges PARKER and ARNOLD concur.

VIRGINIA K. THOMPSON v. JOHN H. THOMPSON

No. 7614DC969

(Filed 7 September 1977)

Divorce and Alimony § 19.2— foreign divorce decree— action to recover accrued alimony— changed circumstances— evidence improperly excluded

In an action by plaintiff to recover accrued alimony and other payments required under a S.C. divorce decree, the trial judge erred in refusing to hear evidence of defendant's changed circumstances as it related to possible modification of future payments.

APPEAL by defendant from *Gantt, Judge*. Judgment entered 31 August 1976 in District Court, DURHAM County. Heard in the Court of Appeals 24 August 1977.

This is an action by plaintiff to recover accrued alimony and other payments required under a South Carolina divorce decree. The chronology of events is as follows:

Plaintiff and defendant were formerly husband and wife residing in Columbia, Richland County, South Carolina. In August 1972 plaintiff instituted an action in the Richland County Court seeking a decree of divorce from defendant and seeking alimony and other payments of expenses from defendant. On 20 June 1974 a final decree of divorce was entered in South Carolina wherein plaintiff was awarded use of the home and furnishings in Columbia; defendant was ordered to pay mortgage payments and normal utilities and maintenance for the Columbia home; plaintiff was awarded a 1969 Chrysler automobile and defendant was ordered to pay the insurance thereon; and defendant was ordered to pay $150.00 per month alimony to plaintiff.

At some time, not disclosed by the record before us, after the marital difficulties began defendant moved to Durham, North Carolina. On 1 November 1974 plaintiff instituted an action in Durham County to recover payments accrued under the South Carolina decree. In that action the South Carolina decree was given full faith and credit, and judgment for payments accrued to 1 November 1974 under the South Carolina decree was rendered against defendant.

On 12 December 1975 the present action was instituted to recover payments accrued under the South Carolina decree from 1 November 1974 to the date of institution of this action on 12 December 1975. The trial judge found that defendant was in arrears

in alimony payments in the amount of $2,168.25, and was in arrears in house maintenance costs in the amount of $997.70.

Defendant alleged in his answer, and sought to introduce evidence of, a change of circumstances since entry of the South Carolina decree in June 1974, and sought a modification of the South Carolina decree to comport with the changed circumstances. The trial court ruled that the evidence was not admissible in this action which was instituted for past due payments under the decree. Defendant appealed.

Battle & Bayliss, by William H. Bayliss, for the plaintiff.

Pulley & Wainio, by W. Paul Pulley, Jr., for the defendant.

BROCK, Chief Judge.

Apparently the trial judge was either persuaded that defendant was seeking to modify the South Carolina decree with respect to the past due payments, or persuaded that G.S. 50-16.9(c) requires that an independent action be instituted for the specific purpose of modifying the South Carolina decree. In either event, His Honor's persuasion was misguided.

Defendant concedes that he is entitled to such modification of the South Carolina decree only with respect to future payments. Defendant has the burden of showing a change of circumstances to justify a change in future payments. In *Downey v. Downey*, 29 N.C. App. 375, 224 S.E. 2d 255 (1976) this Court held that the trial judge had jurisdiction to consider defendant's evidence of changed circumstances in plaintiff's action for judgment for payments past due under a foreign decree. In *Downey* the trial judge awarded judgment for accrued payments but modified the amount of future payments because of a showing of changed circumstances. This Court affirmed.

We see no impediment to a defendant's seeking relief as to future payments in an action by a plaintiff for recovery of payments accrued under a foreign alimony decree. However, we think it is advisable that he should do so by counterclaim specifically alleging a change of circumstances and specifically seeking relief only as to future payments. Then the Court and the parties will be fully apprised of his intention. In fact the one action is clearly more expeditious than requiring two separate actions between the same parties.

In the instant case, we hold that the trial judge erred in refusing to hear evidence of changed circumstances as it relates to possible modification of future payments.

We affirm so much of the judgment appealed from that awards judgment to plaintiff for accrued payments. We reverse the ruling of the trial judge that prohibited defendant in this action from seeking modification of the foreign decree with respect to future payments, and remand this cause to the District Court for further appropriate proceedings.

Affirmed in part.

Reversed in part and remanded.

Judges BRITT and MORRIS concur.

LEO B. NEASHAM AND WIFE, WINNIFRED NEASHAM v. JOHN D. DAY AND WIFE, DORIS DAY

No. 7630SC958

(Filed 7 September 1977)

1. **Rules of Civil Procedure § 41— trial by judge without jury—motion to dismiss**

A motion to dismiss made pursuant to Rule 41(b) permits the judge to weigh the evidence, to find facts against the plaintiffs, and to sustain defendants' motion at the conclusion of plaintiffs' evidence even though plaintiffs may have made out a *prima facie* case which could have precluded a directed verdict for defendants in a jury case; however, the practice of withholding judgment until all the evidence has been presented is considered the better practice except in the clearest cases.

2. **Highways and Cartways § 12.2— deed excepting roads—obstruction by landowner improper**

In an action to enjoin defendants from interfering with plaintiffs' use of roads for access to their property, the trial court properly determined that defendants had no right, title or interest in the roads except as joint users with other landowners where the evidence tended to show that the roads were excepted from the deed which conveyed property to defendants.

APPEAL by defendants from *Snepp, Judge*. Judgment entered 29 June 1976 in Superior Court, JACKSON County. Heard in the Court of Appeals 23 August 1977.

Plaintiffs' complaint alleges that defendants improperly interfered with plaintiffs' use of a public road known as the "Claude Hunter and Lawton Zachary Roads" which plaintiffs use for access to their residence. In support of their contention that defendants do not own the road plaintiffs incorporate defendants' deed "excepting and reserving from the operation of this deed . . . [t]he Main State Road and the Claude Hunter and Lawton Zachary Roads, as they are not (sic) located on and upon said lands . . . ." Plaintiffs further allege that roads have been opened and used by area residents and the public for over forty years, and they seek a declaration of right-of-way and an injunction against defendants' further interference with the road.

Defendants allege that the roads have not been used by the public since 1964 when they purchased their property. They deny the validity of the exception in their deed and further allege that the exception gives plaintiffs no rights to use the road, and that plaintiffs' use of the road has been with defendants' knowledge and consent. Defendants deny that plaintiffs have established an easement by prescription.

The trial court sitting without a jury concluded that defendants have no right, title, or interest in the Claude Hunter and Lawton Zachary roads except as joint users with other adjacent landowners. Defendants were enjoined from further interference with the use of the road and they appeal.

No brief filed for plaintiff appellee.

McKeever, Edwards, Davis & Hays, by George P. Davis, Jr., for defendant appellant.

ARNOLD, Judge.

Only one assignment of error is contained in the record on appeal:

> "The Court erred in denying the defendants' Motions for a Directed Verdict at the close of plaintiffs' evidence and renewed at the closing of all the evidence.
>
> Defendants' Exceptions No. 1 and 2"

In an action tried without a jury the appropriate motion by which defendants test the sufficiency of plaintiffs' evidence is by motion for dismissal. G.S. 1A-1, Rule 41(b). However, this Court may elect to consider defendants' motions for directed verdict as mo-

tions to dismiss in order to pass on the merits of this appeal. *Whitaker v. Earnhardt*, 289 N.C. 260, 221 S.E. 2d 316 (1976).

[1] A motion to dismiss made pursuant to Rule 41(b) permits the trial judge to weigh the evidence, to find facts against the plaintiff, and to sustain defendant's motion at the conclusion of plaintiff's evidence even though plaintiff may have made out a *prima facie* case which could have precluded a directed verdict for defendant in a jury case. *Helms v. Rea*, 282 N.C. 610, 194 S.E. 2d 1 (1972). Under Rule 41(b), the trial judge may decline to render judgment until all the evidence is in. The practice of withholding judgment until all the evidence has been presented is considered the better practice "except in the clearest cases." *Helms v. Rea, supra.*

The question raised by defendants' motion to dismiss made at the close of all the evidence is whether any findings of fact could be made from the evidence which would support a recovery for plaintiffs. *Pegram-West, Inc. v. Homes, Inc.*, 12 N.C. App. 519, 184 S.E. 2d 65 (1971). If such findings can be made the motion to dismiss must be denied.

[2] In the case at bar, competent evidence introduced by plaintiffs tended to show that the Claude Hunter and Lawton Zachary roads were excepted from the deed which conveyed property to defendants, and this evidence is sufficient to justify a finding of fact in support of judgment for plaintiffs. Hence, there is no basis for defendants' contentions that denial of their motions was error. Defendants' Assignment of Error is, therefore, without merit.

Defendants also undertake to attack the conclusions of law reached by the trial court as being unsupported by the findings of fact. Under App. R. 10(b)(2) defendants' contentions will not be considered on this appeal. There are no exceptions, and no assignments of error, in the record on appeal to any conclusions of law or findings of fact. App. R. 10(b)(2), in pertinent part, provides: "A separate exception shall be set out to the making or omission of each finding of fact or conclusion of law which is to be assigned as error." *Koehring Co. v. Marine Corp.*, 29 N.C. App. 498, 224 S.E. 2d 654 (1976); *pet. denied* 290 N.C. 308, 225 S.E. 2d 833 (1976). Also, see *Fetherbay v. Motor Lines*, 8 N.C. App. 58, 173 S.E. 2d 589 (1970), where this Court noted that the State Constitution gives exclusive authority to the Supreme Court to make rules of practice and procedure for the appellate division, and even where the North Carolina General Statutes conflict with Rules of Appellate Pro-

cedure, the Rules of Appellate Procedure will prevail. *Id.* at 60, 173 S.E. 2d at 591.

Affirmed.

Judges PARKER and MARTIN concur.

VIRGINIA F. LEVITCH v. DAVID H. LEVITCH

No. 7628DC991

(Filed 7 September 1977)

Divorce and Alimony § 21.6— separation agreement incorporated into divorce judgment—failure to pay alimony—contempt

Where the court merely incorporated a separation agreement into a judgment of absolute divorce by reference but did not order defendant husband to pay alimony as provided in the agreement, defendant may not be compelled by contempt proceedings to pay alimony as provided in the agreement.

APPEAL by plaintiff from *Israel, Judge.* Order entered 5 August 1976 in District Court, BUNCOMBE County. Heard in the Court of Appeals 30 August 1977.

On 7 December 1973 a judgment was signed in this action granting defendant an absolute divorce from plaintiff. In the judgment the court found as a fact that on 21 November 1973 the parties executed a deed of separation and ordered that the separation agreement "be, and the same is hereby, incorporated by reference in this Judgment and shall survive this Judgment".

On 20 January 1976 plaintiff filed a motion in the cause alleging that defendant had failed to pay alimony as provided in the separation agreement and was in arrears in payments to the extent of at least $1500. She asked that defendant be adjudged in contempt of court.

On 5 August 1976 the court entered an order denying plaintiff's motion for the reason that the 7 December 1973 judgment merely incorporated the separation agreement between the parties, and the court did not order defendant to pay alimony as provided in the agreement. Plaintiff appealed.

Jerry W. Miller for plaintiff appellant.

Riddle and Shackelford, by Robert E. Riddle, for defendant appellee.

BRITT, Judge.

Defendant has moved in this court that the appeal be dismissed for the reason that plaintiff did not comply with the rules of the court in perfecting her appeal. Although the motion has merit, we elect to treat the papers filed as a petition for writ of certiorari, allow the petition and proceed to consider the cause on the merits.

The crucial question presented by this appeal is: May defendant be compelled by contempt proceedings to pay alimony as provided in the separation agreement? The answer is no.

While the Supreme Court in *Bunn v. Bunn*, 262 N.C. 67, 136 S.E. 2d 240 (1964), was dealing with a consent judgment providing for the payment of alimony, we think the principle stated or restated in that case applies here. We quote from the opinion (p. 69) by Justice (now Chief Justice) Sharp:

> " . . . Consent judgments for the payment of subsistence to the wife are of two kinds. In one, the court merely approves or sanctions the payments which the husband has agreed to make for the wife's support and sets them out in a judgment against him. Such a judgment constitutes nothing more than a contract between the parties made with the approval of the court. Since the court itself does not in such case order the payments, the amount specified therein is not technically alimony. In the other, the court adopts the agreement of the parties as its own determination of their respective rights and obligations and orders the husband to pay the specified amounts as alimony.
>
> "A contract-judgment of the first type is enforceable only as an ordinary contract. It may not be enforced by contempt proceedings . . . . "

In the case at hand the trial court did nothing more than approve or sanction the provisions which defendant had made for plaintiff. The court did not *order* defendant to make the payments.

It would appear that the courts are still open to plaintiff for enforcement of the contractual rights created by the separation agreement. *See Merritt v. Merritt*, 237 N.C. 271, 74 S.E. 2d 529 (1953); *also*, 2 R. Lee, N.C. Family Law § 152 (1963).

For the reasons stated, the order appealed from is

Affirmed.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. BRICE CHRISTOPHER CHURCH AND BARBARA LOUISE WHITEHEAD CHURCH

No. 7725SC282

(Filed 7 September 1977)

Criminal Law § 75.10— statement by defendant—waiver of right to remain silent

In a prosecution for felonious possession of marijuana the trial court properly allowed the State to offer evidence of statements made by the male defendant where the evidence showed that he waived his right to remain silent and later stated that he would not answer questions about where marijuana in his possession came from; and defendant's assertion of his right to remain silent on that subject was honored by the interrogators.

APPEAL by defendants from *Thornburg, Judge.* Judgments entered 13 October 1976 in Superior Court, BURKE County. Heard in the Court of Appeals 30 August 1977.

Defendants were convicted of felonious possession of marijuana and were sentenced to terms of imprisonment.

Attorney General Edmisten, by Associate Attorney Leigh Emerson Koman, for the State.

Triggs & Hodges, by C. Gary Triggs, for the defendants.

BROCK, Chief Judge.

This appeal presents the question of whether the trial judge committed prejudicial error in allowing the State to offer evidence of statements made by defendant Brice Christopher Church.

Pursuant to a search warrant, officers searched defendants' house and found 371 grams of marijuana. The marijuana was impounded and defendants were arrested. After defendants were transported to the sheriff's office they were given the *Miranda* warnings and defendant Brice Church waived his right to remain silent and his right to counsel. During interrogation of defendant Brice Church he stated that he would not answer questions about

where the marijuana came from. Thereafter no questions were asked concerning where the marijuana came from. However, the interrogation continued on other phases of the investigation.

From competent evidence the trial judge found facts approximately as above set out and concluded that evidence of statements made by Brice Church was admissible. Thereafter the State was permitted to offer evidence that Brice Church stated that "he was not going to sell a lot of stems and junk, that only the good stuff was going to go into the bags." Also the State was permitted to offer evidence that Brice Church stated that "Simon Price was a friend of theirs and that he was just visiting the house that night" and that the marijuana "was not Simon Price's."

We see no error in the admission of Brice Church's statements. He waived his right to remain silent and later stated that he would not answer questions about where the marijuana came from. No further questions were asked about where it came from. Defendant's assertion of his right to remain silent on that subject was honored by the interrogators.

No error.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. JAMES SANDERS

No. 777SC174

(Filed 21 September 1977)

Constitutional Law § 40— right to counsel—non-indigent defendant—appearance without counsel

Defendant was not denied his constitutional right to counsel at his preliminary hearing, two aborted trials or the trial at which he was convicted where a district court judge advised defendant of his right to have counsel and that counsel would be appointed if defendant were found to be indigent, and defendant informed the judge that he would employ his own attorney; defendant thereafter filed an affidavit of indigency and a request for appointment of counsel, but the district court found that defendant was not an indigent and denied the request; a probable cause hearing was held and defendant was bound over to superior court; after an indictment was returned, defendant was again advised of his right to appointed counsel; defendant filed another affidavit of indigency and request for appointment of counsel, and a superior court judge found that defendant was able to employ counsel and denied the request; defendant

thereafter appeared *pro se* at his two aborted trials and the trial at which he was convicted; and the record supports the determinations that defendant was not indigent, it being clear that defendant was made fully aware of his rights, that he was not entitled to appointed counsel because he was not indigent, and that it was defendant's decision not to employ counsel.

Judge MARTIN dissenting.

APPEAL by defendant from *Cowper, Judge.* Judgment entered 19 October 1976 in Superior Court, NASH County. Heard in the Court of Appeals 28 June 1977.

Defendant was tried and convicted upon a charge of nonfeloniously receiving stolen goods. Judgment of imprisonment for a period of two years was entered.

Attorney General Edmisten by Special Deputy Attorney General Myron C. Banks for the State.

L. G. Diedrick for the defendant.

BROCK, Chief Judge.

Defendant strenuously argues that he was denied his constitutional right to be represented at trial by counsel. The following sequence of events appears from the record on appeal.

In January 1976 one Keith Clark offered to sell defendant a color television set for $125.00. Defendant agreed to the price and told Clark to meet him at his (defendant's) house. Clark and one John Lee Batchelor drove to a house near Frazier's Crossroad, broke and entered the house and stole a Zenith color television set. They then drove to defendant's house where the sale for $125.00 was consummated. Clark told defendant the television set "came out of a poker house and [Clark] didn't think anybody would find out about it." Defendant said "as long as it didn't come out of anybody's house he was not worried about it." The television set was recovered from defendant's house and defendant was arrested on 21 April 1976. On 22 April 1976 defendant posted a $500.00 appearance bond. On 23 April 1976 defendant appeared before District Court Judge Carlton without counsel. Defendant was advised by Judge Carlton of his right to have counsel and that counsel would be appointed if defendant were found to be indigent. Defendant advised the judge that he would employ his own attorney.

On 29 June 1976 defendant filed an affidavit of indigency and requested appointment of counsel. His affidavit indicated that he was regularly employed, earning $100.00 per week; that he was mar-

ried and his wife's income was unknown; that he owned a home in Spring Hope; that he owned a 1969 Plymouth; and that he owed a total of $728.00. Judge Matthews found on 29 June 1976 that defendant was not indigent and denied the request for appointment of counsel. On 6 July 1976, after a probable cause hearing, defendant was bound over to Superior Court for trial and his $500.00 appearance bond was continued.

On 9 August 1976 an indictment was returned charging defendant with breaking and entering, and larceny. On 10 August 1976 defendant filed in superior court another affidavit of indigency and requested the appointment of counsel. This affidavit indicated that defendant was unemployed (having been laid off the previous week); that he was married and his wife's income was unknown; that he was buying a home in Spring Hope upon which he paid $500.00 to $600.00 per month; that he was buying a 1969 Plymouth upon which he paid $40.00 per month. After a hearing upon this affidavit and request the superior court judge ruled that defendant was not indigent and denied appointment of counsel.

On 27 September 1976 defendant was called for trial upon the indictment charging breaking and entering, and larceny. Defendant appeared *pro se* and entered a plea of not guilty. After a jury was selected and empaneled the trial court of its own initiative declared a mistrial. On the same day (27 September 1976) the grand jury returned a bill of indictment purporting to charge defendant with breaking and entering, larceny, and receiving. On 28 September 1976 defendant appeared *pro se* and entered a plea of not guilty. After a jury was selected and empaneled the trial court of its own initiative quashed the 27 September 1976 bill of indictment.

On 18 October 1976 the grand jury returned a bill of indictment, proper in form, charging defendant with breaking and entering, larceny, and receiving. Defendant again appeared *pro se* and entered a plea of not guilty. Defendant was placed on trial only upon the charge of receiving stolen goods. This is the charge of which he was convicted. Acting in his own behalf defendant gave notice of appeal and an appearance bond of $5,000.00 was ordered on 19 October 1976. On 22 October 1976 defendant posted the $5,000.00 appearance bond. Also on 22 October 1976 defendant posted a $300.00 appeal bond. Defendant appears in this Court through privately retained counsel.

Defendant argues that he was denied his constitutional right to counsel at the probable cause hearing; at the 27 September 1976

aborted trial; at the 28 September 1976 aborted trial; and at the 18 October 1976 trial which resulted in his conviction. It is defendant's position that it was incumbent upon the presiding judge on each of these occasions to advise defendant of his right to appointed counsel and to conduct a hearing upon his financial ability to employ counsel.

The theory argued by defendant would cause a never ending course of hearings upon a defendant's financial ability to employ counsel. Obviously, before the probable cause hearing defendant was advised of his right to have appointed counsel. Defendant filed an affidavit and request. After hearing upon the request it was determined that defendant was able to employ counsel and the request was denied by the district court judge. After a bill of indictment was returned by the grand jury in superior court it is obvious that defendant was again advised of his right to appointed counsel. He again filed an affidavit and requested appointment of counsel. After hearing upon this second request it was again determined that defendant was able to employ counsel and the request was denied by the superior court judge. With this clearly established knowledge of his right to have counsel appointed if defendant were indigent, defendant made no further undertaking to establish indigency, if indeed he could have established it. He chose to proceed *pro se* at the two aborted trials and chose to proceed *pro se* at the trial resulting in this conviction. Defendant's ability to post a $500.00 appearance bond the day after his arrest retained his freedom throughout the trial proceedings. That circumstance plus defendant's ability, upon conviction, to post a $300.00 appeal bond and a $5,000.00 appearance bond lends substantial credence to the findings that defendant was not indigent.

In this case the defendant was advised of his right to have appointed counsel, and upon his request for appointed counsel defendant was found not to be indigent once in the district court and again in the superior court. Under these circumstances we think defendant was made fully aware of his rights. He was not entitled to appointed counsel because he was not indigent. It was defendant's decision not to employ counsel. The State has in no way deprived defendant of his right to counsel.

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

No error.

Judge HEDRICK concurs.

Judge MARTIN dissents.

Judge MARTIN dissenting.

Defendant's position can be properly appreciated only through a keen awareness of the chronology of events:

22 April 1976:	Initial appearance—magistrate's order
23 April 1976:	First appearance before district judge—the only point at which the record affirmatively reveals that defendant was advised of right to counsel and right to appointment of counsel if indigent
29 June 1976:	First affidavit of indigency and request for appointment of counsel—denied by district court judge
6 July 1976:	Probable cause hearing—found probable cause as charged
9 August 1976:	First indictment returned
10 August 1976:	Second affidavit of indigency and request for appointment of counsel—denied by superior court judge
27 September 1976:	Defendant called for trial—jury empaneled, mistrial declared
27 September 1976:	Second indictment returned
28 September 1976:	Order entered quashing bill of indictment and declaring mistrial
18 October 1976:	Third indictment returned
18 October 1976:	Defendant arraigned, tried and convicted without assistance of counsel

Defendant contends that he was denied his constitutional right to counsel at several junctures, most important of which is the 18 October proceedings during which defendant was arraigned, tried and convicted without the assistance of counsel. The record of same date is completely barren of any indication that the trial court informed defendant of his right to counsel or sought to determine

whether the lack of counsel resulted from indigency or choice. In general, the majority concludes that the defendant was not indigent and that the trial court's failure to inform defendant of his right to counsel or to inquire into his indigency was excused in that defendant was fully aware of his rights and by not requesting counsel *chose* to proceed *pro se*. In essence, the majority finds that defendant voluntarily waived his constitutional right to the assistance of counsel. With this I cannot agree.

It is familiar learning that the Sixth Amendment guarantees the right of an indigent defendant in a criminal prosecution to the assistance of counsel. This fundamental right is made obligatory upon the States by the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 9 L.Ed. 2d 799, 83 S.Ct. 792 (1963). Underscoring the necessity of counsel to the assurance of a fair trial, the United States Supreme Court held in *Argersinger v. Hamlin*, 407 U.S. 25, 32 L.Ed. 2d 530, 92 S.Ct. 2006 (1972), that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at trial." 407 U.S. at 37, 32 L.Ed. 2d at 538. In response to this constitutional mandate, we have undertaken by case law and statutory enactment to insure the right to counsel and the right to the appointment of counsel if indigent. *State v. Cradle*, 281 N.C. 198, 188 S.E. 2d 296 (1972); G.S. 7A-450-51; G.S. 15A-942.

In the case at bar, the sole issue upon which the majority and I differ in opinion is whether the defendant voluntarily and intelligently waived his right to counsel on 18 October by not requesting counsel and filing another affidavit of indigency. On the facts of this case it would require reaching and stretching to conclude that defendant's appearance without counsel on 18 October constituted a *voluntary* choice to proceed *pro se*. The record affirmatively reveals at only one point (23 April 1976), during six months of proceedings and at least seven appearances in court without counsel, that defendant was advised of his right to counsel and right to appointed counsel if indigent. Defendant's desire for counsel is indicated by the two affidavits of indigency he filed. Moreover, defendant's affidavit of 10 August strongly indicates that he was "financially unable to secure legal representation and to provide all other necessary expenses." G.S. 7A-450(a). A significant change in defendant's financial condition had occurred between the time of his first affidavit of indigency on 29 June and the second affidavit of indigency filed 10 August. Defendant had lost his job, had no income

and no money, and had apparently mortgaged his 1969 Plymouth. Nothing in the record refutes or contradicts the import of defendant's affidavit of indigency. Notwithstanding this showing, defendant was found, after "due inquiry," to be financially able to provide the necessary expenses of legal representation and was accordingly denied appointed counsel. In my opinion, the failure to assign counsel was error. *State v. Cradle, supra.* Concededly, this error did not manifest itself in prejudice to the defendant at the aborted trial of 27 September. However, it can be reasonably argued that the improper denial of counsel at this juncture frustrated defendant's further efforts to obtain appointed counsel which is evidenced by his failure to file another affidavit of indigency and request for counsel on 18 October.

G.S. 7A-450(c) specifically provides that the question of indigency may be determined or redetermined by the court at any stage of the action. See *State v. Hairston*, 280 N.C. 220, 185 S.E. 2d 633 (1972). The substantial change in defendant's financial condition evinced by his 10 August affidavit when combined with the fact that more than two months had transpired since that determination made further inquiry into defendant's indigency on 18 October essential to any finding of a voluntary waiver of counsel. On these matters the record is silent. "[I]t is . . . important for the trial judge to determine in the first instance the question of indigency and for the record to show whether the lack of counsel results from indigency or choice." *State v. Morris*, 275 N.C. 50, 60, 165 S.E. 2d 245, 251 (1969). Further, the record must show that an indigent accused appearing without counsel was offered counsel and voluntarily and intelligently refused the same. Anything less is not a waiver. *State v. Morris, supra*; *State v. McClam*, 7 N.C. App. 477, 173 S.E. 2d 53 (1970).

Finally, the majority complains that the theory argued by the defendant would cause a never ending course of hearings upon a defendant's financial ability to employ counsel. However, the record reveals that the numerous appearances of the defendant were not through any fault of his own, but rather were due to the failure of the district attorney to properly prepare a bill of indictment. It may be worthy of note that the offense upon which the defendant was finally convicted was never properly charged until the day of his trial. During the several months of proceedings, defendant was brought into court no less than seven times; and during this time he lost his job, had to mortgage his automobile, and apparently fell in arrears in making the payments on a home jointly owned by defend-

ant and his wife. Defendant's situation illustrates one of the very reasons for which there exists a statutory provision allowing the question of indigency of a defendant to be determined or redetermined by the court at any stage of the proceeding at which an indigent is entitled to representation. G.S. 7A-450(c). See *State v. Hoffman*, 281 N.C. 727, 190 S.E. 2d 842 (1972).

I cannot agree that defendant's failure to make any further attempt to establish his indigency following the 10 August determination established his choice to proceed *pro se* at the subsequent court proceedings. The better reasoned conclusion is that the court's refusal to appoint counsel on 10 August upon the strong showing made by defendant thwarted any further efforts by him to establish his indigency. As a layman, defendant may well have perceived that any further remonstration on his part would be futile. This brand of inaction falls far short of a voluntary waiver of counsel. For the reasons indicated, I vote for a new trial.

STATE OF NORTH CAROLINA v. FRANKLIN P. BARBEE

No. 7713SC103

(Filed 21 September 1977)

1. **Searches and Seizures § 4— contraband examined before search warrant issued— contraband seized pursuant to warrant— admissibility**

In a prosecution for felonious possession of more than one ounce of marijuana, information lawfully obtained from a confidential informant and presented to the magistrate was sufficient to support the magistrate's finding of probable cause, and any violation of defendant's fourth amendment rights which may have occurred when an officer, through excess of diligence, removed marijuana from a suitcase in plain view on defendant's premises prior to obtaining the search warrant, did not so taint the entire proceedings as to require exclusion of the marijuana seized pursuant to the warrant.

2. **Criminal Law § 50— arresting officer— opinion as to guilt— evidence admissible**

Defendant was not prejudiced where one of the arresting officers testified that he made a statement to the defendant at the time of the arrest which implied that the officer thought that defendant was guilty.

APPEAL by defendant from *McKinnon, Judge*. Judgment entered 10 September 1976 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 2 June 1977.

Attorney General Edmisten by Associate Attorney Henry H. Burgwyn for the State.

Frink, Foy & Gainey by E. M. Allen III for the defendant appellant.

PARKER, Judge.

[1] This is an appeal from judgment imposed upon defendant's conviction for felonious possession of more than one ounce of marijuana. The principal question presented is whether the court erred in denying defendant's motion to suppress evidence concerning 42.2 pounds of marijuana found in two suitcases on defendant's premises. We find no error.

Prior to ruling on defendant's motion to suppress, the court conducted a *voir dire* examination at which the State presented evidence to show the following: On 29 February 1976 defendant owned and operated a self-service gasoline station and grocery store in Yaupon Beach. The business was conducted in a two story cinder block building located on the west side of Highway 133. The bottom story was used for the self-service gas station and grocery store, and the upper story was used for apartments. The entrance to the building was from the front, or east, end of the building which fronted on the highway. On the south side of the building there was a parking lot which was paved with asphalt halfway back on that side of the building, and the remainder of the area on the south side of the building was cleared of all growth. At the rear, or west, end of the building there was an old field, which, beginning at a point five or six feet from the rear wall of the building, sloped sharply down from the back of the building into "sort of a bay" which was grown up in high weeds and small trees.

On the afternoon of 29 February 1976 a confidential informant told Officer Folding, a County Narcotics Officer of the Brunswick County Sheriff's Department, that between 4:00 and 4:30 p.m. that day he had gone to the rear of defendant's building looking for a restroom. While so engaged, he observed two suitcases in a hole in the cinder block wall at the rear of the building. The front suitcase was partially open. The informant looked in and smelled an odor of what he believed to be marijuana. The open suitcase contained numerous packages wrapped in white plastic bags. In the informant's opinion these contained marijuana and he referred to them as "bricks" of marijuana. Officer Folding examined his informant as to his knowledge about marijuana.

After receiving the information from his informant, Officer Folding went with two other officers to the old field at the rear of defendant's store building. As he approached the building through the field and when he was 50 to 75 yards away, he could see the two suitcases in the hole in the rear wall of the building. As he got closer, he could see "a white plastic thing" sticking out of one of the suitcases, as his informant had told him he had observed. The hole in which the suitcases were lodged had been created when several cinder blocks had been removed from the wall to provide an outlet for the exhaust from the cooler in the store. Officer Folding climbed up the embankment at the rear of the building. When he was within a couple of feet of the building, he could smell the odor of what he thought to be marijuana. He looked into the partially opened suitcase and saw the plastic bags or packages which his informant had described. The plastic was not transparent and he could not see what was in the packages without opening them. He reached into the partially opened suitcase and took out one of the plastic packages, opened it, and saw a green vegetable matter that he thought to be marijuana.

Leaving the other two officers to maintain surveillance over the rear of defendant's store, Officer Folding went before a magistrate to obtain a search warrant authorizing a search of defendant's building for marijuana, swearing to the following facts in the affidavit which he presented to the magistrate to establish probable cause for issuance of the warrant:

> "The affiant was contacted by a Confidential and reliable source on 2/27/76, (sic) stating that in the PM hours of 2/29/76, source was on the premises and to the rear of the building, while looking for a rest room saw (2) beige suit cases sitting in an opening in the rear wall of the building. Source went on to say that one of the suit cases was open and he believed what, he, the source knew to be marijuana wrapped in white plastic bags, what, he the source referred to as "bricks" the affiant, then went to the above described building and from the outside rear, observed the two beige suitcases with white plastic from one of the suitcases. The affiant has received information from sources of proven reliability that Franklin Pierce Barbee is involved in illegal Drug traffic and has been for some time. This informant has given affiant information in the past, which through personal observation and other proven sources has proved to be true and Correct. Due to the reliability of the in-

formant and the reputation of the suspect, I pray that this search warrant be issued."

On Officer Folding's affidavit, the magistrate issued a search warrant authorizing search of defendant's building for marijuana.

At 7:50 p.m. Officer Folding returned to the store and served the search warrant on the defendant, who was in the store at the time. The officers seized the two suitcases and subsequently determined that they contained 42.2 pounds of marijuana. Search of the interior of the building resulted in the finding of a small amount of marijuana (less than an ounce) wrapped in a paper towel in the freezer compartment of a refrigerator in one of the back rooms. Particles of marijuana were also found beneath the mats in the trunk of defendant's automobile, which was parked next to the building.

In assigning error to the court's rulings admitting evidence concerning the marijuana found on defendant's premises, defendant contends the search warrant was invalid because it was issued "upon the basis of an illegal and unreasonable prior search conducted without a warrant in violation of the Fourth Amendment." This contention requires that we examine into the lawfulness of the officers' activities prior to issuance of the search warrant and into the connection between those activities and the subsequent issuance of the warrant.

At the outset we observe that we are not here concerned with a warrantless intrusion by the police into a residential curtilage or, at least insofar as the field behind defendant's building is concerned, into any area with respect to which defendant's reasonable expectations of privacy were protected by the fourth amendment. All activities of the officers prior to obtaining the search warrant took place outside of defendant's building and in an area to which the public had unrestricted access. Defendant invited the public to patronize his business, and by maintaining a parking lot to the south of the building, he invited the public to come into that area. The spot in the rear wall of the building where the suitcases were found was but a few feet from the parking area, and there was nothing in between to hinder easy access or to indicate that defendant ever attempted in any manner to exclude the public from the area at the rear of his building. When the officers entered and passed through the old field at the rear of defendant's building and while they were still 50 to 75 yards away, they could see the suitcases in plain view. Defendant could hardly have had any reasonable expectation of privacy for items so openly displayed. Although the officers may

have been trespassers in the field, such a trespass did not, of itself, make the search illegal, and the fourth amendment does not extend to open fields. *Hester v. United States*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924).

It may be conceded that when Officer Folding reached into the open suitcase and removed and opened one of the "bricks" of marijuana, he at that point violated defendant's fourth amendment rights. It does not follow, however, that this unwarranted intrusion automatically so tainted all subsequent proceedings as to render the warrant itself and the search made pursuant thereto unlawful. So far as the record reveals, the only information presented to the magistrate to establish probable cause for issuance of the warrant was the information contained in Officer Folding's affidavit. In this, no mention was made that the officer had reached inside the suitcase or removed any of its contents. The only mention in the affidavit of anything done by the affiant is that, after receiving the information from his confidential informant, he "then went to the above described building and from the outside rear, observed the two beige suitcases with white plastic from one of the suitcases." In this, as in every case in which a search warrant is sought, the officers were under a duty to use due care to ascertain that the information presented to the magistrate to establish probable cause for the search was accurate. If by any excess of diligence in that regard Officer Folding at one point may have violated defendant's fourth amendment rights, nevertheless it does not follow that the exclusionary rule must be automatically applied. "If the lawfully obtained information amounts to probable cause and would have justified issuance of the warrant, apart from the tainted information, the evidence seized pursuant to the warrant is admitted." *James v. United States*, 418 F. 2d 1150, 1152 (D.C. Cir. 1969). We agree with the comment contained in footnote 4 to the opinion in that case, that "[w]hile it is logically possible, by extending the deterrence rationale for the exclusionary rule, to argue as appellant does, that any taint in the police conduct nullified the entire investigatory process so that no warrant can issue, we think this extension goes beyond the sound limits of the deterrence philosophy." We hold that the lawfully obtained information presented to the magistrate in this case was sufficient to support the magistrate's finding of probable cause and that any violation of defendant's fourth amendment rights which may have occurred when Officer Folding, through excess of diligence, reached into the open suitcase, did not so taint the entire proceedings as to require exclusion of the evidence seized

pursuant to the warrant. Defendant's first assignment of error is overruled.

[2] Defendant's only remaining assignment of error is directed to the court's denial of defendant's motion to strike an answer given by one of the State's witnesses during direct examination. The witness, L. D. Jones, Assistant Police Chief of Yaupon Beach, testified that he was present while the search was being conducted and at that time had a conversation with defendant after defendant had been warned of his constitutional rights. Jones testified that during the conversation he asked defendant, "Why did you do it?," to which defendant responded, "You have never been broke, have you?" Jones then testified, over defendant's objection, that he responded to defendant's question by saying:

> "Yes, I have, too. I tried to work out of it through the framework of the law—within the framework of the law."

Defendant moved to strike the testimony of the witness as to this last response which he testified he had given to the defendant, and the denial of this motion is the basis for defendant's second assignment of error.

Defendant contends that the answer which the officer testified he gave to the defendant carried with it the clear implication that, in the opinion of the officer, defendant was not acting within the framework of the law. From this, defendant argues that allowing this evidence showing by implication the opinion of the officer, the province of the jury was invaded. If so, the invasion was minimal. In view of the overwhelming evidence of defendant's guilt, the jury could hardly have been influenced because one of the arresting officers testified that he made a statement to the defendant at the time of the arrest which implied that the officer thought that defendant was guilty. In the majority of criminal cases, the very act of making the arrest carries with it the same implication. We find no prejudicial error in the court's denial of the motion to strike.

In defendant's trial and in the judgment appealed from we find

No error.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. LOUIS C. CUNNINGHAM

No. 7712SC244

(Filed 21 September 1977)

1. **Disorderly Conduct § 4— allegations treated as surplusage—sufficiency of warrant**

Although a warrant for disorderly conduct contained language previously held to be unconstitutionally vague and invalid as part of the disorderly conduct statute in that it alleged that defendant engaged in disorderly conduct "by using profane and abusive language in such a manner as to alarm or disturb persons present or provoke a breach of the peace," the unconstitutionally vague language will be treated as surplusage, and judgment will not be arrested where the remaining allegations of the warrant sufficiently alleged all the essential elements of the offense of disorderly conduct. Furthermore, defendant was not prejudiced by the inclusion of the unconstitutionally vague language in the warrant since the trial judge correctly charged on the elements of disorderly conduct and disregarded the vague language contained in the warrant.

2. **Arrest and Bail § 6.1— resisting arrest—duty of office—sufficiency of warrant**

A warrant for resisting arrest sufficiently alleged that the officer was performing a duty of his office at the time of the incident in question where it charged that the officer was attempting to preserve the peace by placing the defendant under arrest for disorderly conduct.

3. **Disorderly Conduct § 5— use of abusive language—sufficiency of evidence for jury**

The State's evidence in a disorderly conduct case was sufficient to permit the jury to find that defendant used abusive language which was intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace where it tended to show that defendant approached an officer concerning a parking ticket placed on his vehicle by the officer; defendant, cursing, stated that he didn't intend to pay the ticket, stepped into his truck and told the officer to get his "g-- d--- ass out of the way before he ran over [him]"; the officer told defendant he was under arrest, but defendant refused to accompany the officer to the magistrate's office; defendant resisted physical efforts by two officers to remove him from his truck; and defendant was subdued only by the use of mace and a blackjack.

4. **Arrest and Bail § 3.9— legality of arrest for disorderly conduct**

An officer had probable cause to arrest defendant for disorderly conduct when defendant complained to an officer about a parking ticket and stepped into his truck and told the officer to get his "g-- d--- ass out of the way before he ran over [him]"; therefore, the arrest was lawful and defendant did not have the right to resist.

5. **Criminal Law § 163.4— broadside assignment of error to charge**

An assignment of error to the charge as a whole which specifies no portion which defendant deems erroneous and no additional instructions which he deems to be required is broadside and ineffective to bring up any portion of the charge for review.

State v. Cunningham

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 1 November 1976 in Superior Court, HOKE County. Heard in the Court of Appeals 23 August 1977.

Defendant was charged with disorderly conduct and resisting an officer in violation of G.S. 14-288.4(a)(2) and G.S. 14-223. Upon his plea of not guilty to each charge, the jury returned a verdict of guilty. From a judgment sentencing him to imprisonment for 30 days for disorderly conduct and 90 days for resisting an officer, defendant appealed.

The State's evidence tended to show that on the afternoon of 7 July 1977 Officer J. E. Tindall, while on duty on Main Street in Raeford, was approached by defendant Cunningham, who was in an agitated state concerning a parking ticket just placed on his vehicle by Officer Tindall. Upon inquiry as to the justification for the ticket and receiving Officer Tindall's explanation, the defendant, cursing, stated that he didn't intend to pay the ticket, stepped into his truck and told Officer Tindall to get his "g-- d--- ass out of the way before he [Cunningham] ran over [him]." At this point, the defendant was informed that he was under arrest for disorderly conduct and was requested to accompany Officer Tindall to the Magistrate's Office. The defendant refused, and Officer Tindall called Officer Campbell for assistance. After Officer Campbell arrived, the defendant continued his resistance by refusing to accompany the two officers to the Magistrate's Office, and he resisted physical efforts to remove him from the truck by clinging to the steering wheel. The officers then resorted to mace and a blackjack to force the defendant out of the truck. The defendant eventually released his grip on the wheel and accompanied the two officers to the Magistrate's Office.

The defendant's evidence tends to show that he approached Officer Tindall to seek advice concerning the parking ticket; that words were exchanged concerning the parking ticket; that he requested Officer Tindall to call the chief "to straighten it out"; that thereafter Officer Campbell arrived and said "let's go"; that after the defendant stated he planned to wait for the chief, Officer Tindall sprayed the defendant with mace and then Officer Campbell began to beat the defendant with a blackjack and then a flashlight about the shoulders and head. The defendant contended he was placed under arrest only after he had been beaten by Officer Campbell, whereupon he proceeded to the Magistrate's Office with the two policemen.

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

Assistant Public Defender Fred J. Williams for defendant appellant.

MORRIS, Judge.

[1] The defendant's first assignment of error is directed to the court's failure to quash the warrants upon defendant's arraignment. At his trial, defendant waived counsel and represented himself. No motion to quash was made, but on appeal defendant takes the position that the court should have, *ex mero motu*, quashed the warrants. We know of no statute or case law which requires a judge to so rule. Defendant concedes that he can find none. Of course, if the warrant or indictment does not sufficiently charge an offense, this Court, *ex mero motu*, may arrest judgment. *State v. Walker*, 249 N.C. 35, 105 S.E. 2d 101 (1958). We do not agree that the warrant contains such defects and requires arrest of judgment. It is defendant's position that the warrant for disorderly conduct contains language declared to be unconstitutionally vague and is therefore fatally defective, and that the second warrant for resisting an officer should be quashed because its validity is dependent upon the constitutionality and legality of the first warrant.

The defendant bases his position upon *State v. Summrell*, 282 N.C. 157, 192 S.E. 2d 569 (1972), in which part of the wording of G.S. 14-288.4(a)(2) prior to the 1971 amendment was declared unconstitutional. The portion of the old statute held to be vague and overly broad was "that part of section (a)(2) which proscribes 'offensively coarse' utterances and acts such as to alarm and disturb persons present." *State v. Summrell, supra*, at 166. The warrant charging the defendant with disorderly conduct alleges that the defendant did "unlawfully and wilfully, engage in disorderly conduct by using profane and abusive language in such a manner as to alarm or disturb persons present or provoke a breach of the peace . . . ."

Conceding that the warrant contains language held to be unconstitutional as a part of the disorderly conduct statute, it is not dispositive of the case. The contested language, in the instant case, is contained in the warrant, and superfluous words or allegations in a warrant beyond the essential elements of the crime charged may be treated as surplusage and disregarded. *State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677 (1972). *See also State v. Wilson*, 293 N.C. 47, 235 S.E. 2d 219 (1977). A motion to arrest judgment on the ground of a

defective warrant will not be granted unless it is so defective that the court could not pronounce judgment on it. *State v. Martin*, 13 N.C. App. 613, 186 S.E. 2d 647 (1972), *cert. denied* 281 N.C. 156, 188 S.E. 2d 364 (1972). Absent the contested language the warrant still alleges all the essential elements of G.S. 14-288.4(a)(2) and meets the requirements for a valid warrant to uphold the conviction. *State v. Letterlough*, 6 N.C. App. 36, 169 S.E. 2d 269 (1969).

Even if the vague language in the warrant were not disregarded there would be no prejudicial error to the defendant. In the case of *State v. Summrell, supra*, relied upon by the defendant for its pronouncement of the contested language as unconstitutionally vague, the Court affirmed the conviction under the statute declared overly broad because the trial judge narrowly and properly construed the statute in his charge to the jury, thereby confining the jury to constitutional limits by his instructions. *State v. Summrell, supra*, at 169. The instant case differs from *Summrell* in that the defendant made no motion to quash the warrant at trial and, therefore, the warrant was not amended, but the trial judge's instruction to the jury was clearly within constitutional limits. The judge, in his charge to the jury, listed the elements of disorderly conduct which the State must prove beyond a reasonable doubt as:

> "FIRST, that the defendant used abusive language,
>
> SECOND, that the language used was intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace,
>
> AND THIRDLY, that the defendant acted wilfully and unlawfully, . . .".

The trial judge corrctly listed the elements of the offense pursuant to current G.S. 14-288.4(a)(2) and correctly disregarded the vague language in the warrant in his charge to the jury.

[2] The defendant contends that the second warrant charging the defendant with resisting an officer should be quashed because its validity is dependent upon the constitutionality and legality of the disorderly conduct warrant. This contention is groundless in view of our conclusion regarding the legality of the disorderly conduct warrant. The defendant also contends that the second warrant should be quashed because Officer Tindall was not performing a duty of his office at the time of the incident. We disagree. The record shows and the warrant charges that Officer Tindall was attempting to preserve the peace by placing the defendant under arrest for

disorderly conduct; clearly one of the duties of his office. The warrant properly alleges that a duty was being performed which the defendant resisted. *State v. Smith*, 262 N.C. 472, 137 S.E. 2d 819 (1964).

The defendant's second assignment of error is to the court's failure to grant a nonsuit at the close of the State's evidence and at the close of all the evidence. A proper motion was not made at trial but the defendant requests the Court to review the sufficiency of the State's evidence pursuant to G.S. 15-173.1. There is ample evidence to support both convictions.

[3] To support a conviction for disorderly conduct in the instant case the State carried the burden of proving that the defendant: (1) used abusive language; (2) that the language was intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace; and (3) that the defendant acted wilfully and unlawfully. The defendant contends that the evidence does not support a finding that he did any intentional act likely to provoke retaliation, and in support points out that he had ceased his conversation and was preparing to leave. Upon a motion to nonsuit, the evidence must be viewed in the light favorable to the State and the State's evidence tends to show that the conversation had not concluded; that the abusive language was uttered by the defendant after he had entered the truck; and that the abusive language not only indicated an intent to leave but also contained a threat to run over Officer Tindall while doing so. It is noted that Tindall, as a police officer, would be expected to show restraint when confronted with abusive language and that as a practical matter the likelihood of violent retaliation may have been slight, but the jury could reasonably interpret the defendant's utterances as fighting words likely to provoke the average person to retaliation. Under similar facts, Justice Sharp in *State v. Summrell, supra*, at 170, noted that as a practical matter, because of the persons present, violent retaliation was unlikely but she concluded that the conviction should be upheld because the utterances "were likely to provoke the average person to retaliation and thus cause an immediate breach of the peace."

The contention that the defendant had no intent to commit an act likely to provoke retaliation and a breach of the peace is countered by evidence that the defendant while sitting at the wheel of his vehicle threatened to run over Officer Tindall. Under the evidence of the instant case, the questions of intent and the likelihood of violent retaliation were properly left for the jury.

[4] The defendant's contention that the evidence is insufficient to support the conviction for resisting arrest is based on the argument that Officer Tindall did not have probable cause to arrest the defendant for disorderly conduct, and he, therefore, had the right to resist the arrest as unlawful. *State v. Mobley*, 240 N.C. 476, 83 S.E. 2d 100 (1954). We disagree. The analysis of the evidence relating to the disorderly conduct charge is also relevant here and supports the conclusion that Officer Tindall had probable cause to believe that the offense of disorderly conduct had been committed in his presence. G.S. 15A-401 conferred upon the officer the right to arrest the defendant without a warrant. The arrest, therefore, was lawful and the defendant did not have the right to resist.

[5] The defendant's remaining assignment of error is directed to the court's instructions to the jury. This assignment of error reads as follows: "Did the trial court commit reversible error in its charge to the jury? DEFENDANT'S EXCEPTION NO. 4 (R p 24)". Exception No. 4 is found at the end of the court's charge and reads: "This constitutes DEFENDANT'S EXCEPTION NO. 4." This assignment of error is to the charge as a whole and specifies no portion which defendant deems erroneous nor does it advise the reviewing court what, in defendant's opinion, the court should have charged. This is a broadside assignment of error and we have repeatedly said that it is ineffective to bring before the Court any question for review. *Investment Properties v. Allen*, 281 N.C. 174, 188 S.E. 2d 441 (1973), and cases there cited; *Hudson v. Hudson*, 21 N.C. App. 412, 204 S.E. 2d 697 (1974), and cases there cited. The North Carolina Rules of Appellate Procedure explicitly set out the manner of taking exception to the instructions of the court to the jury. Rule 10, (Exceptions and Assignments of Error in Record on Appeal) North Carolina Rules of Appellate Procedure. 287 N.C. 679, 698.

No error.

Chief Judge BROCK and Judge BRITT concur.

STATE OF NORTH CAROLINA v. EDWARD STEVE TURNER

No. 7729SC246

(Filed 21 September 1977)

1. **Courts § 9— superior court judge overruled by another superior court judge— permissible circumstances**

Although the general rule is that ordinarily one superior court judge cannot overrule another superior court judge, this rule has no application to an interlocutory order which is issued in the discretion of the trial judge when there is a showing of changed circumstances.

2. **Courts § 9; Constitutional Law § 50— speedy trial—interlocutory order of superior court judge—modification proper**

Order by a superior court judge that defendant's case be tried during the August session of court in Rutherford County or be dismissed by the State was a discretionary interlocutory order, and there was a sufficient showing of changed circumstances to warrant modification of the order where the evidence tended to show that the August calendar in Rutherford County was more crowded than usual and both the district attorney and the court proceeded with the trial of all scheduled cases with due diligence; not only was the calendar filled with difficult cases, but it also contained several serious cases in which the defendants had made requests for speedy trials under G.S. 15A-711(c) and the six-month time limit would have expired if the cases were not heard during the August session; defendant's case could still be given attention within the six-month time limit if the trial were scheduled for the next succeeding session; and since defendant was already serving a five-year sentence on another charge, he was not prejudiced by such a delay.

3. **Constitutional Law § 50— request for speedy trial—trial not within six months— no violation of statute**

Defendant's contention that the State did not proceed within six months after demand was made upon the solicitor for a speedy trial as provided under G.S. 15A-711(c) is without merit, since defendant filed his request with the clerk on 29 April 1976; the State proceeded within the six-month limitation when it requested on 27 October 1976 defendant's temporary release from prison for appearance at trial; the fact that the trial itself was not until 1 November 1976 was not a violation of this provision; and a copy of defendant's request was not served on the district attorney as provided by G.S. 15A-711(c).

APPEAL by defendant from *Griffin, Judge*. Judgment entered 3 November 1976 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 23 August 1977.

Defendant was tried initially at the May 1975 Session of the Superior Court of Rutherford County on a charge of assault with a deadly weapon with intent to kill inflicting serious bodily injury. He was convicted of assault with a deadly weapon inflicting serious bodily injury and sentenced to a term of imprisonment of 4 to 7 years. Upon appeal to this court he was granted a new trial on 17

March 1976. (*See* 29 N.C. App. 33, 222 S.E. 2d 745.) On 29 April 1976, while imprisoned on other charges in Central Prison, defendant filed four motions with the Clerk of Superior Court of Rutherford County: a motion for a speedy trial pursuant to G.S. 15A-701, G.S. 15A-702(a), (b); a motion for assistance of counsel; a motion for attendance of witnesses; and a "Motion to Dismiss Bar to any Further Prosecution".

On 21 May 1976, Judge Ervin ruled on the motions and found that defendant sought a speedy trial for a confined defendant pursuant to G.S. 15A-711. He ordered that defendant be tried at the August Session of Superior Court of Rutherford County or the case be dismissed by the State; and that defendant be brought to the Rutherford County Jail at least one week prior to the beginning of the August Session so that he might assist his attorney in preparing his defense.

The case was calendared to be tried on 9 August 1976 and on 30 July 1976 Judge Baley issued a writ of habeas corpus *ad prosequendum* to the Commissioner, Department of Correction, ordering that defendant be brought to Rutherford County on 1 August 1976. On 13 August 1976 the district attorney made a motion to continue the defendant's case until the next succeeding session. Judge Baley granted the continuance upon the following findings of fact:

> 1. That the court has presided at this term of court which began August 2nd and has continued continuously except for the weekend until this date.
>
> 2. That there were a large number of cases on the Court Calendar, which included a Court Calendar of some 18 legal sized pages.
>
> 3. That the court is advised, from a calculation that at this session of court, 95 cases have been disposed of and judgments imposed therein; that there have been jury trials in second degree murder case, armed robbery case, felonious receiving of stolen property, rape case and the jury has just completed its deliberations in the last rape case on this last scheduled day of court.
>
> 4. That in several of the cases which were tried before a jury, the defendants had previously been tried and been granted new trials by the Court of Appeals and had filed motions for speedy trials.
>
> 5. That in the case of State against Joseph Marion Head, in particular, the case has been before the Court of Appeals upon

two occasions and the defendant in the case had made enumerable motions for a speedy trial and a wide variety of other motions; that all of these cases had to be heard and the motions heard and determined; that Joseph Head requested that his counsel be dismissed and that the court permitted such counsel to be withdrawn and permitted the defendant, Joseph Head to represent himself at his insistence and request; that the trial of the case against Joseph Head required an unusually long period of time by virtue of the fact the court was endeavoring to protect a defendant who was acting without counsel.

6. That there has been no delay of any kind in connection with the cases on trial and that they involve matters of great and grave importance to the people of the county, including murder, rape, armed robbery and other similar serious offenses; that the district attorney has been busily engaged personally in the trial of practically all of the cases and certainly all of the important cases which have been tried, that both the district attorney and the court have been diligent in seeing that every effort was made to try all of the cases on the calendar and to reach the defendant's case, if possible; that there were many defendants in the jail and an effort has been made to see that prompt action was taken in all cases where the defendants were incarcerated and needed a speedy trial.

7. That this defendant, Steve Turner, is now incarcerated in the North Carolina Department of Correction upon another case where he is sentenced to a term of 5 years imprisonment; that there is no showing by him or his counsel other than the statement of counsel that there is any prejudice which would be served against Steve Turner by a continuance of this matter to the next term of court, that any witnesses which counsel states may not be available have not been named and none of the testimony which they propose to be brought forth by them is submitted and there is no indication of what those witnesses would testify about; that the defendant has represented that he cannot get work release and that his parole will not be considered and that this is prejudice to him. The court finds that this is not sufficient grounds or prejudice to require the dismissal of a charge of assault with a deadly weapon with intent to kill inflicting serious bodily injury; that the court has not been apprised by the defendant or his attorney until just shortly before the present motion was heard. Counsel appeared in court and moved that the case be dismissed; that there was

no other notice to this court during the entire trial of the two week term that counsel for the defendant was urging that this case be tried. The only other indication was that in the file there was an Order by Judge Ervin, as hereinabove referred to.

8. That the trial of the defendant, Turner, at this term of court was not unduly delayed but that, in the discretion of the district attorney in which the court concurs, other cases of a major importance and essential to the administration of justice were tried prior to this case and the time which was available for trial was utilized at all times and the court finds as a fact that it was utilized in cases which were of such magnitude that the present case must, of necessity, be deferred; that in particular, the case of *State v. Joseph Marion Head* for rape required time which could have been used in this trial and had been set aside therefor, but in view of the magnitude of the Head case and the fact a motion for speedy trial had been filed in that case to the district attorney, in his discretion in which the court concurs, tried the other cases in preference to the present case.

9. That under all of the circumstances in this case and the term of court trials which have been conducted, the court determines, in its discretion, that the district attorney has been diligent in his duty and there has been no undue delay in the trial of Steve Turner and there is no prejudice which has been shown which will be incurred by the defendant, Steve Turner, AND IT IS ORDERED THAT THIS CASE BE CONTINUED FOR THE TERM UNTIL THE NEXT SUCCEEDING TERM AT WHICH IT MAY BE TRIED, if there is not some unusual emergency which would prevent its trial at this time.

On 27 October 1976, Judge Griffin issued a writ of habeas corpus *ad prosequendum* to the Commissioner, Department of Correction, directing him to deliver the defendant for trial on 1 November 1976. Defendant moved to dismiss pursuant to G.S. 15A-711(c). Judge Griffin denied the motion.

The case was called for trial on 1 November 1976. Defendant entered a plea of not guilty to the charge of assault with a deadly weapon inflicting serious injury. The jury returned a verdict of guilty of assault with a deadly weapon, and the court entered judgment imposing a two-year sentence, to begin at the expiration of the sentence defendant is now serving in case No. 74-CR-8063. Defendant was given credit against the two-year sentence of the period

from 14 August 1975 until 7 April 1976. The court recommended work release and that the defendant be required to support his wife from his earnings.

Attorney General Edmisten, by Assistant Attorney General Jo Anne S. Routh, for the State.

Donald F. Coats for defendant appellant.

BRITT, Judge.

By his first assignment of error, defendant contends that Judge Baley erred in granting the State's motion for continuance after Judge Ervin had ordered that the case be tried during the August session of court in Rutherford County or be dismissed by the State. The assignment has no merit.

Defendant made his original motion for a speedy trial under G.S. 15A-702 on 29 April 1976, some 31 days after the Court of Appeals had granted him a new trial. On 21 May 1976 Judge Ervin, in response to defendant's motion, ordered that defendant be tried at the August Session of the court or that the case be dismissed. In the order Judge Ervin cited G.S. 15A-711 as supporting authority for the motion and order.

Under G.S. 15A-711(c) provision is made for the speedy trial request to the solicitor by a defendant who is confined in an institution in this State pursuant to a criminal proceeding and who has other criminal charges pending against him. This statute provides:

> "15A-711(c) A defendant who is confined in an institution in this State pursuant to a criminal proceeding and who has other criminal charges pending against him may, by written request filed with the clerk of the court where the other charges are pending, require the solicitor prosecuting such charges to proceed pursuant to this section. A copy of the request must be served upon the solicitor in the manner provided by the Rules of Civil Procedure, G.S. 1A-1, Rule 5(b). If the solicitor does not proceed pursuant to subsection (a) within six months from the date the request is filed with the clerk, the charges must be dismissed."

The quoted statute did not give Judge Ervin the power to require a trial at the August session or order a dismissal. The statute requires that the request be served on the solicitor (district attorney) who then has six months to proceed.

Defendant argues that Judge Ervin's authority was not derived solely from this statute, and that one superior court judge cannot overrule another superior court judge.

[1] Although the general rule in civil cases is that ordinarily one superior court judge cannot overrule another superior court judge, 3 Strong's North Carolina Index 3d, Courts § 9, p. 587, this rule has no application to an interlocutory order which is issued in the discretion of the trial judge when there is a showing of changed circumstances. *Calloway v. Ford Motor Co.*, 281 N.C. 496, 189 S.E. 2d 484 (1972); *Moore v. W O O W, Inc.*, 250 N.C. 695, 110 S.E. 2d 311 (1959); *Bland v. Faulkner*, 194 N.C. 427, 139 S.E. 835 (1927).

The same basic principles apply in criminal cases. In *State v. Jones*, 278 N.C. 259, 179 S.E. 2d 433 (1971), the court held that a defendant would not be allowed to withdraw a guilty plea after it had already been accepted by another judge absent a showing of fraud, duress or undue influence. But in *State v. McClure*, 280 N.C. 288, 185 S.E. 2d 693 (1972), the court held that a second judge could in his discretion accept the defendant's guilty plea which had been rejected by another judge if circumstances would then support the plea.

The key points are (1) determination of whether there is an interlocutory order rather than a final decision, and (2) whether there is a sufficient showing of a change in circumstances to justify modifying the prior order.

On the question of interlocutory orders, North Carolina case law has provided the following rules. In *Greene v. Charlotte Chemical Laboratories, Inc.*, 254 N.C. 680 at page 693, 120 S.E. 2d 82, p. 91 (1961), the court stated:

> "An order or judgment is merely interlocutory if it does not determine the issues but directs some further proceeding preliminary to final decree. Such an order or judgment is subject to change by the court during the pendency of the action to meet the exigencies of the case. But an order or judgment which affects some substantial right claimed by a party may not be modified or vacated by another judge on the ground that it is erroneous. Relief from an erroneous judgment is by appeal to the Supreme court. *Russ v. Woodard*, 232 N.C. 36, 59 S.E. 2d 351."

In *Bland v. Faulkner*, 194 N.C. 427, 429, 139 S.E. 835 (1927), the court stated (page 836): "Interlocutory orders, not finally determin-

ing or adjudicating rights of the parties are always under the control of the court, and, upon good cause shown, they can be amended, modified, changed, or rescinded as the court may think proper. *Maxwell v. Blair*, 95 N.C. 318, and cases cited."

[2] Applying these principles to the present situation, we think Judge Ervin's order was a discretionary interlocutory order that was subject to modification upon a showing of changed circumstances.

Since it is established that the order was an interlocutory one, the question remaining is whether there was a sufficient showing of changed circumstances to warrant modification of Judge Ervin's interlocutory order. Judge Baley's allowance of the motion for a continuance by the State was also a discretionary interlocutory order and was based upon an ample showing of changed circumstances. The August calendar was more crowded than usual and both the district attorney and the court proceeded with the trial of all scheduled cases with due diligence. Not only was the calendar filled with difficult cases, it also contained several serious cases in which the defendants had made requests for speedy trials under G.S. 15A-711(c) and the six-month time limit would have expired if the cases were not heard during the August session. Defendant's case could still be given attention within the six-month time limit if the trial were scheduled for the next succeeding session. Since defendant was already serving a five-year sentence on another charge, he was not prejudiced by such a delay.

[3] In defendant's second assignment of error, we find no merit. He contends that the State did not proceed within six months after demand was made upon the solicitor for a speedy trial as provided under G.S. 15A-711(c). This statute states in its last provision that "[i]f the solicitor does not proceed pursuant to subsection (a) within six months from the date the request is filed with the clerk, the charges must be dismissed." Subsection (a) provides:

> "(a) When a criminal defendant is confined in a penal or other institution under the control of the State or any of its subdivisions and his presence is required for trial, the solicitor may make written request to the custodian of the institution for temporary release of the defendant to the custody of an appropriate law-enforcement officer who must produce him at the trial. . . ."

In the present case the State obtained from Judge Griffin a writ of habeas corpus *ad prosequendum* to the Commissioner of the

Department of Correction on 27 October 1976. Defendant had filed his request with the clerk on 29 April 1976. The State complied with G.S. 15A-711(a) within the six-month limitation. The fact that the trial was not until 1 November 1976 was not a violation of this provision. The State *proceeded* within the six-month limitation when it made the request for the defendant on 27 October 1976. Furthermore, it does not appear that a copy of defendant's request was served on the district attorney as provided by G.S. 15A-711(c).

No error.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. JOE LOUIS WOOTEN

No. 778SC286

(Filed 21 September 1977)

1. **Arrest and Bail § 3.1— probable cause for arrest—reliability of informant**

Trial court's finding that a confidential informant who furnished information necessary to establish probable cause for defendant's arrest was reliable was supported by an SBI agent's *voir dire* testimony that information received from the informant had always been reliable and had led to several arrests and one conviction, although it had at other times not resulted in arrests.

2. **Arrest and Bail § 3.4— warrantless arrest and search—felony in officer's presence—confidential informant**

Officers had probable cause to believe that defendant was committing a felony in their presence by possessing heroin, and the warrantless arrest and search of defendant was lawful, where a confidential informant told officers that he saw defendant at a certain location in the possession of tinfoil packets represented to contain heroin and described defendant and the clothing he was wearing, and officers observed the defendant as described at the named location.

3. **Searches and Seizures § 1— warrantless search incident to arrest—exigent circumstances**

"Exigent circumstances" are not necessary to justify a search without a warrant which is incident to a valid arrest based on probable cause.

4. **Searches and Seizures § 1— search before formal arrest—search incident to arrest**

A search of a suspect's person before formal arrest is incident to the arrest when probable cause to arrest existed prior to the search and it is clear that evidence seized was in no way necessary to establish probable cause.

State v. Wooten

APPEAL by defendant from *Peel, Judge.* Judgment entered 19 November 1976 in Superior Court, WAYNE County. Heard in the Court of Appeals 30 August 1977.

The defendant was charged in a bill of indictment with feloniously possessing a controlled substance, heroin, in violation of the North Carolina Controlled Substances Act. He pleaded not guilty and a jury found him guilty as charged. From judgment imposing a prison sentence of not less than two nor more than three years, defendant appealed.

Attorney General Edmisten, by Associate Attorney Patricia H. Wagner, for the State.

Kornegay, Bruce & Rice, P.A., by Robert T. Rice, for the defendant.

MARTIN, Judge.

Defendant's first and second assignments of error are directed to the *voir dire* examination conducted by the court to determine the legality and constitutionality of the search of defendant in the parking lot and the admissibility of the articles seized during the search and the heroin later obtained from the floor of the police station.

On the *voir dire* the State offered evidence tending to show: At approximately 6:00 p.m. on 7 July 1976 State Bureau of Investigation Agent Steven G. Surratt and Goldsboro Police Officer David F. Cloutier met with a confidential informant in the parking lot of the Holiday Inn in Goldsboro. The informant stated that he had observed some people, including "Joe Louis," "hustling" drugs in an area known as "the block." Pursuant to Agent Surratt's instructions to call him if further information developed, the informant telephoned Agent Surratt the same evening and the two arranged to meet at 8:30 that night at the Quality Inn. At this meeting, informant advised that he had seen defendant Joe Louis Wooten in possession of tinfoil packets represented to be heroin and that defendant was still in the area known as "the block." Informant described defendant as a black male, 5'6" to 5'7" tall, approximately 160 pounds, wearing a black print shirt, a black and white cap, blue jeans and wire-rimmed sunglasses. Agent Surratt related this information to Officers Cloutier, Bundy and Blackmon and the four officers then proceeded to "the block." Upon arriving there, they saw an individual in the parking lot matching the description given by the informant. He stated that he was Joe Louis Wooten. Agent Surratt

advised defendant that he had probable cause to search defendant for heroin, and began to frisk him. During the frisk, eleven (11) .32 caliber bullets and eighty-nine dollars ($89) in paper money were taken from defendant's front pant's pockets, and a pistol was taken from defendant's waist. At this point, no drugs had been found. Defendant was then placed under arrest for carrying a concealed weapon, handcuffed and taken to the police station. At the station, defendant was taken into the detective room where Officer Bundy observed a small object fall from defendant's hands. The object was found to be a manilla envelope containing tinfoil packets of heroin. Defendant was then placed under arrest for possession of heroin. A subsequent strip search of defendant produced no further objects.

On the *voir dire* Agent Surratt testified that he had known the confidential informant for approximately one year prior to 7 July 1976. During this time, the informant had given Agent Surratt reliable information which had led to the arrest and conviction of at least one individual and the arrest of others he could not recall. The informant's information had proven to be reliable even though many times the information did not lead to an arrest or conviction.

The defendant offered no evidence at the *voir dire*.

At the conclusion of the *voir dire*, the trial judge made findings substantially as detailed above and concluded that the search was legal and the evidence seized during the search and the heroin obtained from the floor of the police station were admissible.

[1] As defendant's second assignment of error is an integral part of his first assignment of error, it will be dealt with first. In this assignment, defendant contends that there was insufficient evidence to support a finding that the confidential informant's information was reliable. In the instant case, such a finding is essential to the existence of the requisite probable cause to arrest defendant. This contention is clearly without merit. Agent Surratt's testimony on *voir dire* that the informant's information had always been reliable and had led to several arrests and a conviction in one instance, although it had at other times not resulted in arrests, was sufficient evidence to support the trial court's finding of reliability; as to this finding, we are bound. *State v. Jackson*, 292 N.C. 203, 232 S.E. 2d 407 (1977); *State v. Gray*, 268 N.C. 69, 150 S.E. 2d 1 (1966).

[2] Defendant's first assignment of error challenges the legality of the warrantless search in the parking lot relative to which defendant makes three contentions. First, defendant contends that the officers lacked probable cause to believe defendant was committing a

felony in their presence in that the informant's information was unreliable. Referring to our discussion of defendant's second assignment of error hereinabove, we can find no merit in this contention. Not only was the informant's information reliable, but it was also sufficient to establish probable cause. Probable cause "may be based upon information given to the officer by another, the source of such information being reasonably reliable." *State v. Shore*, 285 N.C. 328, 204 S.E. 2d 682 (1974); *State v. Roberts*, 276 N.C. 98, 171 S.E. 2d 440 (1970). In the case at bar, Agent Surratt was able to test the accuracy of the informant's information when he observed the defendant. Once he corroborated the description of the defendant and his presence at the named location, Agent Surratt had reasonable grounds to believe a felony was being committed in his presence which in turn created probable cause to arrest and search defendant.

Defendant next contends that even if probable cause to arrest defendant existed, there was no justification for not obtaining a warrant before confronting him. We disagree.

An arrest is *constitutionally* valid whenever there exists probable cause to make it. Whether an arrest warrant must be obtained is determined by State law. *State v. Streeter*, 283 N.C. 203, 195 S.E. 2d 502 (1973); *State v. Eubanks*, 283 N.C. 556, 196 S.E. 2d 706 (1973). The right of a police officer to arrest a person without a warrant is set forth in G.S. 15A-401(b), which reads, in pertinent part, as follows:

> "(1) Offense in Presence of Officer. — An officer may arrest without a warrant any person who the officer has probable cause to believe has committed a criminal offense in the officer's presence."

Thus, if the offense is committed "in the officer's presence," the officer may effectuate the arrest without obtaining a warrant if he possesses the requisite probable cause. This is precisely the situation in the instant case as Agent Surratt, upon corroboration of the informant's information, had reasonable grounds to believe defendant was in possession of heroin, a felony; therefore, defendant was committing an offense in the officer's presence. See *State v. Roberts, supra.* As this was probable cause for defendant's arrest, an immediate search of defendant's person was proper.

[3] Defendant maintains in this contention that "exigent circumstances" must exist to justify the search and arrest of defendant without a warrant. We recognize that exigent circumstances are a

necessary requisite of one category of warrantless searches —specifically, warrantless searches based upon probable cause *to search*. See *State v. Allen*, 282 N.C. 503, 194 S.E. 2d 9 (1972). However, the warrantless search in the case *sub judice* is based upon probable cause to arrest and is justified, as explained below, as "incident to arrest." This latter class of warrantless searches does not require for its justification the presence of exigent circumstances. See generally *United States v. Rabinowitz*, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950); *State v. Allen, supra*. Even so, we note that the trial court found as fact that defendant might leave the area if he was not apprehended and searched, and that the "exigency" of the situation prevented the officers from first obtaining an arrest warrant or a search warrant. On the evidence presented at *voir dire*, we cannot hold as a matter of law that these findings were unreasonable.

In the third contention directed to the legality of the warrantless search, defendant asserts that the search in the parking lot occurred *before* he was arrested and therefore, was not justified as incident to an arrest. This contention is also without merit. There is an abundance of authority in this State in which the courts, under similar facts, have upheld the finding of a *prior* lawful arrest —thereby justifying the warrantless search as "incident" thereto—notwithstanding the absence of a formal declaration of arrest prior to the search and the presence of testimony by an officer that defendant was not under arrest at the time in question. *State v. Jackson*, 280 N.C. 122, 185 S.E. 2d 202 (1971); *State v. Tippett*, 270 N.C. 588, 155 S.E. 2d 269 (1967); *State v. Ausborn*, 26 N.C. App. 481, 216 S.E. 2d 396 (1975); *State v. Harris*, 9 N.C. App. 649, 177 S.E. 2d 445 (1970). Without diminishing in any way the strength of these decisions, we rely in this case on what we believe to be a more appropriate basis for supporting this search as "incident to an arrest."

[4] We hold that where a search of a suspect's person occurs before instead of after formal arrest, such search can be equally justified as "incident to the arrest" provided probable cause to arrest existed prior to the search and it is clear that the evidence seized was in no way necessary to establish the probable cause. If an officer has probable cause to arrest a suspect and as incident to that arrest would be entitled to make a reasonable search of his person, we see no value in a rule which invalidates the search merely because it precedes actual arrest. The justification for the search incident to arrest is the need for immediate action to protect the arresting officer from the use of weapons and to prevent destruction of

evidence of the crime. These considerations are rendered no less important by the postponement of the arrest.

Although no decision of a North Carolina court has come to our attention which passes upon or considers the rule which we now announce, we find ample support for this holding in relevant decisions of the federal courts and courts of other jurisdictions. *United States v. Riggs*, 474 F. 2d 699 (2d Cir. 1973); *United States v. Brown*, 150 U.S. App. D.C. 113, 463 F. 2d 949 (1972); *United States v. Skinner*, 412 F. 2d 98 (8th Cir.), *cert. denied*, 396 U.S. 967, 90 S.Ct. 448, 24 L. Ed. 2d 433 (1969); *Bailey v. United States*, 128 U.S. App. D.C. 354, 398 F. 2d 305 (1967); *Pendergraft v. Cook*, 323 F. Supp. 967 (S.D. Miss. 1971); see *United States v. Gorman*, 355 F. 2d 151 (2d Cir. 1965), *cert. denied*, 384 U.S. 1024, 86 S.Ct. 1962, 16 L.Ed. 2d 1027 (1966); *People v. Simon*, 45 Cal. 2d 645, 290 P. 2d 531 (1955); *Lavato v. People*, 159 Colo. 223, 411 P. 2d 328 (1966); *Cannon v. State*, 235 Md. 133, 200 A. 2d 919 (1964). In all of these decisions, the controlling factor in determining the validity of the search was the existence of probable cause to arrest the suspect prior to the search. We have stated hereinbefore that, in the case at bar, Agent Surratt had probable cause to arrest defendant before he began to search him.

Accordingly, we hold that the search of defendant which produced the pistol, bullets, and money was lawful. It follows that defendant's arrest for carrying a concealed weapon was lawful as was his detention and subsequent arrest for possession of heroin at the police station. The heroin discovered at the police station was therefore admissible in evidence.

We find defendant's remaining assignments of error to be without merit. In the trial we find

No error.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. PAUL B. HUGENBERG, JR.

No. 774SC268

(Filed 21 September 1977)

1. **Homicide § 20.1— photographs of victim—admissibility**

The trial court in a homicide prosecution did not err in allowing into evidence photographs of the victim where the photographs were relevant to testimony concerning cause of death and wounds inflicted upon deceased.

2. **Homicide § 15— appearance of deceased—doctor's testimony—relevancy**

The trial court in a homicide prosecution did not err in allowing a doctor to testify that he knew deceased personally, but that he did not recognize her after her death, since that testimony was relevant in describing the physical appearance of the body and was relevant concerning whether or not defendant had beaten the deceased extensively about the face.

3. **Homicide § 21.1— death by stabbing—sufficiency of evidence**

Evidence was sufficient for the jury in a first degree murder prosecution where it tended to show that deceased was severely beaten and stabbed; deceased and defendant argued before the murder; defendant attempted to make the murder appear the work of a maniac; and defendant, while at the scene of the murder, repeatedly stated to an officer that he had killed his wife and that he had done so because of a doctor.

APPEAL by defendant from *Smith, Judge*. Judgment entered 20 October 1976 in Superior Court, ONSLOW County. Heard in the Court of Appeals 25 August 1977.

Defendant was charged in a bill of indictment with first degree murder of his wife. The State's evidence tended to show that at approximately 9:56 on the night of 30 March 1976, Deputy Barnes of the Onslow County Sheriff's Department discovered defendant as he emerged from a green Pinto automobile parked in the Onslow Recreation Park. Upon inquiry by Deputy Barnes, defendant at first denied any trouble but then he stopped the deputy's further investigation and stated to Deputy Barnes that he wanted to tell the truth, and that he had just killed his wife. Deputy Barnes found a butcher knife lying on the ground by the opened car door. Lieutenant McAvoy of the Sheriff's Department arrived, searched the wooded area where defendant indicated the deceased was, and discovered the body of Linda Hugenberg, defendant's wife. Defendant was advised of his rights. During this proceeding, defendant repeatedly stated to Deputy Barnes that he had killed his wife, that he had done it because of a doctor, and that he had three children at home.

Between the Pinto automobile and the body of the deceased were found the butcher knife, tissue paper, and various pieces of a pair of woman's slacks. In the right front floorboard of the automobile were some articles of male clothing with red stains on them. Dale Padgett, another deputy sheriff, arrived at defendant's house at approximately 12:00 p.m. He noticed what appeared to be bloodstains on the front porch of the house, on the carpets in the den and in the living room of the house.

David Hedgecock, a Forensic Serologist, testified that numerous bloodstains on various items found near the body where it lay in the woods and on the carpet from the den showed the same type blood as that of deceased.

Dr. Gable, County Medical Examiner, testified that in his medical opinion the deceased's hemorrhaging was due to some type of blow on the head that occurred before the stab wounds, that the cause of death was the stab wounds in the chest and back, and that the body of deceased was not moved significantly after the stab wounds were inflicted. He had recorded the time of death at about nine-forty-five p.m. on 30 March 1976.

Other witnesses for the State testified that the deceased and defendant had been out for the evening, that they had returned home about eight-thirty-five, that around nine-thirty-five or nine-forty, the Pinto automobile was parked near the front door of the house, and that a sister of the deceased had been unable to find either defendant or the deceased at home at nine-forty-five.

Testifying in his own behalf, defendant, a Captain in the United States Marine Corps, explained that on the evening of 30 March 1976, he and deceased went to Happy Hours and dinner at the Commissioned Officer's Mess; that they had dinner with a Captain and Mrs. Parker; and that during dinner deceased had an argument with Mrs. Parker. After dinner they went directly home. The deceased was angry that defendant had not taken her side in the argument with Mrs. Parker. She grew angrier with defendant, allegedly for additional reasons including what deceased had claimed was defendant's mistreatment of her child by a previous marriage. The argument worsened and at one point deceased threw an iron at defendant, and she also threatened him with a pair of scissors. Defendant retreated from his wife on several occasions, hoping she would calm down. Finally, in the den, deceased struck at defendant with her fists several times and defendant struck her. The deceased threatened to seek a divorce and stated that she had had sexual re-

lations with a doctor who practiced at the hospital where the deceased was employed as a nurse. An argument then began over who would have custody of the children. A few moments later, according to defendant, deceased came into the den, yelling that defendant would not get the children and "coming at . . . [him] with a butcher knife." She stumbled; a struggle ensued, and a mortal wound in the chest resulted.

Defendant, scared and confused, carried deceased to the Pinto car, returned to the house to get some clothes, and drove around until he came to the Onslow Recreation Area where he had planned to make the incident look like the work of a maniac. He then pulled the knife from his wife's chest, stabbed her in the back, and dragged her body into the woods. He tore some of deceased's clothes and scattered them around the area. He then returned to the body, pulled off her underpants, and tore them in two as well. After changing clothes defendant got back into the car and Deputy Barnes drove up.

Other evidence put on by the defendant tended to show that he had no criminal record, that he was an outstanding Marine Corps officer, and that he was trustworthy, conscientious, and mature.

The jury returned a verdict of guilty of murder in the second degree, and defendant was sentenced to fifty to sixty years imprisonment. Defendant appeals.

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

Bailey and Raynor, by Edward G. Bailey, for defendant appellant.

ARNOLD, Judge.

Defendant makes five arguments covering ten assignments of error.

I.

[1] In the presentation of its evidence the State introduced photographs of the body of the deceased. Defendant contends that admission of these exhibits into evidence constitutes prejudicial error because the photographs portray such horrible and gruesome details that they serve no purpose except to inflame and prejudice the jury.

As defendant correctly points out, properly authenticated photographs of the body of a homicide victim may be introduced into

evidence under proper instructions limiting their use to that of illustrating a witness's testimony. *State v. Cutshall*, 278 N.C. 334, 180 S.E. 2d 745 (1971). So long as a photograph is relevant and material, the fact that it is gruesome or that it may otherwise arouse prejudice, will not alone render it inadmissible. 1 Stansbury's N.C. Evidence, § 34 (Brandis Rev. 1973). Evidence is relevant if it has any logical tendency, however slight, to prove some fact that is in issue; it is sometimes said to be material if it has some tendency to prove a fact and if its probative value is strong enough to overcome objections of confusion, unfair surprise, and unnecessary prolonging of trial. *State v. Brantley*, 84 N.C. 766 (1881); 1 Stansbury's N.C. Evidence § 77 (Brandis Rev. 1973). Applying these standards defendant's contentions are not tenable.

The State's theory in this case was that defendant knocked his wife unconscious at their home and drove her to the recreation area where he intentionally and with malice inflicted the fatal stab wounds. Defendant, on the other hand, contended that he had hit his wife only twice at home and that she had not been rendered unconscious by those blows. Further, he could not remember at trial whether he had beat her around the face when he attempted to make the incident appear as the work of a maniac. The first photograph showing the deceased's face was relevant and material to this conflict of contentions.

A second photograph introduced into evidence showed the chest wound of the victim, and it was relevant to Dr. Gable's testimony concerning the cause of death. Moreover, our Supreme Court has held that even where the photographs of the deceased were not necessary to the State's case no prejudice resulted from their admission into evidence. *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971); *State v. Cutshall, supra.*

II.

[2] Defendant's second argument is that the court erred in overruling his objection to the following unsolicited testimony of Dr. Piver:

> "I think it only fair to tell the jury that I have known Linda Hugenberg for some period of time. She was an emergency nurse and I had seen her almost on a daily basis in the emergency room. When I saw her that night, I did not recognize her."

Defendant's chief contention is that the testimony was irrelevant and highly prejudicial to the defendant. Again, we disagree.

Dr. Piver's statement was relevant in describing the physical appearance of the body. The State attempted to prove that defendant had beaten the victim at home and then had taken her to the park where he inflicted the fatal stab wounds. As defendant contends, the testimony implied that the body was beaten so badly that it could not be recognized. However, this was relevant concerning whether or not defendant had beaten the deceased extensively about the face.

III.

[3] Defendant next argues that the court erred in overruling his motions for nonsuit. He asserts that there was insufficient evidence to show that he intentionally inflicted the wounds. We cannot agree.

Intent, a necessary element of murder in the second degree, is a mental attitude which can rarely be proved by direct evidence. It must ordinarily be proved by circumstances from which it can be inferred, *State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974); in finding the element of intent, the jury may consider the acts and conduct of the defendant and the general circumstances existing at the time of the alleged crime. *State v. Norman*, 14 N.C. App. 394, 188 S.E. 2d 667 (1972).

While there may be other evidence from which a jury could infer intent, the testimony by Deputy Barnes that defendant, while at the recreation area, repeatedly stated that he had killed his wife, and that he had done so because of a doctor, is highly relevant. This testimony was uncontroverted. These statements by the defendant, together with evidence concerning defendant's conduct and the condition of the victim's body, are sufficient evidence from which the jury could infer intent.

IV.

Defendant next contends that the court erred in allowing Dr. Gable to give a speculative answer to an improperly phrased question. We cannot review this purported assignment of error since, as the State points out, the record fails to disclose how the question was phrased. See App. R. 9(c)(1). However, we have considered the testimony which is the subject of the assignment of error and we find no prejudicial error.

V.

Defendant's final argument is that the court incorrectly charged the jury on involuntary manslaughter. We find no error prejudicial to defendant, and in construing the full context of the

charge, *State v. Sanders*, 288 N.C. 285, 218 S.E. 2d 352 (1975), we find that if any incorrect statements were made they were later corrected by the trial court.

In defendant's trial we find

No error.

Judges PARKER and MARTIN concur.

NATIONWIDE MUTUAL INSURANCE COMPANY v. ROMMIE G. KNIGHT, JR., BY AND THROUGH HIS GUARDIAN AD LITEM, ROBERT F. JOHNSON; ROMMIE G. KNIGHT, SR.; CALVIN LEE LOVE; DONNA BURTON LOVE; GERALD GLENN BURTON; AND DELORES BURTON KNIGHT

No. 7621SC994

(Filed 21 September 1977)

1. **Insurance § 79— automobile liability insurance—property damage—intentional ramming of vehicle**

An automobile liability insurer is liable for property damage arising out of the insured's intentional ramming of another vehicle with the insured vehicle. G.S. 20-279.15(3).

2. **Insurance § 79— automobile liability insurance—gunshots from moving vehicle**

Injuries caused by gunshots fired from the insured's moving automobile did not arise out of the ownership, maintenance or use of the insured automobile, and were not covered by insured's automobile liability policy.

3. **Insurance § 79— automobile liability insurance—punitive damages**

An automobile liability policy in which the insurer agrees to "pay all sums which the Insured shall become legally obligated to pay as damages" does not cover punitive damages that might be assessed against the insured.

APPEAL by defendants from *Collier, Judge*. Judgment entered 16 September 1976 in Superior Court, FORSYTH County. Heard in the Court of Appeals 30 August 1977.

Plaintiff insurance company filed action for declaratory judgment to determine whether it has an obligation to defend certain defendants as to claims arising out of an incident occurring on 5 January 1975.

The incident of 5 January involves a tragic set of facts briefly summarized as follows: At approximately 1:00 p.m., defendants

Calvin Lee Love, Donna Burton Love, and Gerald Glenn Burton, allegedly acting on behalf of defendant Delores Burton Knight, attempted to take defendant Rommie Knight, Jr., approximately three years old, from the custody of his father. Failing in that attempt, four of the defendants, the Loves, Burton, and Delores Knight, all in Burton's automobile, began a high speed chase of the car being driven by Rommie Knight, Sr., and in which Rommie, Jr. was a passenger. In the course of the chase, the Burton automobile rammed the Knight automobile on two occasions, and the Knight automobile was shot at, allegedly by defendant Gerald Glenn Burton. Rommie Knight, Jr. was hit by a bullet which struck him behind the right ear and lodged behind his right eye. When the four defendants in the Burton automobile realized that Rommie Knight, Jr. had been hit, they abandoned the chase.

On 29 February 1975, Knight, Jr. and Knight, Sr. filed action against the four defendants who were in the Burton automobile, seeking to recover $500,000 for alleged personal injuries and damages, mental anguish, and property damage; and $25,000 as punitive damages from each of the four defendants. Plaintiff, having in effect on 5 January 1975, a policy of automobile liability insurance issued to Gerald Glenn Burton, denied coverage for personal injuries sustained by Knight, Jr., and filed this declaratory judgment action.

At the declaratory judgment hearing, the court made findings of fact and concluded that (1) the injuries sustained by the minor defendant Rommie Knight, Jr. did not arise out of the ownership, maintenance, or use of an automobile; (2) that plaintiff had no duty to provide a defense for the defendants Calvin Lee Love, Donna Burton Love, Gerald Glenn Burton, and Delores Knight under the automobile insurance policy; and (3) that plaintiff had no obligation to indemnify these same defendants as to any judgment rendered against them in the action pending against them.

Defendants Rommie G. Knight, Jr., by and through his guardian ad litem, Robert F. Johnson and Rommie G. Knight, Sr., appeal.

J. Robert Elster and W. Thompson Comerford, Jr., for plaintiff appellee.

H. Glenn Pettyjohn and Theodore M. Molitoris for defendant appellants.

ARNOLD, Judge.

[1] Damages are sought by defendants for property damage to their vehicle which resulted from the alleged intentional ramming by the insured vehicle. Failure of the trial court to make findings of fact with respect to plaintiff's obligation to defend the claim for property damage caused by the intentional ramming of defendant's car by plaintiff's insured was error.

An automobile insurer in North Carolina is liable, within the maximum coverage required by the Financial Responsibility Act, for property damage caused by an insured who intentionally drives an automobile into plaintiff's property. In *Insurance Company v. Roberts*, 261 N.C. 285, 289, 134 S.E. 2d 654, 658 (1964), a case where defendant deliberately drove an automobile across a sidewalk and into the victim, our Supreme Court said:

> "From the standpoint of the aggressor, an injury intentionally inflicted upon another is certainly not an accident. However, from the point of view of the victim of an unexpected and unprovoked assault with an automobile, his damages are just as accidental as if he had been negligently struck while crossing the street."
>
> * * * *
>
> " '[I]t is apparently the more widely accepted view that an assault constitutes an "accident", and that injuries therefrom are "accidentally sustained", within the coverage of liability insurance policies.' " (Quoting 33 A.L.R. 2d 1027, 1030; and citing 29A Am. Jur., *Insurance* § 1342.)

Under G.S. 20-279.15(3) coverage within the Financial Responsibility Act extends to property damage as well as to personal damages occurring to the victim of an accident. Plaintiff is therefore required to compensate defendant for any property damage arising out of the intentional ramming of defendant's automobile by plaintiff's insured.

The policy of automobile liability insurance involved in this case provides that Nationwide:

> "[P]ay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of:
>
> * * * *
>
> "[B]odily injury, sickness or disease, including death resulting therefrom, hereinafter called 'bodily injury,' sustained by any

person, arising out of the ownership, maintenance or use of the owned automobile or any non-owned automobile."

Defendants contend that the gunshot from the chasing automobile which injured the minor passenger of the fleeing automobile was an accident for which plaintiff insurance company should be liable. In support of this position that the gunshot wound resulted from an accident arising out of the "ownership, maintenance and use" of an automobile, defendants cite authority from other jurisdictions.

In Fidelity and Casualty Company of *New York v. Lott*, 273 F. 2d 500 (Fifth Cir. 1960), an accident within coverage of the policy was found where a passenger was killed when the insured driver, while attempting to shoot a deer, rested his rifle on top of the parked automobile and fired. The muzzle of the rifle did not clear the top of the car and the bullet entered through the top of the car and downward into the plaintiff.

Defendants also present this case as analogous to cases which have held the insurer liable for injuries sustained by projectiles being thrown from automobiles. In *Home Indemnity Company v. Lively*, 353 F. Supp. 1191 (WDOK 1972), for example, it was held that a pop bottle being tossed from an automobile constituted an accident arising out of the use of an automobile. *See also Wyoming Farm Bur. M. Ins. Co. v. State Farm M. Auto. Ins. Co.*, 467 F. 2d 990 (Tenth Cir. 1972).

On the other hand, plaintiff cites *Vanguard Insurance Company v. Cantrell v. Allstate Insurance Company*, 18 Ariz. App. 486, 503 P. 2d 962 (1973), where the insured fired a gun from his automobile and struck plaintiff inside a liquor store. The Arizona Court noted that the phrase "arising out of" does import a concept of causation, and held that plaintiff's injuries did not arise out of the use of a vehicle.

In the recent case of *Insurance Co. v. Walker*, 33 N.C. App. 15, 234 S.E. 2d 206 (1977), this Court held that where the insured had permanently mounted a gun rack to the cab of his truck, and had frequently used the truck to transport rifles on hunting trips, the transportation of guns was one of the uses to which the truck had been put so that an accidental discharge of a gun on the rack was an accident arising out of the use of the truck. The *Walker* case is distinguishable from the case at bar since it did not deal with an intentional firing of a gun, and there is no evidence in the present case that the insured's vehicle was used to transport guns.

[2] We reject defendant's contentions and conclude that the wound caused by gunshots fired from the insured's moving automobile does not constitute an accident arising out of the ownership, maintenance or use of such automobile. In *Raines v. Insurance Co.*, 9 N.C. App. 27, 30, 175 S.E. 2d 299, 301 (1970), this Court, in denying coverage for injuries caused by gunshots from within a parked automobile, stated:

> "[T]he accidental shooting of Benjamin Raines, under the facts of this case, did not arise out of the ownership, maintenance or use of the automobile which is the vehicle insured under the defendant's policy. No causal connection between the discharge of the pistol and the 'ownership, maintenance or use' of the parked automobile was shown . . . ."

Similarly, there is no causal relationship between the ownership, maintenance and use of the insured's moving vehicle, and the injury sustained by the minor defendant as a result of gunshots fired from that moving vehicle. Defendant's argument that "but for the use of the automobile" to establish causation is too broad and is rejected.

[3] Finally, defendants contend that Nationwide should be liable for punitive damages since the insured automobile was intentionally driven into defendant's vehicle. Among other arguments defendants assert that plaintiff agreed in its policy to "pay all sums which the Insured shall become legally obligated to pay as damages. . . ." However, we conclude that the inclusive language of the policy does not cover punitive damages that might be assessed against the insured.

The commonly accepted definition of the term "damages" does not include punitive damages. In 25 C.J.S., Damages § 1, for example, there is the following definition:

> "In its legal sense the word 'damages' is defined as meaning the compensation which the law will award for an injury done; a compensation, recompense, or satisfaction in money for a loss or injury sustained; and the most common meaning of the term is compensation for actual injury."

Punitive damages are not compensation for injuries sustained. In construing the damages clause of the Labor Management Relations Act, Justice Higgins, in *Transportation Co. v. Brotherhood*, 257 N.C. 18, 30, 125 S.E. 2d 277, 286 (1962), stated:

"[R]ecovery is authorized 'for the damages sustained and the cost of the suit.' Damages sustained are limited to actual damages suffered as a result of the wrong inflicted. [Citation omitted.] Punitive damages are never awarded as compensation. They are awarded above and beyond actual damages, as a punishment for the defendant's intentional wrong. They are given to the plaintiff in a proper case, not because they are due, but because of the opportunity the case affords the court to inflict punishment for conduct intentionally wrongful."

In summary, that part of the judgment which, in effect, excludes liability by plaintiff for property damage caused by the intentional driving of the insured vehicle into defendant's vehicle is reversed. The judgment is otherwise affirmed.

Reversed in part.

Affirmed in part.

Judges PARKER and MARTIN concur.

STATE OF NORTH CAROLINA v. CLEM CLEMMONS

No. 777SC302

(Filed 21 September 1977)

1. **Criminal Law § 66.9— pretrial photographic identification of defendant—no suggestiveness**

An in-court identification of defendant by the victim of an attempted robbery was not tainted by pretrial identification of photographs where the evidence tended to show that the victim was shown photographs on three occasions; she saw at least eight or ten photographs of black males each time; and there was no hint or suggestion that she select the defendant's photograph.

2. **Criminal Law § 66.20— identification of defendant—voir dire—sufficiency of findings**

Defendant's contention that the trial court failed to make adequate conclusions based on the *voir dire* with respect to in-court identification of defendant is without merit where the court found that the witness's identification was based on observation of defendant at the crime scene and that defendant's constitutional rights were not violated by pretrial photographic identification procedures.

3. **Robbery § 5— attempted armed robbery—failure to instruct on attempted common law robbery—no error**

In a prosecution for attempted armed robbery where the evidence that defendant's accomplice used a rifle was uncontradicted, the trial court did not err

in failing to instruct the jury as to the lesser included offense of attempted common law robbery.

4. **Criminal Law § 138.7— punishment—consideration of victim's testimony**

In a prosecution for attempted armed robbery, the trial court did not err by allowing a victim to make a statement relating to the punishment of defendant.

APPEAL by defendant from *Browning, Judge.* Judgment entered 14 October 1976 in Superior Court, WILSON County. Heard in the Court of Appeals 1 September 1977.

Defendant was charged with attempted armed robbery. At his trial there was evidence to show that at approximately 10:00 p.m. on the night of 3 August 1976, defendant entered Kenwood Court Motel in Wilson, North Carolina where Mrs. Nellie Williams was working as manager. Defendant was followed into the motel office by Walter Hardy. Hardy carried a rifle, later alleged to be empty. Tipped off by the screams of his wife, Mr. Williams got his gun and came from their nearby bedroom shooting at defendant and Hardy, both of whom fled. Mrs. Williams was injured by a bullet from her husband's gun.

On *voir dire* it was established that on separate occasions Mrs. Williams had identified both Hardy and defendant from photographs supplied by the police. She was thereafter allowed to identify defendant as the man who came into the motel first on the night of the attempted armed robbery. Walter Hardy testified for the State that he and defendant had been drinking on the night of 3 August 1976, and that defendant had suggested that they "rob some place." According to Hardy, defendant told him to stop at the motel and to come in with the rifle after defendant had gone in on the pretense of getting a room.

Defendant presented testimony that Hardy had driven him to the motel so that defendant could rent a room in which to meet a girl friend later that night, and that he had no intent to commit armed robbery. Hardy, according to defendant's testimony, followed him into the motel and placed him unwittingly in a situation in which he appeared to be an accomplice. Helen Woodard testified that she and defendant did have a date planned for the evening of 3 August 1976, and that they were to meet at a motel which defendant was to select that night.

Defendant was convicted of attempted armed robbery and was sentenced to sixty (60) years imprisonment. He appeals.

Attorney General Edmisten, by Robert W. Newsom, III, Associate Attorney, for the State.

Bobby G. Abrams for defendant appellant.

ARNOLD, Judge.

[1] Defendant makes several arguments concerning the in-court identification by Mrs. Williams. The record shows that upon objection by defense counsel there was a proper *voir dire* examination of the witness Nellie Williams. The defendant asserts, first, that the trial court's conclusion following the *voir dire* examination did not meet the requirements of *Simmons v. United States*, 390 U.S. 377, 384, 19 L.Ed. 2d 1247, 1253 (1968), which defendant quotes:

> "[C]onvictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

We have reviewed the record and find no evidence that the pretrial identification by photograph was impermissibly suggestive. The testimony of both Mrs. Williams and the Chief Deputy Sheriff of Wilson County established that Mrs. Williams was shown photographs on three occasions, that she saw at least eight or ten photographs of black males each time, and that there was no hint or suggestion that she select the defendant's photograph.

[2] As a second contention, defendant argues that the trial court failed to make adequate conclusions based on the *voir dire* examination. The court stated:

> "That, based on the foregoing FINDINGS OF FACT, the Court CONCLUDES THAT THE identification of the defendant, Clem Clemmons by Mrs. Williams, was based on her viewing of the defendant on the night in question in the Kenwood Motel;
>
> "The Court further CONCLUDES that the identification procedure as described above does not violate the Constitutional rights of the defendant either under the Constitution of the United States or the Constitution of the State of North Carolina."

The defendant argues that the case of *State v. Accor* and *State v. Moore*, 277 N.C. 65, 175 S.E. 2d 583 (1970), controls the content of the

court's conclusions. In that case, the Supreme Court ruled that the following conclusion was inadequate:

> " 'Upon the foregoing Findings of Fact, the Court concludes as a matter of law that the out-of-court identifications of the defendants, Moore and Accor, by Mr. and Mrs. Witt Martin, Mr. James Martin, and Mrs. Elizabeth Martin Carson were lawful.' "

The Court went on to state that under certain circumstances, depending on the objection to identification, the trial court should evaluate, in the *voir dire* hearing, possible violations of Fourth Amendment and Sixth Amendment rights. In the instant case, however, the trial court did conclude that the pretrial identification procedure did not violate the constitutional rights of the defendant.

Defendant specifically contends, nevertheless, that there was no evidence that defendant was under arrest when he was photographed. The record is unclear on this point. The trial court did not make a specific finding of fact concerning this question, and while the findings of fact may be less than adequate, we conclude that the overall pretrial identification procedure was not "so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification." *Simmons v. United States, supra.*

The total absurdity of defendant's arguments with respect to the in-court identification by Mrs. Williams is that defendant never denied being at the motel at the time of the attempted robbery. Defendant testified that he went into the motel lobby and discussed with Mrs. Williams the possibility of renting a room, and that when Hardy entered behind him carrying a rifle he was just as surprised as Mrs. Williams, and that he ran when shots were fired.

A second argument by defendant that the court erred by denying him the right to cross-examine Hardy concerning Hardy's wife's actions when she discovered that her rifle was used during the attempted robbery cannot be considered. The denial of a criminal defendant's questions on cross-examination is closely scrutinized, but the record here fails to disclose Hardy's answer, and without more definite assertion of error in the court's denial we are unable to find any abuse in the discretion exercised by the trial judge.

[3] The third argument made by defendant that the trial court committed prejudicial error by failing to instruct the jury as to the lesser included offense of attempted common law robbery is without merit. The essential difference between armed robbery and com-

mon law robbery is that the former is accomplished by the use or threatened use of a firearm, or other dangerous weapon, whereby the life of a person is endangered or threatened. G.S. 14-87; *State v. Lee*, 282 N.C. 566, 193 S.E. 2d 705 (1973). In a prosecution for armed robbery, the trial court is not required to submit the lesser included offense of common law robbery unless there is evidence of defendant's guilt of that crime. If the State's evidence shows an armed robbery, and there is no conflicting evidence on the elements of the crime charged, an instruction on common law robbery is not required. *State v. Lee, supra.*

The same distinction would, of course, exist as between attempted armed robbery and attempted common law robbery, and the same analysis would apply. In the present case there was no evidence of attempted common law robbery. There was no conflict of evidence concerning the threatened use by Hardy of a firearm. Hence, there was no reason for the trial court to instruct on the lesser included offense of attempted common law robbery.

[4] The final argument which we will consider is defendant's contention that the trial court committed prejudicial error by allowing a victim of the attempted armed robbery to make a statement relating to the punishment of the defendant. After the verdict and before sentencing, Mr. Williams, at the invitation of the trial judge, made a statement concerning defendant's punishment. Defendant had previously made a statement with respect to punishment and requested a light sentence. We can find no prejudicial error in allowing the statement by Mr. Williams.

In determining the punishment to be imposed, the trial court is not confined to evidence relating to the offense charged, but may look anywhere, within reasonable limits, for other facts which will enable the court to act wisely. *State v. Thompson*, 267 N.C. 653, 148 S.E. 2d 613 (1966). While the victim's statement does not fall within the categories frequently listed for permissible inquiry, i.e., age, character, education, environment, habits, mentality, propensities, and the record of defendant, *State v. Cooper*, 238 N.C. 241, 244, 77 S.E. 2d 695, 698 (1953), we find no authority which would prohibit such inquiry. Furthermore, the sentence of sixty years was within the permissible limit of life imprisonment for armed robbery under G.S. 14-87. (We note also from the statement which defendant made that, at the time he committed this offense, defendant was on parole from a sentence for armed robbery in Maryland.)

Defendant makes several more arguments in which we find no merit.

No error.

Judges PARKER and MARTIN concur.

STATE OF NORTH CAROLINA v. MORGAN JESSIE LEE

No. 774SC304

(Filed 21 September 1977)

Homicide § 21.4— defendant as perpetrator—insufficiency of evidence

The State's evidence was insufficient to support a verdict finding defendant guilty of second degree murder where it tended to show that defendant and deceased lived together in a trailer park; deceased's body was found a few miles from the home of defendant's father in another county; two gunshot wounds caused deceased's death; defendant had beaten and threatened to kill deceased; a neighbor heard two shots near defendant's trailer during the night before deceased's body was found; defendant possessed a .25 caliber pistol prior to deceased's death and had a small pistol when he went to his father's home on the day deceased's body was found; defendant's sister gave officers a .25 caliber pistol when they went to the home of defendant's father; two lead fragments taken from deceased's body were unsuitable for identification; and defendant had himself been shot prior to the time deceased's body was found.

Judge MARTIN dissenting.

APPEAL by defendant from *Webb, Judge.* Judgment entered 3 February 1977 in Superior Court, SAMPSON County. Heard in the Court of Appeals 1 September 1977.

Defendant was tried on his plea of not guilty to an indictment charging him with the first degree murder of Brenda Jones.

According to the evidence presented by the State, the body of Brenda Jones, the deceased, was discovered in a clearing located "a few miles" from the home of defendant's father in Sampson County. The body was found sometime after 8:00 p.m. on Saturday, 28 August, and the parties stipulated that two gunshot wounds caused her death. However, the officers found no spent cartridges or other evidence in the area where the body was lying.

The defendant had been living with the deceased in a trailer park in Fayetteville for approximately two months. Neighbors in the trailer park testified that the deceased had been beaten on two separate occasions within two weeks of her death. After the second beating, defendant admitted to one of the neighbors that he had

beaten the deceased because she was having an affair. Sometime between the Thursday and Friday mornings prior to the death of Brenda Jones, defendant also told one of the neighbors that he was going to kill Brenda. On Friday night, 27 August, one of the next-door neighbors heard two shots fired outside his trailer, and the shots "seemed fairly close."

On Saturday evening, just before the body was discovered, an officer went to the home of defendant's father, where he saw the defendant. The defendant was acting nervous and had just been shot in the right side. The defendant told the officer that the unidentified person who shot him had run away, but his father testified that he accidentally shot defendant during a "scramble" that occurred as a result of a "misunderstanding." Defendant was taken to a hospital where a detective from the Sheriff's Department questioned him. Defendant told the detective that he had not seen Brenda since 7:30 on Saturday morning and that she did not tell him where she was going. The detective also testified that "[w]hen I asked him about Brenda, he denied knowing anything, sort of smiled and said, 'well, you read my rights and everything, didn't you.' "

Two lead fragments were taken from the body of Brenda Jones, but they were unsuitable for identification. The State introduced into evidence a .25 caliber pistol, identified as State's Exhibit 1, that defendant's sister gave to the officer when he went to the home of defendant's father on Saturday evening. Defendant's father testified that the defendant had a "small pistol" with him when he came home on Saturday evening. One of defendant's neighbors from the trailer park testified that defendant had a black .25 caliber pistol with him in his trailer a few days before the death of Brenda Jones, and that the pistol was similar to State's Exhibit 1. The State introduced into evidence a fired cartridge casing, identified as State's Exhibit 7, which was found to be similar to cartridges test-fired from State's Exhibit 1. However, the State's firearms expert could not conclusively determine whether or not State's Exhibit 7 had been fired from State's Exhibit 1.

At the close of the State's evidence, the defendant moved for nonsuit, and the court denied the motion. The defendant presented no evidence, and the jury found him guilty of second degree murder. From judgment imposing a prison sentence, defendant appealed.

Attorney General Edmisten by Assistant Attorney General James Peeler Smith for the State.

Holland & Poole, P.A., by R. Maurice Holland for defendant appellant.

PARKER, Judge.

Defendant challenges the sufficiency of the evidence to take the case to the jury. We find the evidence insufficient and hold that defendant's motion for nonsuit should have been granted.

While it is the duty of the jury to determine the weight and credibility of the evidence, it is the court's duty, in the first instance, to determine whether sufficient evidence has been presented to permit the jury to pass upon its weight and credibility. *State v. Brackville*, 106 N.C. 701, 11 S.E. 284 (1890). In this case the State relied upon circumstantial evidence, but the test of the sufficiency of the evidence is the same, whether the evidence is circumstantial, direct, or both. *State v. McKnight*, 279 N.C. 148, 181 S.E. 2d 415 (1971). "To withstand the motion for nonsuit, there must be substantial evidence of all material elements of the offense." *State v. Furr*, 292 N.C. 711, 715, 235 S.E. 2d 193, 196 (1977). In determining whether there is substantial evidence, the court must consider all the evidence in the light most favorable to the State, and every reasonable inference arising from the evidence must be made in favor of the State. *State v. Furr, supra.*

Viewed in the light most favorable to the State, the evidence is sufficient to show that Brenda Jones died by virtue of a criminal act, but the evidence is insufficient to permit a jury to find that the criminal act was committed by the defendant. The evidence that defendant had beaten and threatened to kill the deceased provides strong evidence of motive, but evidence of motive, standing alone, is insufficient to support a conviction. *State v. Furr, supra; State v. Jarrell*, 233 N.C. 741, 65 S.E. 2d 304 (1951); *State v. Hendrick*, 232 N.C. 447, 61 S.E. 2d 349 (1950). A neighbor heard two shots near defendant's trailer, but there was no evidence that either the defendant or the deceased was at the trailer at the time. In fact, there was no evidence to show where the deceased met her death, and the only evidence fixing the time of death was that death must have occurred sometime between Thursday morning, 26 August, when a neighbor saw Brenda Jones alive, and Saturday evening, 28 August, when the body was discovered. The State introduced in evidence a .25 caliber pistol, State's Exhibit 1, but presented no direct evidence to connect this weapon with the defendant. Only by indulging in speculation and assuming facts not in evidence can the inference be drawn that State's Exhibit 1 was ever at any time in defendant's possession. Neither was there any evidence that State's Exhibit 1 was used to kill the deceased. State's Exhibit 7, the fired cartridge casing, could not be conclusively connected to State's Exhibit 1, but

even if the connection could have been made, there was no evidence as to where State's Exhibit 7 had come from or what connection, if any, it may have had with the death of the decedent. Finally, the State introduced evidence that the defendant himself had been shot, but nothing in the record connects that incident to the shooting of Brenda Jones.

The evidence, viewed as a whole, raises a strong suspicion of guilt, but a suspicion or conjecture is insufficient to support a conviction. The evidence was not inconsistent with defendant's innocence, and the motion for nonsuit should have been granted. *State v. Furr, supra*; *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967); *State v. Jarrell, supra*; *State v. Brackville, supra.*

Reversed.

Judge ARNOLD concurs.

Judge MARTIN dissenting.

In my opinion, the evidence was sufficient to carry the case to the jury and to support its verdict of guilty of murder in the second degree.

STATE OF NORTH CAROLINA v. CHARLES HEWITT

No. 7720SC307

(Filed 21 September 1977)

Weapons and Firearms— shooting into inhabited dwelling—insufficiency of evidence

In a prosecution for discharging a firearm into an inhabited dwelling, evidence was insufficient for the jury where it established no opportunity or motive on the part of defendant to commit the crime; and the only evidence connecting defendant with the offense charged was that a spent .22 caliber casing found on a paved, public road near the house shot into was, in the opinion of a ballistics expert, fired from the gun found under a sofa in defendant's home.

Judge CLARK dissenting.

APPEAL by defendant from *Barbee, Judge*. Judgment entered 3 February 1977 in Superior Court, UNION County. Heard in the Court of Appeals 1 September 1977.

Defendant was charged in a proper bill of indictment with discharging a firearm into an inhabited dwelling in violation of G.S. 14-34.1. Upon his plea of not guilty, the State offered evidence tending to show the following:

On the night of 1 November 1976 Morris and Larry Rowell were at the latter's mobile home in Union County. The home is located on a rural paved road in a fairly wooded area. At approximately 8:30 p.m. they heard the engine of a vehicle slowing down and heard eight to ten noises "like firecrackers which occurred in rapid succession." Although the Rowells immediately left the mobile home in an automobile, they were unable to identify or pursue the vehicle they had heard immediately before they heard the noises. Upon their return, they inspected the front of the home and found two holes near the kitchen window. The holes, which had never been noticed before the night in question, appeared to be bullet holes. Within thirty minutes some deputy sheriffs arrived at the Rowell home and conducted a search of the premises with flashlights. This search produced one bent .22 caliber casing on the side of the road approximately fifty to sixty feet from the home. There was no evidence as to how long the casing had been lying at the location where it was found. The following afternoon another search conducted by the deputies produced six or seven additional .22 caliber casings, some found near the first one and others found on the other side of the road.

At approximately 10:30 p.m. on the night in question, after a search of defendant's home with his consent, a loaded .22 caliber pistol was found under the sofa. A ballistics expert testified that in his opinion one of the .22 caliber casings found on the side of the public road near the Rowell home had been fired by the .22 caliber pistol found in defendant's home. There was no evidence that the other casings found in the vicinity were fired by the defendant's gun. Neither Larry nor Morris Rowell knew defendant or knew of any reason why he would want to harm them.

Defendant offered no evidence.

On submission of the case to the jury the defendant was found guilty as charged. From the judgment imposing a prison term of 8 years in the county jail, defendant appeals.

Attorney General Edmisten by Associate Attorney Mary I. Murrill for the State.

Bailey, Brackett and Brackett by Terry D. Brown for the defendant appellant.

HEDRICK, Judge.

As his sole assignment of error, defendant contends that the court erred in its denial of defendant's motion for judgment as of nonsuit.

In determining the sufficiency of the evidence to withstand a motion for judgment as of nonsuit, the evidence must be considered in the light most favorable to the State, including all reasonable inferences which could be drawn therefrom. *State v. Bruton*, 264 N.C. 488, 142 S.E. 2d 169 (1965). In the present case the evidence is largely uncontroverted. The question then is whether on the basis of this evidence a jury could reasonably infer that an offense has been committed, and that the defendant committed it. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967).

While we think it may be reasonably inferred from the evidence that the offense charged in the bill of indictment was committed, we think the evidence is insufficient to raise more than a suspicion that the defendant committed the crime. *State v. Cutler, supra*; *State v. Brackville*, 106 N.C. 701, 11 S.E. 284 (1890). The only evidence connecting defendant with the offense charged is that a spent .22 caliber casing found on the paved road near the Rowell home was, in the opinion of the ballistics expert, fired from the gun found in the defendant's house. We can only speculate that the holes observed in the Rowell home were actually made by a bullet from the spent .22 caliber casing fired from defendant's gun. *State v. Cutler, supra*. Furthermore, since there is no evidence that defendant had an opportunity or motive to commit the crime, we can do no more than speculate that defendant actually fired the gun which left the casing on the side of the road. Thus, we hold that the court erred in denying defendant's motion for judgment as of nonsuit.

Reversed.

Judge VAUGHN concurs.

Judge CLARK dissents.

Judge CLARK dissenting.

The evidence and reasonable inferences therefrom, considered in the light most favorable to the State, tend to show:

> Eight to ten shots were fired at the trailer home from a motor vehicle on the road where the eight or nine .22 caliber shell cas-

ings were found, and at least two bullets struck and were imbedded in the home. Two hours after the shooting the .22 caliber weapon which fired these shots was found in defendant's home behind the sofa where defendant was sitting. The weapon was fully loaded with .22 caliber cartridges, and some .22 caliber cartridges were found in defendant's pocket.

It is my opinion that from the totality of circumstances it may reasonably be inferred that defendant committed the charged crime, and the trial court did not err in denying the motion for judgment as of nonsuit.

STATE OF NORTH CAROLINA v. ROBERT EARL GILES

No. 7710SC303

(Filed 21 September 1977)

1. **Criminal Law § 34.1— witness's occupation as undercover police officer—reason for presence at crime scene—similar offenses**

In a prosecution for assault with intent to commit rape, the trial court did not err in the admission of testimony by the prosecutrix that at the time of the assault she was a police officer working undercover on the N. C. State University campus and that she was being "used as a decoy in order to apprehend the subject or subjects responsible for reported assaults and rapes in the area," since the testimony was not an attempt to show similar offenses by defendant but was relevant to inform the jury of the witness's occupation and reason for being on the N. C. State campus at the time of the assault.

2. **Rape § 17; Constitutional Law § 28— assault with intent to commit rape upon female—equal protection**

The statute prescribing the punishment for assault with intent to commit rape upon a female, G.S. 14-22, does not deny equal protection of the laws to a male defendant by prohibiting conduct directed toward females without prohibiting the same conduct directed toward males since the statute does not prescribe different punishment for the same acts committed under the same circumstances by persons in like situations, and the statute applies to "every person" and would be equally applicable to a female who aids, abets and assists a man in the perpetration of an assault with intent to commit rape. N.C. Constitution, Art. I, § 19; U.S. Constitution, Amendment XIV.

APPEAL by defendant from *Bailey, Judge*. Judgment entered 12 October 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 1 September 1977.

The defendant was indicted for assault with intent to commit rape.

Evidence for the State tended to show that Carol Simmons was a Raleigh Patrolman and on the night of 5 May 1976 was working undercover with the Selective Enforcement Unit on the North Carolina State University campus. She testified that as she walked past the Alumni Building, defendant grabbed her from behind; that she screamed and struggled, and the defendant gouged her in the crotch area and continuously grabbed her having his hand in the area of her vagina; and that after defendant pushed her forward and released his hands, she turned around and saw the back of him running and noticed that he was not wearing anything except socks. The testimony of the officers who were following Carol Simmons tended to show that they came in response to her screams and chased a man wearing nothing but socks; that they caught up with him several times but his skin was covered with an extremely slippery substance other than sweat which enabled him to slip away from them. They testified that the man dropped a bottle of skin lotion as he ran; that they finally caught defendant and put him in a police car; that defendant asked for his clothes and police found his clothes in the area of the attack; and that defendant told police where they could find his automobile parked on the campus.

The defendant offered no evidence.

Upon a verdict of guilty of the offense charged, the defendant was sentenced to imprisonment for the term of not less than ten years nor more than fifteen years. He appealed to this Court.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis, and Associate Attorney Rebecca R. Bevacqua, for the State.

Tharrington, Smith & Hargrove, by Roger W. Smith, for the defendant.

MARTIN, Judge.

[1] In response to preliminary questions regarding her occupation and whereabouts at the time of the assault, Officer Simmons testified that she was a police officer working undercover on the North Carolina State University campus and that she was being "used as a decoy in order to apprehend the subject or subjects responsible for reported assaults and rapes in the area." The defendant contends that this testimony should have been excluded as irrelevant and prejudicial and the court erred in allowing its admission. We disagree.

The testimony of Officer Simmons was not an attempt to introduce inadmissible evidence of similar offenses by the defendant. It in no way implicated the defendant, and the State made no attempt to prove that any other assaults or rapes had actually occurred or that the defendant was in any way responsible for or suspected of these other similar offenses. However, the testimony was relevant and necessary to inform the jury who the witness was, what her occupation was, and why she was on the North Carolina State University campus at the time the assault occurred. Thus, the cases cited by defendant concerning the admissibility of evidence of similar offenses are inapplicable here and the admission of Officer Simmons' testimony was proper.

[2] Defendant next contends that G.S. 14-22 "prohibits conduct directed toward females without prohibiting the same conduct directed toward males" and thereby denies him equal protection of the laws contrary to Article 1, Section 19 of the North Carolina Constitution and the Fourteenth Amendment of the United States Constitution. This contention is without merit. Allowing defendant's assertion that G.S. 14-22 speaks only to "an assault with intent to commit a rape upon . . . [a] female," this Court, nevertheless, fails to perceive in what manner this statute denies defendant equal protection of the laws. The rule is well established that "equal protection of the laws is not denied by a statute prescribing the punishment to be inflicted on a person convicted of a crime unless it prescribes different punishment for the same acts committed under the same circumstances by persons in like situations." *State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970); *State v. Fowler*, 193 N.C. 290, 136 S.E. 709 (1927); 16A C.J.S. Constitutional Law, § 564 (1956). Defendant has brought to the attention of this Court *no* person or class of persons, similarly situated or otherwise, to whom G.S. 14-22 would prescribe a different punishment for the commission of an assault with intent to commit rape on a female. Moreover, G.S. 14-22 is explicitly made applicable to "[e]very person" and thus, by its express terms makes no attempt to create legal classifications among those subject to its sanctions. In this respect, we note that the sanctions of 14-22 are equally applicable to a *woman* who, although incapable in and of herself to commit a rape, aids, abets and assists a man in the perpetration of an assault with intent to commit a rape. *State v. Jones*, 83 N.C. 605 (1880).

We have carefully reviewed defendant's remaining assignments of error and find them to be without merit. In the trial we find no prejudicial error.

No error.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. RICHARD ALLAN SHUFFORD AND LARRY CLIFFORD SHUFFORD

No. 7725SC281

(Filed 21 September 1977)

1. **Narcotics § 4— manufacture of marijuana—close juxtaposition—sufficiency of evidence**

The State's evidence was sufficient for the jury on the issue of defendants' guilt of the felonious manufacture of marijuana where it tended to show that when officers requested entry into a third person's residence, they heard "motors running" and footsteps going through the house; officers discovered in the kitchen a trash compactor, several bags containing green leaf material, and three blenders filled with a green substance; two of the blenders were running; defendants, the third person, and compressed blocks of marijuana were found in a bedroom next to the kitchen; a trash compactor bag containing compressed marijuana was found in an upstairs bedroom; the trash compactor in the kitchen contained a piece of cardboard which caused it to form blocks the same size as the marijuana blocks found in the downstairs bedroom; and the trash compactor had been purchased by the third person, since evidence of defendants' close juxtaposition to the place where the marijuana was being manufactured was sufficient to overcome their motion for nonsuit on the charge of manufacturing marijuana.

2. **Criminal Law § 132— motion to set aside verdict**

A motion to set aside a verdict as being against the weight of the evidence is addressed to the discretion of the trial judge, and his refusal to grant the motion is not reviewable on appeal absent a showing of abuse of discretion.

3. **Criminal Law § 124.5; Narcotics § 5— inconsistency in verdict**

A verdict finding defendants not guilty of possession of marijuana with intent to manufacture but guilty of the manufacture of marijuana will not be disturbed on appeal, since the verdict is not required to be consistent.

APPEAL by defendants from *Thornburg, Judge*. Judgments entered 16 July 1976 in Superior Court, CATAWBA County. Heard in the Court of Appeals 30 August 1977.

Upon pleas of not guilty defendants were tried jointly on bills of indictment charging them with (1) felonious possession of approximately 100 pounds of marijuana with intent to manufacture, and (2) felonious manufacture of marijuana. The offenses allegedly occurred on 12 January 1976. They were found not guilty of (1) but

guilty of (2). From judgments imposing prison sentences of five years, they appealed.

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

Triggs and Hodges, by C. Gary Triggs, for defendant appellants.

BRITT, Judge.

[1] By their first assignment of error, defendants contend that the court erred in denying their motions for nonsuit because the evidence failed to show either actual or constructive possession of the marijuana by them or that they manufactured marijuana. We find no merit in this assignment.

The State's evidence tended to show: On 12 January 1976 police officers obtained a search warrant for the residence of Gregory Watts. They knocked on the door of the Watts residence, announced that they were police officers with a search warrant and requested that the door be opened. After waiting a reasonable time and upon hearing "motors running" and "footsteps going through the house and into the upper part of the house", the officers forcibly gained entrance by kicking the door open. Inside the kitchen they found three blenders, two in operation, filled with a green substance; a trash compactor; a plastic trash can; and several bags with green leaf material in them. In a downstairs bedroom, they found defendants and Gregory Watts along with three suitcases and a burlap sack containing compressed blocks of marijuana. In an upstairs bedroom, they found a trash compactor bag containing compressed marijuana. The trash compactor which was found in the kitchen contained a piece of cardboard which caused it to form blocks the same size of the marijuana blocks found in the downstairs bedroom.

In addition the officers found a receipt from Sears for the trash compactor in the name of Earl Watson. Both the Sears salesman and the boy who loaded the trash compactor into the car at Sears remembered selling the compactor to Gregory Watts and another person whom they could not positively identify as one of the defendants. Several other bills and receipts, all in the name of Gregory Watts, were found in the house.

Defendants did not present any evidence but made motions for nonsuit at the close of the State's evidence.

When the evidence is considered in the light most favorable to the State, giving it the benefit of all reasonable inferences and resolving all doubts in its favor, as we are required to do, *State v. Rigsbee*, 21 N.C. App. 188, 203 S.E. 2d 660, *aff'd* 285 N.C. 708, 208 S.E. 2d 656 (1974), we think the evidence was sufficient to survive the motions for nonsuit. Although we find no case exactly on point with the case at hand, the following cases and articles are instructive in determining whether the State's evidence was sufficient to overcome the defendants' motions for nonsuit under the above stated test. *See State v. Smith*, 226 N.C. 738, 40 S.E. 2d 363 (1946); *State v. Adams*, 191 N.C. 526, 132 S.E. 281 (1926); *State v. Moore*, 190 N.C. 876, 130 S.E. 713 (1925); *State v. Sykes*, 180 N.C. 679, 104 S.E. 83 (1920); *State v. Perry*, 179 N.C. 718, 102 S.E. 277 (1920); *State v. Ogleston*, 177 N.C. 541, 98 S.E. 537 (1919). *See also State v. Minor*, 290 N.C. 68, 224 S.E. 2d 180 (1976); *State v. Baxter*, 21 N.C. App. 81, 203 S.E. 2d 93, *cert. granted* 285 N.C. 374, 205 S.E. 2d 99, *rev. on other grounds* 285 N.C. 735, 208 S.E. 2d 696 (1974). *See generally* Annot., 56 A.L.R. 3d 948 (1974); Annot., 47 A.L.R. 3d 1239 (1973); Annot., 64 A.L.R. 427 (1929); 7 Strong's N.C. Index 3d, Intoxicating Liquor §§ 15, 15.1, 17; 22 C.J.S., Criminal Law § 88(2) (1961); 23 C.J.S., Criminal Law §§ 790, 798(18) (1961).

G.S. 90-95(a)(1) makes the manufacturing of a controlled substance a criminal offense. G.S. 90-94 declares marijuana to be a controlled substance. G.S. 90-87(15) defines "manufacture" and provides that, among other things, the term includes production, preparation, compounding, processing, packaging or repackaging a controlled substance.

The evidence in the case at hand clearly showed that marijuana was being "manufactured", as that term is defined by statute, on the occasion in question. A considerable quantity of the vegetable material found downstairs was not marijuana but was mere grass and leaves. The strong inference is that the grass and leaves were being blended with the marijuana and the resulting material packaged into new blocks.

Defendants argue that mere presence at the place where a crime is being committed, without more, is not sufficient to withstand a motion for a nonsuit. *State v. Minor, supra*; *State v. Adams, supra*. *See also* 7 Strong's N.C. Index 3d, Intoxicating Liquor §§ 15, 15.1, 17; 22 C.J.S., Criminal Law § 88(2) (1961); 23 C.J.S., Criminal Law §§ 790, 798(18) (1961). While appellate court decisions relating to the manufacture of marijuana are limited, we think analogous North Carolina cases concerning the illegal manufacture of whiskey

are instructive on the question of sufficiency of the evidence required to survive a motion for nonsuit.

Based on the principles set out in the above articles and cases and the evidence presented in the present case, we think nonsuit was properly denied. The three major evidentiary points which supported the trial court's ruling were: (1) officers heard "running through the house" immediately after announcing the presence of the police and requesting entry; (2) defendants and Gregory Watts were found in the downstairs bedroom with the packaged marijuana next to the kitchen where the manufacturing paraphernalia was assembled; and (3) two of the blenders were in operation and manufacturing appeared to be in progress.

It has been held that presence at a place where illegal whiskey is being manufactured, along with other supporting evidence, is sufficient to overcome a defendant's motion for nonsuit. *State v. Adams, supra; State v. Perry, supra.* In the illegal manufacture of whiskey cases, the conduct of the defendants when found at the whiskey distillery and the fact that the distillery was in operation when the officers arrived were usually determinative factors in allowing the case to go to the jury. *State v. Smith, supra; State v. Moore, supra; State v. Sykes, supra; State v. Ogleston, supra.*

In *State v. Ogleston, supra,* the evidence for the State showed that the two defendants were the only ones found at the still which was in operation, that one was standing with his back to the fire of the still and the other was reclining on the ground. The court held that the evidence permitted the inference that the two men were manufacturing whiskey and was sufficient to support a denial of the motion for a nonsuit.

In *State v. Moore, supra,* the defendant claimed that he was at the still because of an invitation from a stranger whom he had met along the roadside and stated that he did not have a "bit of interest in the still." The court concluded that the evidence that the defendant was present at the still, that he ran when officers approached, that there was a fire under the still and that it had been recently operated, was sufficient for the jury to find him guilty of the illegal manufacture of whiskey.

In addition to the illegal manufacture of whiskey cases, there are cases involving the possession of narcotics which have held that evidence of close juxtaposition to the narcotics is sufficient to overcome a motion for nonsuit on a possession charge. *State v. Crouch,* 15 N.C. App. 172, 189 S.E. 2d 763, *cert. den.* 281 N.C. 760, 191 S.E. 2d

357 (1972). *See State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972). In *Crouch* the court stated at page 174 (765):

> The State may overcome a motion for a nonsuit by presenting evidence which places the accused "within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession." *State v. Allen*, 279 N.C. 406, 411, 183 S.E. 2d 680, 684. Also see *State v. Cook*, 273 N.C. 377, 160 S.E. 2d 49.

We perceive no reason why the principle of "close juxtaposition" should not apply to manufacturing of controlled substances as well as to their possession. The assignment of error is overruled.

By their second assignment of error, defendants contend the trial court erred in denying their motions to set aside the verdicts as being against the evidence and charge of the court and as being fatally inconsistent. We find no merit in this assignment.

[2] It is well settled that a motion to set aside a verdict as being against the weight of the evidence is addressed to the discretion of the trial judge and his refusal to grant the motion is not reviewable on appeal absent a showing of abuse of discretion. 4 Strong's N.C. Index 3d, Criminal Law § 132, p. 681. We perceive no abuse of discretion in the refusal to set aside the verdict in this case as being against the weight of the evidence and the charge of the court.

[3] On the question of inconsistent verdicts, in 4 Strong's N.C. Index 3d, Criminal Law § 124.5, p. 653, we find: "It is not required that the verdict be consistent; therefore, a verdict of guilty of a lesser degree of the crime when all the evidence points to the graver crime, although illogical and incongruous, or a verdict of guilty on one count and not guilty on the other, when the same act results in both offenses, will not be disturbed." *See also State v. Davis*, 214 N.C. 787, 1 S.E. 2d 104 (1939).

Defendants' second assignment of error is overruled.

In defendants' trial and the judgments imposed, we find

No error.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. GEORGE EUGENE SCHULTZ

No. 7728SC261

(Filed 21 September 1977)

1. **Larceny § 2— urns stolen from graves— no chattels real— charge of larceny proper**

In a prosecution for felonious larceny of bronze urns and vases from cemeteries, defendant was properly charged with felonious larceny rather than with larceny of chattels real pursuant to G.S. 14-80 or G.S. 14-148, since the urns or vases were not so connected to the land that they could not be the subject of common law larceny, but instead were movable objects of a decorative nature that were easily moved from the grave markers on which they rested.

2. **Larceny § 8— three separate offenses— jury instructions proper**

In a prosecution charging defendant with three offenses of felonious larceny, the trial court's instructions did not lead the jury to believe that if it found defendant guilty on only one of the charges it could return a guilty verdict in all of the cases; rather, the instructions made it abundantly clear that separate cases were being tried and that the verdict in one case did not depend upon the verdict in the other case.

Judge CLARK dissenting.

APPEAL by defendant from *Howell, Judge*. Judgments entered 7 December 1976 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 24 August 1977.

Defendant was charged with three offenses of felonious larceny. The indictments charged that defendant took 70 bronze urns from Mountain View Memorial Park, Inc., 55 bronze vases from the same corporation on another date and 280 urns from Ashlawn Garden of Memories, Inc.

The State's evidence, in part, consisted of testimony from a witness who said he helped defendant steal the property, testimony from scrap metal dealers to whom defendant sold the property shortly after the thefts, and confessions of guilt by the defendant.

Defendant offered no evidence.

The jury found defendant guilty of all charges. Judgments were entered imposing consecutive sentences of imprisonment.

Attorney General Edmisten, by Associate Attorney Patricia B. Hodulik, for the State.

Roberts, Cogburn and Williams, by Max O. Cogburn, Jr., for defendant appellant.

VAUGHN, Judge.

[1] Defendant first assigns as error the denial of his motions for judgment or dismissal as of nonsuit. He asserts that the property which he took was in the nature of chattels real and not susceptible of common law larceny. He argues that the proper indictments could only have been under G.S. 14-80 or G.S. 14-148 and, therefore, that there was a fatal variance between the indictments and the proof.

G.S. 14-80 provides:

> "If any person, not being the present owner or bona fide claimant thereof, shall willfully and unlawfully enter upon the lands of another, carrying off or being engaged in carrying off any wood or other kind of property whatsoever, growing or being thereon, the same being the property of the owner of the premises, or under his control, keeping or care, such person shall, if the act be done with felonious intent, be guilty of larceny, and punished as for that offense; and if not done with such intent, he shall be guilty of a misdemeanor."

In *State v. Vosburg*, 111 N.C. 718, 16 S.E. 392 (1892), the purpose of the statute was discussed. The Court said that the intention of the Legislature was to prevent "the willful and unlawful entry upon land of another, and the taking and carrying away of such articles as were not at common law, or by previous statute, the subject of larceny." Such items which were not considered subject to larceny at common law included growing crops, wood in growing trees, plants, minerals, metals, and "fences and other erections not growing, but being on the land and in contemplation of the common law part of the land. . . ." *Id.* 111 N.C. at 721, 16 S.E. at 392. The Court goes on to point out that the words of the statute "or other kind of property whatsoever" are to be restricted in their meaning to property of the character previously enumerated, *i.e.* "connected in some way with the land." *Id.* 111 N.C. at 721, 16 S.E. at 393.

The Court in *State v. Jackson*, 218 N.C. 373, 11 S.E. 2d 149 (1940), considered G.S. 14-80 and held that it applied to the type of property the Court termed chattels real. The Court held that a tombstone or marker is such a chattel real but it said that the purpose of a tombstone or marker is to "designate the spot where the deceased was buried, to perpetuate his name and to record biographical data as to birth, death, etc. *When so erected* it becomes a chattel real. . . ." (Emphasis added.)

There is nothing in the record to establish that the urns or vases stolen by defendant in this case were so connected to the land

that they could not be the subject of common law larceny or that they were affixed to the soil as tombstones or markers. Instead, as the evidence shows, the vases were movable objects of a decorative nature that were easily moved from the grave markers on which they rested. Defendant demonstrated this by the ease with which he quickly removed several hundred of them and hauled them away by automobile. Defendant was, therefore, properly convicted of the crime with which he was charged.

[2] Defendant's remaining assignment of error is to a portion of the judge's charge wherein he contends that the jury could have understood the judge to say that if it found defendant guilty on only one of the charges it could return a guilty verdict in all of the cases. The exception is to the following part of the charge:

> "So I charge you that if you find from the evidence and beyond a reasonable doubt that either on or about the 5th of June, 1976, the 29th of June, 1976, or the 27th or the 29th of September, 1976, the defendant, either acting by himself, or acting together with Jack Sharpe, David Barnes, Rita Barnes, and Elsie Barnes, took and carried away the property of the Mountain View Memorial Park with respect to case #76CR19296, the property of Mountain View Memorial Park with respect to 76CR19295, the property of Ashlawn Garden of Memories with respect to 76CR19297, and that this was done without the consent of these parties, and that he, George Schultz, was not entitled to take the property and intending at the time to deprive the Mountain View Memorial Park and the Ashlawn Garden of Memories of its use permanently, and that in each instance the value of the property was worth more than $200.00, it would be your duty to return a verdict of guilty of felonious larceny."

We concede that the portion of the charge to which defendant excepts is lacking in the degree of clarity that is ordinarily expected. The judge's meaning would have been clearer if he had added "in each case where you so find" at the end of the sentence. Nevertheless, a charge must be construed contextually to determine whether the jury must have clearly understood the circumstances under which they could return a verdict of guilty in any of the cases. *State v. McWillaims*, 277 N.C. 680, 178 S.E. 2d 476 (1971). It is not sufficient to show error. It must also be shown that the error was prejudicial to defendant.

In other portions of the charge, the judge made it abundantly clear that separate cases were being tried and that the verdict in

one case did not depend upon the verdict in the other case. For example, immediately following the portion of the charge to which defendant excepts, the court instructed the jury:

> "Now in this case you may return one of two verdicts in each case. You may return a verdict of guilty of felonious larceny or not guilty with respect to each of the three cases, which, as I told you earlier, you will consider as separate and distinct cases."

Earlier in the charge the jury was instructed:

> "Now, ladies and gentlemen of the jury, each bill of indictment charges a separate and distinct offense. You must decide upon each bill of indictment separately on the evidence and the law applicable to it uninfluenced by your decision as to any other bill of indictment. The defendant may be convicted or acquitted on any or all of the offenses charged. Your finding as to each charge must be stated in a separate verdict."

To hold that there is a probability that the jurors, in this trial, understood that they must return a verdict of guilty in all cases if they only believed defendant was guilty in one of the cases would, we believe, suggest that they not only lacked common sense but also were incapable of understanding the English language in its simplest terms. We hold that the assignment of error fails to disclose error that was prejudicial to defendant.

No error.

Judge HEDRICK concurs.

Judge CLARK dissents.

Judge CLARK dissenting.

In his final mandate the trial judge instructed the jury in effect to return a verdict of guilty on the three charges of larceny if it found him guilty on either charge. In my opinion this error was not corrected by other instructions to the effect that the jury would consider each charge as separate and distinct.

The jury cannot be expected to know which of two conflicting instructions is correct. *State v. Harris*, 289 N.C. 275, 221 S.E. 2d 343 (1976); *State v. Lee*, 28 N.C. App. 156, 220 S.E. 2d 164 (1975). It must be assumed on appeal that the jury was influenced by that portion of the charge which is incorrect. *State v. Harris, supra.*

One reason for the customary use of the "final mandate" by the trial judges in instructing the jury is to apply the law to evidence, as required by G.S. 1-180 in criminal cases. If it is assumed that the jury was capable of determining which of the conflicting instructions in simple English language was correct, the instructions are devoid of any application of law to the evidence.

I agree with the majority that the State made out a strong case. I cannot agree that error of this kind is harmless beyond a reasonable doubt.

PHILLIP W. COOKE v. RUTH BYRD COOKE

No. 7615DC965

(Filed 21 September 1977)

Divorce and Alimony § 13.4— separation agreement—reconciliation—exclusion of affidavit not prejudicial

In an action for divorce where defendant counterclaimed for child support and alimony as provided in a separation agreement between the parties, and defendant timely moved for summary judgment, the trial court erred in excluding plaintiff's affidavit alleging reconciliation, which reconciliation would invalidate the executory provisions of the agreement, since unpleaded affirmative defenses should be deemed part of the pleadings where such defenses are raised in a hearing on motion for summary judgment; however, such error was not prejudicial because the assertions in plaintiff's affidavit were not sufficient to raise the issue of reconciliation, reconciliation requiring more than casual acts of sexual intercourse and more than a hope for resumption of the full marital relationship.

APPEAL by plaintiff from *Allen, Judge*. Judgment entered 31 August 1976 in District Court, ORANGE County. Heard in the Court of Appeals 24 August 1977.

Plaintiff-husband brought action on 8 October 1975 for absolute divorce based on one year's separation from defendant-wife. Defendant filed an answer and counterclaim for custody of minor children, child support, alimony and other payments due under a separation agreement allegedly executed 31 December 1973. Plaintiff replied admitting execution of the separation agreement, but denying that any sums were due defendant pursuant to it.

Defendant made timely motion for summary judgment, supported by a copy of the separation agreement and by an affidavit stating that plaintiff had not fully paid. Plaintiff responded, first, by

objecting that defendant's affidavit violated Rule 56(e), and, second, by submitting his own affidavit alleging reconciliation on several occasions subsequent to execution of the separation agreement, which reconciliation invalidated the executory provisions of the agreement. The trial judge sustained defendant's objection to the admittance of plaintiff's affidavit on the ground that it raised a new issue, reconciliation, which was an affirmative defense, and deemed waived because not specifically pleaded in accordance with Rule 8(c).

The trial judge granted defendant partial summary judgment, holding that the separation agreement was valid and in force, and that defendant was entitled to recover amounts due. From that judgment plaintiff appeals.

Winston, Coleman and Bernholz by J. William Blue, Jr., for plaintiff appellant.

Elisabeth S. Petersen and O. William Faison, Jr., for defendant appellee.

CLARK, Judge.

The plaintiff did not specifically plead reconciliation as a defense in his reply to defendant's counterclaim for payments under the separation agreement. But in his affidavit in response to defendant's motion for summary judgment plaintiff averred that he and his wife agreed "to attempt a reconciliation," and in March or April, 1974 spent a weekend together at the beach, engaging in sexual intercourse, that in early June 1974 they spent two or three nights together and engaged in sexual intercourse; that he was "attempting to reconcile the differences" and it was his "intention . . . to effect a reconciliation," but that in late June, 1974, "we determined that a reconciliation was not possible. . . ."

The trial court excluded plaintiff's affidavit on the ground that reconciliation was an affirmative defense which plaintiff had not specifically pleaded. The exclusion of evidence on the ground that an affirmative defense was not specifically pleaded may be raised properly at trial. G.S. 1A-1, Rule 8; 61 Am. Jur. 2d, Pleading (p. 584). But assuming that reconciliation is an affirmative defense which must be specifically pleaded, the nature of summary judgment procedure (G.S. 1A-1, Rule 56), coupled with our generally liberal rules relating to amendment of pleadings, require that unpleaded affirmative defenses be deemed part of the pleadings where such defenses are raised in a hearing on motion for summary judgment. *Bank v. Gillespie*, 291 N.C. 303, 230 S.E. 2d 375 (1976). See also 6 Moore,

Federal Practice (2d ed. 1976) § 56-736. "Indeed, in proper cases it is desirable to treat the pleading as though it were amended to conform to the evidence presented at the hearing." *Whitten v. AMC/Jeep, Inc.*, 292 N.C. 84, 90, 231 S.E. 2d 891, 894 (1977).

This State has long recognized the general rule that a contract of separation is annulled and rescinded, at least as to the future or as to executory provisions, by a reconciliation and resumption of marital relations. *Smith v. King*, 107 N.C. 273, 12 S.E. 57 (1890); *Hutchins v. Hutchins*, 260 N.C. 628, 133 S.E. 2d 459 (1963); *Williams v. Williams*, 261 N.C. 48, 134 S.E. 2d 227 (1964); *Joyner v. Joyner*, 264 N.C. 27, 140 S.E. 2d 714 (1965); *Tilley v. Tilley*, 268 N.C. 630, 151 S.E. 2d 592 (1966); *Potts v. Potts*, 24 N.C. App. 673, 211 S.E. 2d 815 (1975); *Newton v. Williams*, 25 N.C. App. 527, 214 S.E. 2d 285 (1975).

But we find that the averments in plaintiff's affidavit are not sufficient to raise the defense of reconciliation. We do not find in the case law of this State a precise definition of "reconciliation." The early cases contain language indicating that the resumption of the conjugal relationship alone would rescind the separation agreement. See *Smith v. King, supra*; *Archbell v. Archbell*, 158 N.C. 408, 74 S.E. 327 (1912); *Moore v. Moore*, 185 N.C. 332, 117 S.E. 12 (1923); *State v. Gossett*, 203 N.C. 641, 166 S.E. 754 (1932). It appears that at one time deeds of separation were held to be invalid. *Collins v. Collins*, 62 N.C. 153 (1867). And though recognized as valid in *Sparks v. Sparks*, 94 N.C. 527 (1886), subsequent decisions stated that separation agreements were not favored. It is possible that their unfavored status led to the language implying that the agreements would be breached and rescinded if the parties engaged in sexual intercourse or otherwise violated their agreement to live separate and apart. Nevertheless, an examination of these cases reveals that rescission was based on more than mere casual acts of sexual intercourse. There were other circumstances evidencing that resumption of cohabitation incorporated intent to resume the marriage and an intentional revocation of the agreement as well.

In *Newton v. Williams, supra*, an action to enforce a separation agreement, the husband pled reconciliation as a defense. In the hearing on motion for summary judgment, it was stipulated by the parties that they had spent three nights together as husband and wife and had engaged in sexual relations, but the wife's affidavit asserted that she did not intend to resume a full marital relationship. The trial court awarded summary judgment for the wife but this Court ruled that since "they disagree with respect to their intention," the issue of their mutual intent raised an issue of fact for

determination by the jury, the trial court erred in rendering summary judgment. This opinion quoted from 1 Lee, N.C. Family Law (3d ed. 1963) § 35, at 153 as follows:

> "Mere proof that isolated acts of sexual intercourse have taken place between the parties is not conclusive evidence of a reconciliation and resumption of cohabitation. There must ordinarily appear that the parties have established a home and that they are living in it in the normal relationship of husband and wife."

We note also the following statement in 2 Lee, N.C. Family Law (3d ed. 1963) § 200, at 423:

> "A mere offer of one of the separated spouses to resume marital cohabitation does not terminate the separation agreement. There must be a mutual agreement to be reconciled and a resumption of cohabitation as husband and wife."

Lee cites authority to support the first sentence of the foregoing but none to support the second sentence except *Newton v. Williams, supra,* cited in 1976 Cum. Supp. at 138.

In *sub judice,* the affidavit of the plaintiff at most evidences a hope for and an attempt at reconciliation which included two isolated acts of sexual intercourse, but clearly there was only a temporary resumption of marital relations on a trial basis without the intent to resume a full marital relationship, or to repudiate the separation agreement. Shortly thereafter the parties agreed that reconciliation was impossible.

Though the trial judge erred in excluding the plaintiff's affidavit, it was not prejudicial because the assertions therein were not sufficient to raise the issue of reconciliation. Since the pleadings and proof do not disclose a defense, defendant was entitled to the partial summary judgment on her counterclaim.

Affirmed.

Judges VAUGHN and HEDRICK concur.

EVA MAE HICKS v. ARCHIE WARREN HICKS

No. 7610DC1000

(Filed 21 September 1977)

Divorce and Alimony § 24.1— back child support— insufficient findings

The trial court erred in finding that defendant father is indebted to plaintiff mother in the sum of $8,000 for back support provided to the children of the parties where the amount of child support to be provided by the father had not previously been determined, and there was no evidence or finding as to the amount actually expended by the mother which represented the father's share of support. G.S. 50-13.4(b).

APPEAL by defendant from *Barnette, Judge*. Judgment entered 6 July 1976 in District Court, WAKE County. Heard in the Court of Appeals 31 August 1977.

Civil action wherein plaintiff filed a complaint seeking custody of two minor children born of the marriage of plaintiff and defendant, support for said children, and attorney's fees for the prosecution of the cause. No answer was filed by the defendant. Default was entered by the assistant clerk of superior court pursuant to Rule 55(a). The parties were thereafter called to a hearing before the judge. Affidavits were submitted by plaintiff regarding expenses for support of the children and the financial standing of the plaintiff.

The evidence presented at the hearing before the judge tends to show the following:

Plaintiff and defendant were married on 22 February 1968. There were two children born of the marriage. The parties separated on 10 March 1973 and were divorced on 14 July 1975. Since the date of separation plaintiff and the two children have lived with her parents in Raleigh. She is employed at Fort Bragg, North Carolina, where she commutes each day, leaving the children in the care of their grandparents. Her income is approximately $440.00 per month. Defendant is employed by the United States Postal Services in Raleigh and his present income is approximately $13,000 per year. During the parties' separation plaintiff has been the sole source of support for the children other than minor presents conferred on them on defendant's occasional visits.

On the basis of this evidence the court concluded:

"1. That it is in the best interest, health and welfare of the two minor children . . . that the plaintiff have custody of them . . . .

"2. That the defendant should provide $117.00 per month per child for the support, maintenance, health, education and welfare of the two children . . . .

"3. That the defendant is indebted to the plaintiff in the amount of Eight Thousand Dollars ($8,000.00) for back support provided to the children . . . .

"4. That the plaintiff is entitled to recover reasonable attorney's fees from the defendant . . . ."

The court ordered accordingly and from this order defendant appeals.

Brenton D. Adams for plaintiff appellee.

Nathaniel Currie for defendant appellant.

HEDRICK, Judge.

Defendant's six assignments of error relate to that portion of the judgment decreeing that defendant is indebted to the plaintiff in the sum of $8,000 for "back support provided to the children born of the marriage of the parties," and ordering defendant "to pay . . . the sum of $50.00 [per month] for the use and benefit of Eva Mae Hicks to be applied to the defendant's $8,000 indebtedness . . . ." Thus, no question is raised on this appeal regarding that portion of the judgment awarding custody of the children to plaintiff, and requiring defendant to pay support for each child at the rate of $117 per month, and ordering defendant to pay attorney's fees for services rendered to plaintiff in the amount of $200.

Defendant's six assignments of error raise the single question of whether the court erred in concluding that defendant was indebted to plaintiff in the sum of $8,000. In *Tidwell v. Booker*, 290 N.C. 98, 115-6, 225 S.E. 2d 816, 826-7 (1976), Justice Lake, speaking for the Supreme Court, wrote:

"G.S. 50-13.4(b) provides:

'(b) In the absence of pleading and proof that circumstances of the case otherwise warrant, the father, the mother * * * shall be liable, *in that order*, for the support of a minor child. * * * ' (Emphasis added.)

"Thus, the statute imposes upon the father the primary duty to support the child, the mother's obligation being secondary.

. . .

> "A party secondarily liable for the payment of an obligation, who is compelled by the default of the party primarily liable therefor to pay it, may, by action brought within the period of the applicable statute of limitations, compel the party primarily liable to reimburse him for such expenditure." (Citations omitted.)

The evidence in the present case is sufficient to support a finding and conclusion that defendant is primarily liable, and the plaintiff secondarily liable for support of the children born of the marriage, and that from 10 March 1973 to 6 July 1976 the plaintiff has provided the sole support for the children. However, there is no evidence or finding as to the actual amount expended by plaintiff for the support of the children for which she is entitled to reimbursement from defendant.

The trial judge found that "from March 10, 1973, through July 6, 1976, the defendant should have paid $8,000 for the support of the children." What the defendant "should have paid" is not the measure of his liability to *plaintiff*. The measure of defendant's liability to plaintiff is the amount actually expended by plaintiff which represented the defendant's share of support. *Tidwell v. Booker, supra.* In determining this amount the court must take into consideration the needs of the children and the ability of the defendant to pay during the time for which reimbursement is sought. *Williams v. Williams*, 18 N.C. App. 635, 197 S.E. 2d 629 (1973). The plaintiff is not entitled to be compensated for support for the children provided by others, nor is she entitled to be reimbursed for sums expended by her for the support of the children which represent her share of support as determined by the trial judge, considering "the relative ability of . . . the . . . parties to provide support . . . ." G.S. 50-13.4(b). It seems clear from the findings and conclusions made by the trial judge that he calculated that defendant should have been paying from 10 March 1973 to 6 July 1976 the same amount per month as he will be required to pay in the future. Obviously, the trial judge did not arrive at the $8,000 figure by taking into consideration what plaintiff actually expended for the children's support for and in behalf of the defendant. While the amount that the defendant "should have paid" might very well be substantially the same as the amount of his liability to the plaintiff, we cannot assume so. Thus, that portion of the judgment decreeing that defendant is indebted to plaintiff in the amount of $8,000, and ordering him to pay $50.00 each month until such indebtedness is paid is not supported by the facts found, and must be vacated.

The result is: that portion of the judgment awarding plaintiff custody of the children, requiring defendant to pay future support in a specific amount, and ordering defendant to pay plaintiff's attorney's fees is affirmed; that portion of the judgment ordering defendant to pay $50.00 monthly until the indebtedness of $8,000 is paid, is vacated and the cause is remanded to the district court for a new trial on the single issue of what amount, if any, plaintiff is entitled to be reimbursed by defendant for sums expended by plaintiff in providing support for the two children after 10 March 1973, provided that the pleadings are properly amended to present this issue.

Affirmed in part.

Vacated and remanded in part.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. KENNETH L. LEONARD

No. 7722SC274

(Filed 21 September 1977)

1. **Narcotics § 4— constructive possession of drugs— sufficiency of evidence**

Evidence was sufficient to show that defendant had constructive possession of drugs which were hidden under the hood of an automobile of which defendant had possession and control and to which he claimed ownership.

2. **Automobiles § 134— possession of stolen vehicle— reason to believe vehicle stolen — insufficiency of evidence**

Evidence was insufficient for the jury in a prosecution for possession of a vehicle which defendant knew or had reason to believe had been stolen where the evidence tended to show that defendant purchased the automobile in Virginia six days after it was stolen in N. C.; defendant claimed to be the owner at all times; and there was no evidence that replacement of the public vehicle identification number plate was done by defendant or with his knowledge.

APPEAL by defendant from *Albright, Judge*. Judgment entered 23 September 1976 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 25 August 1977.

Defendant, Kenneth L. Leonard, was charged in bills of indictment, proper in form, with the possession of a vehicle which he

knew or had reason to believe had been stolen in violation of G.S. 20-106 and with possession of Schedule II controlled substances with intent to distribute in violation of G.S. 90-95(a)(1). At trial the State offered evidence tending to show the following:

On 1 March 1976 defendant was found pinned in the driver's seat of a 1966 Pontiac automobile which was wrecked beside the road near Lexington, North Carolina. After defendant was removed from the vehicle, Maynard Edward, a volunteer fireman, attempted to open the hood so that he could cut the battery cables to prevent an electrical fire. As he opened the hood a Crown Regal liquor bag fell out from under the hood and hit his foot. The bag contained 252 capsules of secobarbital, 45 capsules of Schedule II amphetamines, other various drugs, and various personal items such as a razor, nail clippers, beer opener, and a hair brush.

The 1966 Pontiac belonged to Frank Chandler. It was stolen from a hospital parking lot in Salisbury, North Carolina on 24 January 1976. The original metal plate attached to the left front pillar post containing the "public vehicle identification number" had been replaced with a plate bearing the number 242076B130370. Defendant had a Virginia certificate of title for a 1966 Pontiac with the serial number 242076B130370 assigned to him on 30 January 1976. The title indicated that defendant purchased the vehicle from Arthur E. Williams of Patrick Springs, Virginia on 30 January 1976. On 2 February 1976 defendant applied for a North Carolina title for a 1966 Pontiac with identification number 242076B130370.

The jury convicted defendant of the possession of Schedule II controlled substances in excess of 100 tablets and of possession of a stolen vehicle. From a judgment imposing a prison sentence of 5 years for possession of the stolen vehicle and a consecutive prison sentence of 2 to 5 years for possession of the controlled substances, defendant appealed.

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

James M. Honeycutt for defendant appellant.

HEDRICK, Judge.

[1] Defendant contends the court erred in denying his motions for judgment as of nonsuit as to the charge of possession of a controlled substance. Defendant argues that the evidence is insufficient to show that defendant was in possession of the drugs in question. We do not agree.

The State's evidence tends to show that defendant had possession and control of and claimed ownership to the automobile in which the drugs were located. When the evidence is considered in the light most favorable to the State, it is sufficient to show that defendant had constructive possession of the drugs in question. *State v. Rogers*, 28 N.C. App. 110, 220 S.E. 2d 398 (1975).

[2] Defendant also contends that the court erred in denying his motions for judgment as of nonsuit with respect to the charge of possession of a stolen vehicle.

G.S. 20-106 in pertinent part provides, "Any person . . . who has in his possession any vehicle *which he knows or has reason to believe* has been stolen or unlawfully taken . . . is guilty of a felony." (Emphasis added.) The State argues that evidence that the defendant was in possession of the stolen vehicle approximately one month after it was stolen in Salisbury, North Carolina, is sufficient to raise an inference that the defendant knew or had reason to believe that the automobile was stolen. In articulating the doctrine of the possession of recently stolen goods this Court in *State v. Cotten*, 2 N.C. App. 305, 310, 163 S.E. 2d 100, 103 (1968), said the following: "The possession of stolen property recently after the theft, and under circumstances *excluding the intervening agency of others*, affords presumptive evidence that the person in possession is himself the thief . . . ." (Emphasis added.)

In the present case the evidence offered by the State demonstrates the "intervening agency of others," thereby rendering the doctrine inapplicable. All of the evidence tends to show that the defendant purchased the automobile in Virginia on 30 January 1976 and that he at all times claimed to be the owner. While the evidence is sufficient to raise an inference that the automobile was stolen, the defendant's possession thereof under the circumstances of this case is not sufficient to raise the inference that defendant was the thief or that he knew or had reason to believe that the automobile was stolen.

Furthermore, the evidence tending to show that the public vehicle identification number plate had been replaced is not sufficient to raise an inference that defendant knew or had reason to believe that the vehicle was stolen, since there is no evidence that the alteration was made by defendant or with his knowledge. Indeed, the evidence disclosed that the vehicle contained the same identification number when defendant purchased it in Virginia as it did when he applied for a title in North Carolina. The alteration was

not such as to alert a layman to the fact that any change had been made in the identification plate, or that the vehicle was stolen. Thus, we hold that the court erred in denying defendant's motions for judgment as of nonsuit with respect to the charge of possession of a stolen vehicle.

The result is:

As to the charge of possession of a controlled substance (76CR2347)

No error.

As to the charge of possession of a stolen vehicle in violation of G.S. 20-106 (76CR2345)

Reversed.

Judges VAUGHN and CLARK concur.

NORTH CAROLINA NATIONAL BANK v. JOHNSON FURNITURE COMPANY OF MOUNT AIRY, INCORPORATED; MOUNT PILOT DEVELOPMENT CORPORATION; E. L. JOHNSON; DONNA LEE JOHNSON; HARRY LEE JOHNSON; SHIRLEY ANNE MEDLEY JOHNSON; LEONARD L. JOHNSON; FRIEDERIKE P. JOHNSON; MARTHA JO JONES; AND ANN BETH (HUNTER) GRIGGS

No. 7617SC1008

(Filed 21 September 1977)

Fraudulent Conveyances § 3.4— conveyances to defraud creditors—summary judgment proper

In an action to have conveyances by defendants set aside as conveyances to defraud creditors, the trial court properly granted plaintiff's motion for summary judgment and ordered that the conveyances in question be set aside and rendered void, since a contract signed by one defendant, though captioned "GUARANTY," clearly established her as a primary debtor of plaintiff on the date of the conveyances, and since plaintiff, pursuant to G.S. 39-17, showed by uncontroverted evidence that the defendant failed to retain property sufficient to pay her debts existing at the time of the conveyances.

APPEAL by defendant from *Walker, Judge*. Judgment entered 26 July 1976 in Superior Court, SURRY County. Heard in the Court of Appeals 1 September 1977.

This appeal arises from the granting of summary judgment in the third cause of action in a case involving four causes of action. Each cause of action involves at least one allegedly fraudulent conveyance by one or more of the defendants. For purposes of this opinion, only the facts surrounding the third cause of action need be presented.

On 23 August 1974, defendants Harry Lee Johnson, Donna Lee Johnson and Leonard L. Johnson signed a "GUARANTY" agreement with the plaintiff. By its terms, the agreement was an inducement for the plaintiff to extend credit to Johnson Furniture Company, another defendant. Pertinent provisions of the agreement are as follows:

> "[T]he undersigned hereby absolutely and unconditionally guarantees to you and your successors and assigns the due and punctual payment of any and all notes, drafts, debts, obligations and liabilities, primary or secondary (whether by way of endorsement or otherwise), of Borrower, at any time, now or hereafter, incurred with or held by you, together with interest, as and when the same become due and payable, whether by acceleration or otherwise, in accordance with the terms of any such notes, drafts, debts, obligations, or liabilities or agreements evidencing any such indebtedness, obligation or liability including all renewals, extensions and modifications thereof."

On 26 August 1974, defendant Donna Lee Johnson conveyed a tract of land, which she had held on the date of her agreement with the bank, to herself and her husband, defendant E. L. Johnson, as tenants by the entirety. The next day, 27 August 1974, defendants Johnson conveyed the same tract of land to their daughters, defendants Martha Jo Jones and Ann Beth (Hunter) Griggs, reserving a life estate for themselves.

On 22 April 1975, judgment, rendered in favor of plaintiff and against defendants for an amount in excess of $56,000, was entered and docketed in the office of the Clerk of Superior Court in Surry County. Plaintiff brought this action to have the conveyances by defendants Donna Lee Johnson and E. L. Johnson set aside as conveyances to defraud creditors. On 25 May 1976, plaintiff moved for summary judgment pursuant to G.S. 1A-1, Rule 56; in its motion, plaintiff cited the answer to an interrogatory which established that, on 27 August 1974, after her conveyance to her daughters, defendant Donna Lee Johnson owned property worth only $300.

Plaintiff argues that the facts presented established that the conveyances of real property were voluntary and that defendant Donna Lee Johnson had not retained property sufficient to pay her debts.

The trial court granted plaintiff's motion for summary judgment and ordered that the two conveyances involved in this third cause of action be set aside and rendered void. Defendants appeal.

Folger and Folger, by Fred Folger, Jr. and Larry Bowman, for plaintiff appellee.

Kenneth A. Smith for defendant appellants Donna Lee Johnson and E. L. Johnson.

Charles M. Neaves for defendant appellants Martha Jo Jones and Ann Beth (Hunter) Griggs.

ARNOLD, Judge.

Defendants argue that the trial court erred in granting plaintiff's motion for summary judgment. In support of their argument, defendants make two contentions, one of which is that defendant Donna Lee Johnson was not, on the date of the conveyances, a debtor of plaintiff. This contention is based on the assumption that defendant Donna Lee Johnson, when she signed the agreement with the plaintiff, became a guarantor of payment so that her liability for the debt would begin only at maturity when the primary debtors did not pay. Defendants' assumption is not correct. Donna Lee Johnson was not a guarantor of payment by Johnson Furniture Co. since by the terms of the agreement defendant Donna Lee Johnson was primarily liable to the plaintiff:

> "This obligation and liability on the part of the undersigned shall be a primary and not a secondary obligation and liability, payable immediately upon demand without recourse first having been had by you against the Borrower or any person, firm or corporation; and the undersigned hereby waives the benefits of all provisions of law for stay or delay of execution or sale of property or other satisfaction of judgment against the undersigned on account of obligation and liability hereunder until judgment be obtained therefor against the Borrower and execution thereon returned unsatisfied, or until it is shown that the Borrower has no property available for the satisfaction of the indebtedness, obligation and liability guaranteed hereby, or until any other proceedings can be had."

Although the agreement is captioned "GUARANTY," the clear language of the contract establishes Donna Lee Johnson as a primary debtor of the plaintiff on 23 August 1974.

The second contention of defendants is that plaintiff failed to establish an intent by defendant Donna Lee Johnson to defraud her creditors.

G. S. § 39-17 reads as follows:

> "No voluntary gift or settlement of property by one indebted shall be deemed or taken to be void in law, as to creditors of the donor or settler prior to such gift or settlement, by reason merely of such indebtedness, if property, at the time of making such gift or settlement, fully sufficient and available for the satisfaction of his then creditors, be retained by such donor or settler; but the indebtedness of the donor or settler at such time shall be held and taken, as well with respect to creditors prior as creditors subsequent to such gift or settlement, to be evidence only from which an intent to delay, hinder or defraud creditors may be inferred; and in any trial shall, as such, be submitted by the court to the jury, with such observations as may be right and proper."

Under interpretations of G.S. § 39-17 by the North Carolina Supreme Court, actual intent of the donor, here the defendant Donna Lee Johnson, to defraud her creditors need not be shown. In *Garland v. Arrowood*, 177 N.C. 371, 374, 99 S.E. 100, 102 (1919), the Court stated:

> "[I]f the defendant, the donor of the gift, failed to retain property fully sufficient and available for the satisfaction of his then creditors, the gift was void in law, without regard to the intent with which it was made."

The ultimate burden of proof rests upon the plaintiff to show either actual intent by the defendant grantors to defraud their creditors or failure by them to retain property sufficient to pay the then existing debts. *Supply Corp. v. Scott*, 267 N.C. 145, 148 S.E. 2d 1 (1966).

Review of the record shows that plaintiff met this burden of proof by uncontroverted evidence that immediately after the conveyances in question, defendant Donna Lee Johnson owed plaintiff $56,000, and that she had property worth only $300. There being no material facts at issue the trial court properly granted plaintiff's motion for summary judgment.

Affirmed.

Chief Judge BROCK and Judge MARTIN concur.

IVA COGGINS (WIDOW), J. J. SAUER AND WIFE, E. HAMPTON SAUER; LEE G. LEWIS AND WIFE, PANSY LEWIS, CLIFTON S. LAMBERT AND WIFE, EVELYN LAMBERT; JOHN C. ADAMS (DIVORCED); AND SUE ADAMS (DIVORCED) v. JAMES HOWARD FOX AND WIFE, CAROL ANN FOX

No. 7630SC980

(Filed 21 September 1977)

Easements § 6.1 — easement by prescription — adverse, hostile use — insufficient evidence

Plaintiffs' evidence was insufficient to establish a road easement by prescription across the lands of defendants where it tended to show that the road was built by the predecessor in title of one plaintiff with the permission of defendants' predecessor in title and that one plaintiff had asked defendants' predecessor for permission to widen the road, since the evidence was insufficient to show that use of the road by plaintiffs was adverse, hostile and under a claim of right.

APPEAL by plaintiffs from *Snepp, Judge*. Judgment entered 29 June 1976 in Superior Court, JACKSON County. Heard in the Court of Appeals 25 August 1977.

The plaintiffs seek to establish by prescription a road easement across the lands of the defendants. The plaintiffs are the owners of several contiguous tracts or lots, none of which front on a public road. Defendants own a tract of land, fronting on Mill Creek Road, and the claimed roadway runs from Mill Creek Road across the defendants' tract, across or adjoining lands of plaintiffs, and terminating at the top of a mountain on the tract of plaintiff Coggins.

At the close of plaintiffs' evidence, defendants moved for and the trial court granted a directed verdict.

Holt, Haire & Bridgers, P.A. by W. Paul Holt, Jr. and Ben Oshell Bridgers for plaintiff apppellants.

James U. Downs for defendant appellees.

CLARK, Judge.

The sole question raised by this appeal is whether the trial court erred in granting a directed verdict for defendants on the

ground that the evidence was not sufficient to go to the jury. G.S. 1A-1, Rule 50(a). This Court is confronted with determining the sufficiency of the evidence based upon the same standards as those to be applied by the trial judge. *Huff v. Thornton*, 23 N.C. App. 388, 209 S.E. 2d 401 (1974).

In *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974), Huskins, J., with his usual accuracy and perception, traced the development in this State of the law with respect to the acquisition of prescriptive easements, concluding that North Carolina has gradually moved away from the majority view of a presumption of adverse user and has begun to emphasize the necessity of showing adverseness without mention of such presumption. The decision listed the following legal principles applicable to prescriptive easements:

1. The burden of proving the elements essential to the acquisition of a prescriptive easement is on the party claiming the easement.

2. The law presumes that the use of a way over another's land is permissive or with the owner's consent unless the contrary appears.

3. The use must be adverse, hostile, or under a claim of right.

4. The use must be open and notorious.

5. The adverse use must be continuous and uninterrupted for a period of twenty years.

6. There must be substantial identity of the easement claimed.

The plaintiffs' evidence, consisting of the testimony of three witnesses, considered in the light most favorable to plaintiffs, tends to show in substance the following:

Aubrey Henderson, son-in-law of plaintiff Coggins, has been familiar with the lands for 30 to 40 years. He began using the roadway in 1953 and has since used it for hunting two or three times a year. The road was also used by Mrs. Coggins' children and others. There are no buildings on the Coggins tract. He logged the Coggins land one time. He never asked permission of defendant Fox to use the road. There are two or three trailers on the lands of some of the plaintiffs. The road was never blocked until Fox blocked it three years ago (1973). Henderson improved the road by opening drains and getting rocks out with his tractor. There was a logging road there years ago, but it hasn't been used for 25 years. The road in question was built on a better grade.

Fred Franks was employed by plaintiff Sauer to work on the road in question in 1964 or 1965, ditched it with a tractor and put tile in. No one tried to stop him. He did not use the road before working on it.

Bascom Bryson, brother of plaintiff Coggins, has been familiar with the lands for 40 years. The present road was built in 1952. He used it off and on for hunting and picking berries. He never asked permission to use the road. Mr. Stiwinter (predecessor in title to plaintiffs Sauer) "asked Mr. Holland [predecessor in title to defendants Fox] to build this road.... I knowed what he said; I never heard him.... That's what he [Stiwinter] said." (After the witness testified as quoted, plaintiffs objected, but the trial judge ruled that the objection came too late.) Mr. Stiwinter used the road regularly, going back and forth to a field on his land. After Mrs. Sauer got the land from Stiwinter he heard talk that she asked Mr. Holland if she could widen the road.

If we assume that the evidence, considered in the light most favorable to plaintiffs, tended to show that the Coggins family continuously and uninterruptedly used the roadway substantially as now located for more than 20 years, we do not find the evidence sufficient to show (go to the jury) that the use of the roadway was adverse, hostile and under claim of right. The plaintiff, Mrs. Sauer, asked Hunter (defendants' predecessor in title) if she could widen the road, and when the road was originally built in 1952 or 1953 Mr. Stiwinter (predecessor in title of plaintiffs Sauer) asked Hunter for permission to do so. This evidence negates adverse and hostile use of the roadway. Permissive use cannot ripen into an easement by prescription. *Nicholas v. Furniture Co.*, 248 N.C. 462, 103 S.E. 2d 837 (1958). Even if we disregard this hearsay evidence of permissive use, we do not find the other evidence sufficient to overcome the presumption that the use of the roadway was permissive or with the owner's consent since it failed to show adverse and hostile use.

The case before us is distinguishable from *Dickinson v. Pake, supra*, where the plaintiffs, who sought the prescriptive right, and their predecessors in title lived on the land in a house located at the terminus of the road and daily used it, as did their friends, relatives and neighbors, in going to and from the house.

The judgment directing verdict for defendants is

Affirmed.

Judges VAUGHN and HEDRICK concur.

STATE OF NORTH CAROLINA v. JOSHUA MOORE

No. 778SC265

(Filed 21 September 1977)

1. **Criminal Law § 26.5— murder in perpetration of felonious assaults—dismissal of murder charge—refusal to dismiss assault charges—doctrine of merger**

In a prosecution for two felonious assaults and for murder committed during perpetration of the assaults, the doctrine of merger did not require dismissal of the felonious assault charges when the murder charge was dismissed at the conclusion of the State's evidence.

2. **Criminal Law § 102.12— dismissal of murder charge—argument relating to punishment for murder**

Where defendant was placed on trial for murder and two felonious assault charges, but the murder charge was dismissed at the conclusion of the State's evidence, the trial court did not err in sustaining an objection to defense counsel's argument relating to the possibility of life imprisonment facing defendant when the trial began since a comment relating to a possible sentence under the murder charge was neither relevant nor material to the remaining assault charges.

APPEAL by defendant from *Tillery, Judge*. Judgment entered 2 December 1976 in Superior Court, GREENE County. Heard in the Court of Appeals 24 August 1977.

Defendant was indicted for: (1) the murder of Patricia Ann Suggs; (2) assault with intent to kill and inflicting serious injury upon William Earl Speight; and (3) assault with intent to kill and inflicting serious injury upon Jesse Ray Jones. The defendant pled not guilty to all three charges. The trial judge dismissed the murder charge at the close of the State's evidence, and the jury returned a verdict of guilty of misdemeanor assault with a deadly weapon as to the other two indictments. From a judgment sentencing him to imprisonment for two years for the Speight assault and 12 months for the Jones assault, to run consecutively, defendant appealed.

State's evidence tended to show that on 16 May 1976 between 8:00 and 9:00 p.m. a group of people were gathered in the front of several stores in the community of Maury; that William Earl Speight had shown a pistol to several people; that Speight placed his gun in his pocket and was walking from one store to the next when the defendant came out of an alley between the stores and fired several shots in the direction of Speight, striking Speight in the neck and Jones in the arm; that Speight, after falling as a result of his wound, drew his pistol and fired in the direction of the defendant but his bullet struck and killed Patricia Ann Suggs who was stand-

ing near the defendant; and that the defendant fired first, without provocation from Speight.

The defendant asserted that he shot Speight in self-defense and offered evidence tending to show that when he walked out from between the stores Speight had the pistol drawn; that Speight's pistol was pointed at the defendant; that Speight fired first; and that the defendant drew and fired his pistol only after being fired upon by Speight and then fired only once.

Attorney General Edmisten, by Associate Attorney Richard L. Griffin, for the State.

Turner and Harrison, by Fred W. Harrison, and I. Joseph Horton, for defendant appellant.

MORRIS, Judge.

[1] The defendant's first assignment of error is directed to the court's failure to grant a nonsuit as to the two assault charges at the close of all the evidence. In support of this assignment of error the defendant argues that the indictment for murder was based upon the felony assault charge under the felony murder theory and that the doctrine of merger operates so as to require the dismissal of the assault charge upon the dismissal of the murder charge. Defendant asserts that failure to dismiss the assault charge places the defendant twice in jeopardy. We disagree.

The common law doctrine of merger is a judicial tool to prevent the subsequent prosecution of a defendant for a lesser included offense once he has been acquitted or convicted of the greater. It is primarily a device to prevent the defendant from being placed twice in jeopardy for the same offense. 22 C.J.S., Criminal Law, § 10. The defendant asserts that the failure of the felony murder charge should require the judge to nonsuit the State as to the assault charge at the same trial, but gives no authority for such a proposition, and our research reveals none. The cases relied upon by the defendant hold that a defendant, convicted and sentenced for murder based upon a felony murder theory cannot also be sentenced for the lesser included felony since the lesser included felony is said to have merged into the murder charge, the lesser charge having been proved as essential elements in the offense of murder. *State v. Peele*, 281 N.C. 253, 188 S.E. 2d 326 (1972); *State v. Carroll*, 282 N.C. 326, 193 S.E. 2d 85 (1972). In the instant case there was no murder conviction, but rather a dismissal of the murder charge. The cases cited do not support the proposition that the doctrine of merger be

extended to require the dismissal of all lesser included charges upon the dismissal of the murder charge. The defendant cites authority to the effect that a defendant acquitted of a greater offense cannot subsequently be tried for a lesser included offense. *State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666 (1972); *State v. Hatcher*, 277 N.C. 380, 177 S.E. 2d 892 (1970). This rule of law does not aid the defendant, however, for he was not subjected to a subsequent prosecution. The defendant was on trial under three indictments and only one —the murder charge— was dismissed. The trial continued upon the assault indictments. The defendant asserts that the prohibition against double jeopardy prohibits prosecution under the assault indictments since they, having merged with the murder charge, should have been dismissed when the murder charge was dismissed. Apparently, the defendant's reasoning is that the continued prosecution under the assault indictments after the point at which they should have been dismissed, constitutes a second prosecution. Having decided that the assault charges had not merged so as to require their dismissal with the murder charge, the contention regarding double jeopardy becomes groundless.

[2] The defendant's second assignment of error is directed to the court's limitation of defense counsel's argument before the jury. The trial judge sustained an objection to the defense attorney's comment relating to the possibility of life imprisonment facing defendant when the trial began. Defendant contends that G.S. 84-14, which, in part, provides that ". . . the whole case as well of law as of fact may be argued to the jury" confers upon counsel the right to have presented this argument. At issue is whether the "whole case" under the statute would include the murder indictment no longer before the jury because of its dismissal by the trial judge. The case before the jury at the time of counsel's argument consisted of the two assault indictments. The murder charge had been dismissed and comment relating to a possible sentence under that charge was neither relevant nor material to the remaining assault charges before the jury and was not within the protection of the statute. The trial judge is allowed discretion in controlling the arguments before the jury and he may restrict comment on facts not material to the case. *State v. Seipel*, 252 N.C. 335, 113 S.E. 2d 432 (1960); *State v. Williams*, 3 N.C. App. 463, 165 S.E. 2d 52 (1969). The murder charge, having been dismissed, was no longer material to the case before the jury, and it was within the judge's discretion to restrict comment relating to it.

No error.

Chief Judge BROCK and Judge BRITT concur.

MERIWETHER W. HUDSON v. FITZGERALD S. HUDSON

No. 7614DC982

(Filed 21 September 1977)

Rules of Civil Procedure § 26— discovery of corporation's records—limitation proper

In an action to obtain alimony where plaintiff sought discovery of certain records relating to defendant's financial condition and business affairs as chairman of the board of directors of a named corporation, the trial judge properly determined that good cause had been shown and justice required that discovery of the corporation's records be limited; moreover, the trial court properly determined that a prior action between the parties in another county was *res judicata* and precluded plaintiff from discovery of matters within the scope of the pleadings of the prior action.

APPEAL by plaintiff from *Gantt, Judge*. Judgment entered 17 September 1976 in District Court, DURHAM County. Heard in the Court of Appeals 25 August 1977.

Civil action wherein plaintiff, Meriwether W. Hudson, filed a complaint seeking alimony from defendant, Fitzgerald S. Hudson, on the grounds of adultery, abandonment and failure to support. Defendant filed an answer denying the material allegations of the complaint, and alleging that a former similar action in Moore County involving the same parties in which a voluntary dismissal with prejudice was entered, settled the issues arising on the facts alleged by plaintiff and precluded the re-litigation of such issues.

On 20 August 1976 the judge of the district court entered an order allowing plaintiff's motion for discovery under Rule 34 of certain records relating to defendant's financial condition and business affairs as Chairman of the Board of Directors of Collier Cobb & Associates, Inc.

On 20 August 1976 Collier Cobb & Associates, Inc., filed a motion seeking a protective order pursuant to Rule 26(c) limiting plaintiff's discovery. In this motion Collier Cobb alleged that the order permitting discovery of defendant's activities as chairman of the board of Collier Cobb would irreparably damage its business by compelling disclosure of certain confidential records which would as

a result be available to any person, including competitors. Collier Cobb further alleged that the information requested pertaining to periods prior to 23 December 1975 had been in issue in an earlier action involving the same parties which was concluded by a voluntary dismissal with prejudice, and that therefore, the parties should be foreclosed from re-litigating such matters.

On 17 September 1976, after reciting ". . . that good cause has been shown and the interests of justice require that protection be afforded Collier Cobb & Associates, Inc. . . . ," the court concluded that the judgment of voluntary dismissal with prejudice entered in the prior action in Moore County was *res judicata* and precluded plaintiff from discovery of matters within the scope of the pleadings of the prior action. The court then vacated the order of 20 August 1976 and entered an order prohibiting discovery of certain records and limiting discovery of other records to the seven-week period between the dismissal of the prior action in Moore County and the institution of the present action. Plaintiff appealed from this order.

On 1 October 1976 plaintiff petitioned this Court for a Writ of Certiorari to have the matter heard on its merits in the event the appeal was found to be from an interlocutory order, not involving the denial of a substantial right. On 2 December 1976 defendant filed a motion to dismiss the plaintiff's appeal on grounds that the court's ruling on discovery was ". . . clearly interlocutory and does not involve a substantial right." When this matter was argued in this Court, counsel for defendant announced in open court that he was abandoning his motion to dismiss. This Court in conference on 25 August 1977 entered an order allowing plaintiff's petition for certiorari.

Jordan, Wright, Nichols, Caffrey and Hill by William W. Jordan for plaintiff appellant.

Smith, Moore, Smith, Schell and Hunter by Robert A. Wicker for defendant appellee. Powe, Porter, Alphin and Whichard by E. K. Powe for Collier Cobb & Associates, Inc., appellee.

HEDRICK, Judge.

It is a general rule that orders regarding matters of discovery are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of discretion. *Stanback v. Stanback*, 287 N.C. 448, 215 S.E. 2d 30 (1975); *Harrington Mfg. Co., Inc. v. Powell Mfg. Co.*, 26 N.C. App. 414, 216 S.E. 2d 379, *cert. denied*, 288 N.C. 242, 217 S.E. 2d 679 (1975); *Fireman's Mut. Ins. Co. v. High*

Point Sprinkler Co., 266 N.C. 134, 146 S.E. 2d 53 (1966). Justice Lake, speaking for the Supreme Court in *Tennessee-Carolina Transportation, Inc. v. Strick Corp.*, 291 N.C. 618, 626-7, 231 S.E. 2d 597, 602 (1977) *on rehearing from* 289 N.C. 587, 223 S.E. 2d 346 (1976), wrote:

> "The authority of the trial judge to issue . . . [a] protective order [under Rule 26(c)] is not unqualified. The statute provides that such order may be issued only 'for good cause shown' and that it may be issued only 'to protect a party or person from unreasonable annoyance, embarrassment, oppression or undue burden or expense.' "

In the present case Judge Gantt recited that ". . . good cause has been shown and the interests of justice require that protection be afforded Collier Cobb & Associates, Inc. . . . ." Unlike *Tennessee-Carolina Transportation, Inc.*, where Justice Lake found that there was "[n]o . . . basis [of good cause] for the order prohibiting . . . [discovery] shown in the record," the record before us demonstrates an adequate basis for the judge's order limiting discovery. Furthermore, we agree with the trial court's conclusion that the judgment of voluntary dismissal with prejudice of the prior action in Moore County involving the same parties ". . . foreclosed and estopped [the parties] from litigating all issuable matters contained in the pleadings of the Moore County action . . . ." *Young v. Young*, 21 N.C. App. 424, 204 S.E. 2d 711 (1974). The plaintiff has failed to show any abuse of discretion in the order dated 17 September 1976.

Affirmed.

Judges VAUGHN and CLARK concur.

TOWN OF TAYLORSVILLE v. MODERN CLEANERS, SAMUEL J. BROOKSHIRE D/B/A

No. 7622DC1015

(Filed 21 September 1977)

1. Municipal Corporations § 4— rates for city services

The statutory authority of a city to fix and enforce rates for its services and to classify its customers is not a license to discriminate among customers of essentially the same character and services.

2. Municipal Corporations § 4— sewer service—arbitrary classifications of customers

A town ordinance providing higher rates for sewer service to customers using sewer service only than to customers using both water and sewer services is arbitrary and discriminatory where the cost of providing sewer service to both classes of customers is the same.

APPEAL by defendant from *Johnson, Judge*. Judgment entered 30 August 1976 in District Court, ALEXANDER County. Heard in the Court of Appeals 1 September 1977.

This is a civil action instituted by plaintiff, Town of Taylorsville, to collect from the defendant, Samuel J. Brookshire, doing business as Modern Cleaners, for the sum of $328.94 which represents sewer services provided by plaintiff for defendant for the months of February and March, 1976.

After a trial without a jury, Judge Johnson made the following pertinent findings of fact:

"[The defendant] is involved in dry cleaning, laundry, and washerette business in the Town of Taylorsville . . . that the business of the Defendant uses water from a private source . . . and that the sewer services of the Defendant for said business are supplied by the Town of Taylorsville as part of the town sewer system and operation;

"Plaintiffs water and sewer rate is on a graduated scale for users of both water and sewer services and also on a graduated scale for users of sewer service only; that in July, 1975 Plaintiff increased its water and sewer rates with a general increase of forty (40%) percent for users of both water and sewer services and also for users of the sewer services only; the Defendant is the only customer within the town that uses the sewer services only; that the charges for sewer service only to the Defendant are only about fifteen (15%) percent higher than the charges for sewer services to the customers of the town using water and sewer services; that the charges to the Defendant for sewer services only are not arbitrary and unreasonable with respect to the Defendant. [A]nd that any customer of the town utilizing the sewer services only of the town and receiving the same kind and degree of services as the Defendant would be subject to the same rates of charges as the Defendant;

. . .

"Plaintiff has rendered a just and valuable service to the Defendant for the months of February and March, 1976 and the

Defendant has failed and refused to pay said sum of Three Hundred Twenty-eight and 94/100 ($328.94) Dollars."

The court concluded:

"The rates of charges for the sewer service of the Plaintiff do not constitute an action that is arbitrary, discriminatory, or that is an abuse of discretion of the Legislative Body of the Town of Taylorsville, and that said rates are a proper exercise of the Legislative authority of the Town of Taylorsville; and that the sewer rates of the Plaintiff when applied to the Defendant are not arbitrary, discriminatory, or an abuse of the Legislative authority of the Plaintiff; that the Defendant is indebted to the Plaintiff in the sum of Three Hundred Twenty-eight and 94/100 ($328.94) Dollars."

From a judgment that the plaintiff recover of the defendant the sum of $328.94, defendant appealed.

Williams, Pannell & Lovekin by Martin C. Pannell for plaintiff appellee.

Richard L. Gwaltney for defendant appellant.

HEDRICK, Judge.

Assuming *arguendo* that the ordinance dated 1 July 1975 increasing the rates for sewer only users was duly enacted, the question before us is whether the trial court erred in concluding that "the sewer rates of the Plaintiff when applied to the Defendant are not arbitrary, discriminatory, or an abuse of the Legislative authority of the Plaintiff . . . ."

A city's authority to own, operate, and finance a public utility is derived from the legislature. G.S. 160A-311, *et seq.* G.S. 160A-314(a) provides in pertinent part:

"A city may establish and revise from time to time schedules of rents, rates, fees, charges, and penalties for the use of or the services furnished by any public enterprise. Schedules of rents, rates, fees, charges, and penalties may vary according to classes of service . . . ."

[1] It is a fundamental principle that a public utility, whether publicly or privately owned, may not discriminate in the distribution of services or the establishment of rates. *Dale v. City of Morganton*, 270 N.C. 567, 155 S.E. 2d 136 (1967); *Utilities Commission v. Mead Corp.*, 238 N.C. 451, 78 S.E. 2d 290 (1953); *Griffin v.*

Goldsboro Water Co., 122 N.C. 206, 30 S.E. 319 (1898); 12 McQuillin, Mun. Corp. § 35.37a (3d Ed. 1970). Thus, the statutory authority of a city to fix and enforce rates for its services and to classify its customers is not a license to discriminate among customers of essentially the same character and services. Rather, the statute must be read as a codification of the general rule that a city has "the right to classify consumers under *reasonable* classifications based upon such factors as the cost of service . . . or any other matter which presents a substantial difference as a ground of distinction." 12 McQuillin, Mun. Corp. § 35.37b, at 485-6 (3d Ed. 1970) (Emphasis added). In *Utilities Commission v. Mead Corp., supra* at 465, 78 S.E. 2d at 300, the Supreme Court recognized this rule: "Rates may be fixed in view of dissimilarities in conditions of service, but there must be some reasonable proportion between the variance in the conditions and the variances in the charges. Classification must be based on substantial difference." (Citation omitted.) *See also Utilities Commission v. Teer Co.*, 266 N.C. 366, 376, 146 S.E. 2d 511, 518 (1966).

[2] Application of the foregoing principles to the present case compels the conclusion that the classification giving rise to higher rates for sewer only users is without justification. The plaintiff's own witness, the mayor of Taylorsville, testified that there is no difference between the costs of providing water and sewer services and sewer only services. We hold that the higher rate charged defendant for sewer only service is not supported by any "substantial difference" in the type of service rendered and bears no rational relation to the cost of service or any other relevant factor, and thus, is arbitrary and discriminatory.

Reversed.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. DENNIS L. GREENE

No. 774SC270

(Filed 21 September 1977)

1. Criminal Law § 92.3— three offenses by one defendant— two victims— consolidation proper

The trial court did not err in consolidating for trial charges of kidnapping and rape of one victim and assault with intent to commit rape on another victim,

since the three offenses occurred in a single afternoon within a three-hour period, with a time lapse of approximately one hour and twenty-five minutes between offenses; the offenses were similar in nature and occurred within such a short time span that they could logically be considered all parts of a continuing program of action by defendant; and evidence of the offense against either victim was competent to show defendant's attitude and purpose in connection with the offense or offenses against the other.

2. **Criminal Law § 92— consolidation—single scheme or plan—nature of offenses properly considered**

The nature of the offenses is one of the factors which may properly be considered in determining whether certain acts or transactions constitute "parts of a single scheme or plan," as those words are used in G.S. 15A-926(a).

APPEAL by defendant from *Rouse, Judge*. Judgments entered 15 September 1976 in Superior Court, ONSLOW County. Heard in the Court of Appeals 25 August 1977.

Defendant was charged in an indictment with the felonious assault on Mrs. Debbie Elerick with intent to commit rape. He was also charged in two other indictments with the second degree rape and kidnapping of Mrs. Catherine A. Rutherford. Defendant pled not guilty, and the cases were consolidated for trial.

The State presented evidence to show that on the afternoon of 3 May 1976, at approximately two o'clock, the defendant came to Mrs. Elerick's apartment posing as a painter employed by the apartment management. Upon being admitted to the apartment, he committed the assault as charged and then left the apartment at approximately 2:45 p.m. Later that same afternoon at approximately 4:10 p.m., Mrs. Rutherford was walking to work, and defendant gave her a ride in his car. Instead of taking her to work, however, the defendant took her to a clearing in the woods and raped her.

Defendant testified and denied that he was the person who assaulted Mrs. Elerick. He admitted that he gave Mrs. Rutherford a ride and engaged in sexual intercourse with her, but he testified that she participated voluntarily.

The jury found defendant guilty on two counts of assault with intent to commit rape. From judgments imposing prison sentences, defendant appealed.

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

Bailey and Raynor by Edward G. Bailey for defendant appellant.

PARKER, Judge.

In his brief the defendant presents but one question for review, being the question raised by his first assignment of error. The questions raised by his remaining assignments of error are deemed abandoned. Rule 28(a), North Carolina Rules of Appellate Procedure.

[1] Defendant's sole contention on this appeal is that the trial court committed prejudicial error in overruling his objection to the State's motion to consolidate all three charges for trial. He admits that the charges of kidnapping and second degree rape were properly joined because those offenses involved a single victim and occurred at virtually the same time. He points out, however, that the third offense, assault with intent to commit rape, involved a different victim and occurred at a different time than the other offenses, and he contends that his defense of the rape and kidnapping charges was unreasonably prejudiced when the State was permitted to introduce evidence of the earlier offense against Mrs. Elerick. We find no error.

G.S. 15A-926(a) provides in part that "[t]wo or more offenses may be joined . . . for trial when the offenses . . . are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." Here, the State's evidence showed "a series of acts or transactions connected together." The offenses for which defendant was tried occurred in a single afternoon within a three-hour period, with a time lapse of approximately one hour and twenty-five minutes between offenses. The offenses were similar in nature and occurred within such a short time span that they could logically be considered "all parts of a continuing program of action by the defendant." *State v. Frazier*, 280 N.C. 181, 195, 185 S.E. 2d 652, 661 (1972), *death sentence vacated*, 283 N.C. 99, 195 S.E. 2d 33 (1973). Evidence of the offense against either victim was competent to show defendant's attitude and purpose in connection with the offense or offenses against the other. *State v. Davis*, 229 N.C. 386, 50 S.E. 2d 37 (1948); *State v. Edwards*, 224 N.C. 527, 31 S.E. 2d 516 (1944); *State v. Gainey*, 32 N.C. App. 682, 233 S.E. 2d 671 (1977); 1 Stansbury's N.C. Evidence (Brandis Rev.), § 92, p. 299; Annot., 167 A.L.R. 565 (1947); Annot., 77 A.L.R. 2d 841 (1961). Under these circumstances, the consolidation of the cases against defendant for trial was within the sound discretion of the trial judge. *State v. Jarrette*, 284 N.C. 625, 202 S.E. 2d 721 (1974), *death sentence vacated*, 428 U.S. 903, 96 S.Ct. 3205, 49 L.Ed. 2d 1206 (1976). No abuse of discretion has been shown.

[2] Defendant contends that a consideration of the class or nature of the offenses is improper in making a decision to consolidate because the legislature, in enacting G.S. 15A-926(a), omitted the clause which appeared in former G.S. 15-152 permitting consolidation of charges "for two or more transactions of the same class of crimes or offenses." However, that clause could arguably apply to offenses which have no connection other than being of the same class. In any event, we hold that the nature of the offenses is one of the factors which may properly be considered in determining whether certain acts or transactions constitute "parts of a single scheme or plan," as those words are used in present G.S. 15A-926(a).

In defendant's trial we find

No error.

Judges MARTIN and ARNOLD concur.

STATE OF NORTH CAROLINA v. GENE CARROLL HEWITT

No. 7718SC296

(Filed 21 September 1977)

1. **Assault and Battery § 15.2— failure to define "assault"**

In a prosecution for assault with a deadly weapon (a pistol) with intent to kill inflicting serious injury, the trial court did not err in failing to define for the jury the term "assault" where the court explained to the jury how an assault with the pistol could be accomplished by charging that the State must prove that defendant assaulted the victim "by intentionally shooting him with a pistol."

2. **Assault and Battery § 15.1— charge of assault with pistol— instruction on cue ball as deadly weapon— harmless error**

In a felonious assault case in which the indictment alleged the assault was accomplished by use of a pistol, defendant was not prejudiced by an instruction permitting the jury to consider whether a cue ball with which defendant struck the victim was a deadly weapon where the remaining instructions made it clear that the State had to prove that defendant intentionally shot the victim with a pistol, and where the jury found that the assault inflicted serious injury and the only evidence of serious injury was from the shooting with a pistol.

APPEAL by defendant from *Crissman, Judge*. Judgment entered 8 December 1976 in Superior Court, GUILFORD County. Heard in the Court of Appeals 31 August 1977.

Defendant was tried upon a bill of indictment charging him with assault with a deadly weapon (a pistol) with intent to kill inflicting serious injury.

The State's evidence tends to show the following: Defendant and Vernon Hedgecock became engaged in a scuffle in a pool room during which scuffle defendant struck Hedgecock on the head with a cue ball. Hedgecock abandoned the scuffle and started toward the door. Defendant shot Hedgecock in the back. Hedgecock was hospitalized for eight days.

Defendant offered no evidence.

The jury found defendant guilty of the lesser included offense of assault with a deadly weapon inflicting serious injury and an active prison sentence was imposed.

Attorney General Edmisten, by Assistant Attorneys General Sandra M. King and Ralf Haskell, for the State.

James F. Morgan and Charles L. Cromer for the defendant.

BROCK, Chief Judge.

[1] Defendant first argues that the trial judge committed error prejudicial to defendant in failing to define for the jury the term "assault." Defendant relies on *State v. Hickman*, 21 N.C. App. 421, 204 S.E. 2d 718 (1974). In *Hickman* the trial judge instructed the jury to return a verdict of guilty if it was satisfied beyond a reasonable doubt that defendant assaulted the victim with a knife. At no point in *Hickman* was the jury instructed upon how an assault with a knife could be accomplished. Therefore this Court held in *Hickman* that "[w]e think it incumbent upon the trial judge to define *or otherwise explain* to a jury the meaning of the legal term 'assault'." (Emphasis added.)

The present case is clearly distinguishable from *Hickman*. In the present case the trial judge explained to the jury how the assault with the pistol could be accomplished. Upon the charge contained in the bill of indictment and again upon the lesser included offense the trial judge instructed the jury that the first element the State must prove was that the defendant assaulted Vernon Hedgecock *by intentionally shooting him with a pistol.* This instruction explained the term assault and applied the law to the evidence. *See State v. Springs*, 33 N.C. App. 61, 234 S.E. 2d 193 (1977). This assignment of error is overruled.

[2] During the instructions to the jury the trial judge stated: "The evidence also tends to show that a cue ball was used. Now, you have a right to take into consideration whether or not a cue ball, used in the manner in which it was used, considering the size and the strength of the defendant as compared to Vernon Hedgecock, was a deadly weapon." Defendant argues that, because the bill of indictment charges an assault with a deadly weapon which the bill describes as a pistol, it was error for the judge to permit the jury to consider whether the cue ball was a deadly weapon. In principle we agree with defendant's argument, however the argument is not controlling under the circumstances presented in this case.

The above quoted statement concerning the cue ball was the only mention of the cue ball by the trial judge. He apparently realized that the issue of assault with the cue ball should not be presented to the jury. In all phases of the instructions the trial judge instructed the jury upon the assault that it must be satisfied beyond a reasonable doubt that defendant assaulted Vernon Hedgecock by intentionally shooting him with a pistol. This clear requirement of finding a shooting with a pistol appears at least four times in the instructions including each final mandate. That coupled with the fact that the jury found that the assault inflicted serious injury makes it clear that the jury was not misled by the brief mention of the cue ball. The evidence of serious injury was from the shooting with a pistol. There was no evidence of serious injury from the cue ball. We perceive no prejudice to defendant from the instruction complained of.

No error.

Judges BRITT and MORRIS concur.

CALVIN CARLYLE CARR v. OLIVER WAYNE SCOTT AND SCOTT AND JONES, INC.

No. 764SC972

(Filed 21 September 1977)

Automobiles § 77.1— passing vehicle traveling in same direction— contributory negligence as a matter of law

In an action to recover damages sustained in a motor vehicle accident, the trial court properly granted defendants' motion for directed verdict where the

evidence showed that plaintiff was contributorily negligent as a matter of law in that, although he saw defendants' truck straddling the center line and saw protruding angle irons which created a dangerous condition, he still attempted to pass the truck, even though he had to drive on the median to do so.

APPEAL by plaintiff from *Bailey, Judge*. Judgment entered 18 September 1976 in Superior Court, DUPLIN County. Heard in the Court of Appeals 24 August 1977.

In this action plaintiff seeks damages from defendants for alleged injury to person and damage to property arising out of a motor vehicle accident allegedly caused by the negligence of the individual defendant who was driving a truck belonging to the corporate defendant.

In his complaint plaintiff alleged facts substantially as set forth in his evidence hereinafter summarized. He alleged that defendant driver was negligent in that he failed to keep a proper lookout for other vehicles using the highway, that he failed to attach a red flag or other warning device on the iron rods being transported, that he unlawfully straddled the center line, that he failed to give proper signals, and that he operated his vehicle in a careless and reckless manner without due regard for other persons.

Defendants filed answer denying any negligence on their part and alleging that the acts of defendant driver were not the proximate cause of the accident. They further alleged that plaintiff was contributorily negligent in that he failed to maintain a proper lookout, failed to keep his vehicle under control, drove at an excessive speed, failed to reduce his speed while overtaking defendants' vehicle, and failed to use due care in passing defendants' vehicle.

Plaintiff presented evidence in the form of his testimony tending to show: On 27 February 1974 he was driving his two-axle truck "loaded to capacity with salad greens" in a northerly direction on four-lane Highway 117. Defendant driver drove the corporate defendant's two-axle truck onto Highway 117 and proceeded ahead of plaintiff in a northerly direction. Loaded on defendants' truck were four pieces of angle iron protruding 12 to 15 feet from the back of the truck body. Plaintiff was traveling about 40 m.p.h., defendant driver was traveling about 15 m.p.h., and both were in the right-hand lane. Plaintiff gave a turn signal with the intention of getting in the left lane and passing defendants' truck; he pulled into the left lane when he was about 150 or 175 feet behind defendants' truck. At that time, without any turn signal having been given, defendants'

truck suddenly veered to the left and began straddling the center line. Plaintiff did not know what defendant driver was going to do but continued to gain on defendants' truck "until I got so near those angle irons until I dared not go any further". Plaintiff then decided to pass defendants' truck on the left even though the truck was still straddling the center line. At that time plaintiff was traveling 20 or 25 m.p.h. and was going a little faster than defendant driver. Thereupon, as plaintiff got within four or five feet of the angle irons, defendant driver suddenly turned to the right. The sudden right turn caused the angle irons to swing into the left lane and plaintiff had to drive onto the median on his left in order to avoid hitting the angle irons. The median was graded and plaintiff's truck overturned, causing the injuries and damage complained of. Defendants did not have a red flag on the end of the angle irons and plaintiff did not remember sounding his horn as he attempted to pass defendants' truck.

At the close of plaintiff's evidence, defendants' motion for a directed verdict was granted. Plaintiff appealed.

White, Allen, Hooten and Hines, P.A., by Thomas J. White III, for defendant appellees.

Graham A. Phillips, Jr., for plaintiff appellant.

BRITT, Judge.

Plaintiff assigns as error the trial court's allowance of defendants' motion for a directed verdict. We think the motion was properly allowed on the ground of plaintiff's contributory negligence as a matter of law.

In *Bledsoe v. Gaddy*, 10 N.C. App. 470, 472, 179 S.E. 2d 167, 169 (1971), the test for determining whether a directed verdict should be allowed on the basis of contributory negligence is stated:

> "A directed verdict on the ground of contributory negligence will be allowed only when plaintiff's evidence, taken in the light most favorable to him, so clearly establishes contributory negligence that no other reasonable inference or conclusion can be drawn therefrom. *Galloway v. Hartman*, 271 N.C. 372, 156 S.E. 2d 727 (1967); *Anderson v. Mann*, 9 N.C. App. 397, 176 S.E. 2d 365 (1970)."

"Before attempting to pass another vehicle traveling in the same direction on the highway in front of him, a driver must exercise due care to see that he can pass in safety . . . . " 2 Strong's N.C.

Index 3d, Automobiles § 16.3, p. 83. "A party may not recover for injuries resulting from a hazard which he helps to create. He is contributorily negligent if he knows of a dangerous condition and voluntarily goes into the place of the danger." 6 Strong's N.C. Index 2d, Negligence § 13, p. 35.

In the case at hand we think plaintiff failed to exercise due care in the operation of his truck before and during his passing maneuver, and that his conduct was a proximate cause of the accident. Plaintiff's testimony tended to show that although he saw that defendants' truck was straddling the center line, and that the protruding angle irons created a dangerous condition, he was determined to pass the truck even if he had to drive on the median to do so.

In *Dreher v. Divine*, 192 N.C. 325, 327, 135 S.E. 29, 30 (1926), in an opinion by Stacy, C.J., we find:

> "One who operates an automobile should have it under control and if the driver of a front car has no knowledge of an approaching vehicle from the rear, and apparently does not hear its approach, the driver of the rear or trailing vehicle should reduce his speed and stop, if necessary, to avoid a collision or an injury. He cannot proceed regardless of the fact that the driver of the front vehicle does not turn to the right of the road, unless there be ample room to pass in safety without it."

For the reasons stated, the judgment appealed from is

Affirmed.

Chief Judge BROCK and Judge MORRIS concur.

WILLIAM DAVID WILES AND WIFE, GLENDA LEE WILES v. WELPARNEL CONSTRUCTION COMPANY, INC.

No. 7623SC1002

(Filed 21 September 1977)

1. Process § 12— summons directed to agent of corporation

A summons directed to "Mr. T. T. Nelson, Registered Agent, Welparnel Construction Company, Inc." did not give the court jurisdiction over the Welparnel Construction Company since a summons directed to an agent for a defendant does not constitute valid service of process on the defendant.

2. **Appearance § 1.1; Process § 2; Rules of Civil Procedure § 12— service of process —waiver—extension of time to answer**

Defendant did not waive its defense of insufficiency of service of process and lack of personal jurisdiction by obtaining extensions of time in which to plead. G.S. 1-75.7; G.S. 1A-1, Rule 12(b).

3. **Appearance § 1.1; Process § 2— service of process—waiver—taking deposition**

Defendant did not waive the defense of insufficiency of service of process by taking plaintiff's deposition after answer was filed raising the jurisdictional defense.

ON *certiorari* to review the order of *Seay, Judge.* Order entered 9 November 1976 in Superior Court, YADKIN County. Heard in the Court of Appeals 31 August 1977.

Ray and Andrews, by R. Lewis Ray, for plaintiff appellees.

Womble, Carlyle, Sandridge & Rice, by Allan R. Gitter, for defendant appellant.

VAUGHN, Judge.

[1] The summons in this case was directed to:

"Mr. T. T. Nelson, Registered Agent
Welparnel Construction Company, Inc.
211 N. Bridge St.
Jonesville, N. C."

Attorneys for Welparnel Construction Company, Inc., twice obtained stipulations extending the time to answer. The answer when filed raised the defense that the plaintiffs had failed by their summons to obtain valid in personam jurisdiction over the corporate defendant. After the answer was filed, but before the court had ruled upon the validity of the summons, attorneys for the Welparnel Construction Company proceeded to take plaintiff's deposition. The corporate defendant's motion for summary judgment on the grounds that the summons was invalid and that the court had not acquired jurisdiction over the corporate defendant was denied. We allowed its petition for certiorari to review the order.

We hold that the summons was insufficient to give the court jurisdiction over the corporate defendant. One of the essential requirements of a summons as set out in G.S. 1A-1, Rule 4(b) is that it shall be directed to the defendant. The appellate courts of this State have consistently held that a summons directed to the agent for a defendant does not constitute valid service on the defendant. A summons to "Brian McDermott, agent for Thorp Commercial Cor-

poration," did not give the court jurisdiction over Thorp. *Ready Mix Concrete v. Sales Corp.*, 30 N.C. App. 526, 227 S.E. 2d 301 (1976). A summons to "Clayton Eddinger . . . local agent for Bea Staple Manufacturing Company, Incorporated defendant(s) above named" did not give the court jurisdiction over the corporation. *Russell v. Manufacturing Co.*, 266 N.C. 531, 146 S.E. 2d 459 (1966).

Plaintiffs argue that these cases are distinguishable since the summons does not identify Mr. Nelson as the "agent for" Welparnel Construction Company. They further argue that it is apparent that T. T. Nelson is obviously not a defendant because he is not named in the case's caption. We do not believe the distinction can be made. The words "Registered Agent" have no meaning or function except that of designating the person to whom the summons is directed as being the registered agent of the corporate entity thereafter named.

[2] Plaintiffs also contend that Welparnel Construction Company has voluntarily submitted to the court's jurisdiction and waived its jurisdictional defense. The argument is without merit. G.S. 1-75.7 provides that a court may exercise jurisdiction over a person who makes a general appearance in an action. The statute further provides, however, "that obtaining an extension of time within which to answer or otherwise plead shall not be considered a general appearance." Rule 12(b) of the North Carolina Rules of Civil Procedure expressly provides that "obtaining an extension of time within which to answer or otherwise plead shall not constitute a waiver of any defense herein set forth." The defense of lack of personal jurisdiction and insufficiency of process are set out in the rule.

[3] We further hold that by taking plaintiff's deposition on 14 May 1976 (after answer was filed raising the jurisdictional defense), the corporate defendant did not waive the defense of insufficiency of service of process. This decision is in accord with decisions of a majority of the courts that have considered the effect of taking depositions upon the defense of lack of personal jurisdiction. *See* e.g., *Neifeld v. Steinberg*, 438 F. 2d 423 (3rd Cir. 1971) and *Kerr v. Compagnie de Ultramar*, 250 F. 2d 860 (2nd Cir. 1958). *See also* 2A Moore's Federal Practice, ¶ 12.12, at 2327.

For the reasons stated, the order denying defendant's motion to dismiss is reversed.

Reversed.

Judges HEDRICK and CLARK concur.

GEORGE F. BLAKE v. MARGARET Y. BLAKE

No. 7610DC974

(Filed 21 September 1977)

Divorce and Alimony § 18.5— counterclaim for alimony—prior judgment under Uniform Reciprocal Enforcement of Support Act—res judicata

In an action for divorce where defendant counterclaimed for alimony, the trial court properly dismissed the counterclaim since the judgment in a prior action brought by defendant under the Uniform Reciprocal Enforcement of Support Act was conclusive in its finding that defendant was not entitled to alimony based on incidents prior to the date of the judgment.

APPEAL by defendant from *Greene, Judge*. Judgment entered 7 June 1976 in District Court, WAKE County. Heard in the Court of Appeals 25 August 1977.

C. K. Brown, Jr., for plaintiff appellee.

Gulley & Green, by Julian Mann III, for defendant appellant.

VAUGHN, Judge.

This action for divorce based on a one-year separation was instituted by the plaintiff, George F. Blake, on 21 November 1975. The defendant, Margaret Y. Blake, counterclaimed for alimony pursuant to G.S. 50-16.8 (b)(3). Plaintiff moved for summary judgment on the counterclaim on the grounds that an order entered in February, 1975, was a bar and a complete defense to the alimony claim. In support of that motion, plaintiff introduced the record of a civil action brought by Margaret Y. Blake against George F. Blake under the Uniform Reciprocal Enforcement of Support Act and decided in Wake County District Court. In that action, the court had adjudged that Margaret Blake was not entitled to alimony.

The court granted plaintiff's motion for summary judgment and dismissed the counterclaim. Defendant appealed.

The doctrine of *res judicata* applies in divorce actions. *Young v. Young*, 21 N.C. App. 424, 204 S.E. 2d 711 (1974). It also applies to civil actions brought under the Uniform Reciprocal Enforcement of Support Act. These actions are in the nature of actions for alimony without divorce. *Cline v. Cline*, 6 N.C. App. 523, 170 S.E. 2d 645 (1969). They are decided under the same law as actions for alimony without divorce. G.S. 52A-12. In *Young v. Young, supra*, a judgment adverse to the wife in a prior action for alimony without divorce was

res judicata as to any claim of adultery occurring up to the date of that judgment. In the present case, since all of the incidents upon which Margaret Blake's claim was based were alleged to have occurred prior to her separation from her husband in 1974, they could or should have been litigated in the first action. *Painter v. Bd. of Education*, 288 N.C. 165, 217 S.E. 2d 650 (1975). The judgment in the action under the Uniform Reciprocal Enforcement of Support Act is thus conclusive in its finding that Margaret Blake is not entitled to alimony based on incidents prior to February, 1975.

Defendant argues that G.S. 52A-4, which provides that the Uniform Reciprocal Enforcement of Support Act remedies "are in addition to and not in substitution for any other remedies," precludes the operation of res judicata in this case. Blake's duty to support is, however, governed by the laws of North Carolina. G.S. 52A-5, 8. Chapter 52A thus provides additional means of enforcing support obligations. It does not establish additional grounds for support. Defendant's right to support has already been litigated and decided against her.

Affirmed.

Judges HEDRICK and CLARK concur.

ORANGE WATER AND SEWER AUTHORITY v. ESTATE OF NANCY ARMSTRONG, DECEASED, AND COY ARMSTRONG; C. V. BRADSHAW AND WIFE, EFFIE BRADSHAW; ELMER JUNE BRADSHAW AND WIFE, KITTY FELMET BRADSHAW; ROBERT E. BRADSHAW AND WIFE, MINNIE BRADSHAW; A. G. CRAWFORD HEIRS, JOEL CRAWFORD AND REBECCA CRAWFORD; CECIL CLAY CRAWFORD, SINGLE, AND BEULAH MAE CRAWFORD; MAURICE M. HENKELS AND WIFE, HELEN M. HENKELS; W. BRUCE HOLT AND WIFE, NANCY F. HOLT; AUBREY W. IVEY AND WIFE, ALICE WALKER IVEY; EDWARD S. JOHNSON AND WIFE, NANCY M. JOHNSON; ALVIS BREWER LLOYD, SINGLE; JOHN D. LLOYD AND WIFE, CAROLYN SHOTTS LLOYD; W. BANKS LLOYD AND WIFE, HAZEL P. LLOYD; ERLE F. LLOYD AND WIFE, PRISCILLA W. LLOYD; GLADYS T. SNIPES, EXECUTRIX OF W. M. SNIPES, DECEASED; CARRIE TEER SNIPES; J. M. SNIPES, JR. AND WIFE, LORA SNIPES; CHARLES W. SNIPES AND WIFE, FRANCIS SNIPES; TEER FARMS, INC.; CHARLES E. TEER AND WIFE, LETA C. TEER; THOMAS E. TEER AND WIFE, JUANITA RILEY TEER; THOMAS Y. TEER AND WIFE, EVELYN M. TEER; JAMES C. THOMPSON AND WIFE, BETTY A. THOMPSON; FORREST W. YOUNG AND WIFE, BERNA PINNER YOUNG

No. 7715SC492

(Filed 26 September 1977)

Municipal Corporations § 4; Sanitary Districts § 2— Water and Sewer Authority— eminent domain—right to survey land

The procedures for eminent domain governing cities and counties apply to Water and Sewer Authorities created pursuant to Article 1 of G.S. Chapter 162A with the additional requirement that, before an action in eminent domain is commenced, a certificate of authorization must be obtained; and because such an Authority has the power of eminent domain possessed by cities, it may enter and survey land prior to the institution of an eminent domain proceeding.

APPEAL by defendants from *Hobgood, Judge*. Order signed 28 April 1977 in Superior Court, ORANGE County. Heard in the Court of Appeals 22 September 1977.

Plaintiff owns and operates the water and sewer public utility system that furnishes water and sewer service to the communities of Carrboro, Chapel Hill and other areas of Orange County. Plaintiff believes that it is necessary to construct a dam and reservoir on Cane Creek. The site of the proposed dam and reservoir will be on some of the lands owned by the defendants. Defendants have refused to allow plaintiff's agent to go on their lands for the purpose of making surveys.

Plaintiff began this action to restrain defendants from preventing plaintiff's agent from going on defendants' land "for the purpose of making surveys in order to locate and map the outside boundaries of the proposed dam and reservoir, as well as the area, if any,

necessary to be acquired extending from the perimeter of such proposed reservoir, together with contour lines and a legal description of each of the properties which will be necessary to be acquired for the purpose of locating and constructing the dam and reservoir."

After a hearing on plaintiff's motion for a temporary injunction, the court allowed the motion and granted the requested relief pending a final determination of the action.

Claude V. Jones, for plaintiff appellee.

Hunt & Abernathy, by George E. Hunt, for defendant appellants.

VAUGHN, Judge.

Plaintiff, Orange Water and Sewer Authority, was created pursuant to Article 1, Chapter 162A of the North Carolina General Statutes. G.S. § 162A-6 enumerates its powers which include the power "[t]o acquire in the name of the authority by . . . exercise of the right of eminent domain in accordance with the General Statutes of North Carolina which may be applicable to the exercise of such powers by municipalities or counties, any lands or rights in land or water rights in connection therewith . . . ." This power is further subject to the provisions of G.S. § 162A-7(a) which states that "[n]o authority shall institute proceedings in the nature of eminent domain to acquire water, water rights, or lands having water rights attached thereto without first securing from the Board a certificate authorizing such acquisition."

Defendants contend that plaintiff has no right to go on their lands for the purpose of making surveys until it has secured the certificate authorizing the institution of eminent domain proceedings and, consequently, cannot bring this action to enforce that right. We cannot sustain that contention.

The portion of G.S. 162A-6 we have quoted gives plaintiff the power of eminent domain to be exercised under any statute applicable to municipalities. G.S. 160A-263 provides that "[a]ny city, without having adopted a preliminary condemnation resolution . . . is authorized to enter upon any lands . . . to make surveys, borings, examinations, and appraisals as may be necessary or expedient in carrying out and performing its rights or duties under this Article [Eminent Domain]." Moreover, G.S. 160A-241 allows a city at its election to use the procedures of Article 2 of Chapter 40. G.S. 40-3 also allows a preliminary entry to lay out routes. Plaintiff,

therefore, having the power of eminent domain possessed by cities, may also enter lands for the purpose of making surveys prior to the institution of eminent domain proceedings.

The present action is not one "in the nature of eminent domain" which must await the granting of the certificate required by G.S. 162A-7. It is, instead, an action to enforce plaintiff's right of entry prior to the institution of such proceeding. A similar question was presented in *Duke Power Co. v. Herndon*, 26 N.C. App. 724, 217 S.E. 2d 82 (1975). The Court held:

> "[t]he present action is not an action to condemn a right-of-way across defendants' lands. This is an action to enforce the statutory right of plaintiff under G.S. 40-3 to 'enter upon' defendants' lands for the purpose of making a survey of the proposed route."

As a practical matter, it appears that the statutory right of entry should be exercised before petitioning for the certificate authorizing the acquisition. The petition must include a description of the waters and water rights involved, plans for impounding the waters, and the names of the riparian owners affected thereby insofar as known. The certificate may be issued only after a finding of maximum benefit based on a variety of criteria including the probable detriment to present water and watershed users that will be caused by the project.

In summary, we hold as follows. The procedures for eminent domain governing cities and counties apply to Water and Sewer Authorities created pursuant to Article 1 of Chapter 162A with the additional requirement that, before an action in eminent domain is commenced, a certificate of authorization must be obtained. The Authority's right of eminent domain is not dormant before certification. Because it has the power of eminent domain possessed by cities, it may enter and survey prior to the institution of an eminent domain proceeding.

Defendants' assignments of error directed to the findings of fact have been considered and are overruled. There is ample evidence to support the order allowing the temporary injunction.

The order is affirmed.

Affirmed.

Judges HEDRICK and CLARK concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 7 SEPTEMBER 1977

DISTRIBUTORS, INC. v. CRISP No. 7630DC944	Swain (76CVD34)	Reversed and Remanded
GARDNER v. GARDNER No. 768DC966	Wayne (76CVD620)	Affirmed
MANAGEMENT CORP. v. RICKMAN No. 7628SC959	Buncombe (75CVS2235)	Affirmed
RODGERS v. MOORE No. 762DC992	Martin (76CVD67)	Appeal Dismissed
STATE v. ALLEN No. 7717SC254	Surry (76CR6044)	No error
STATE v. BALDWIN No. 7716SC189	Robeson (76CR7621) (76CR7622)	No error
STATE v. FLOWERS No. 775SC259	New Hanover (75CR16649)	New Trial
STATE v. JOHNSON No. 7725SC119	Watauga (76CR487)	No Error
STATE v. KING No. 7724SC93	Avery (76CR1216)	No Error
STATE v. OWENS No. 7719SC243	Randolph (75CRS11398)	No Error in the Trial. Remanded for Proper Judgment.
STATE v. SNIPES No. 7730SC263	Haywood (76CR1503)	No Error
STATE v. WARD No. 778SC251	Wayne (75CR2737)	No Error
STATE v. YOUNG No. 7726SC212	Mecklenburg (76CR39062)	No Error

FILED 21 SEPTEMBER 1977

BYERS v. BROWN No. 7630SC1010	Haywood (76CVS352)	Affirmed
SPOONAMORE v. POWELL No. 7615SC998	Alamance (76CVS348)	No Error
STATE v. BATTLE No. 778SC293	Wayne (76CR8114)	No Error
STATE v. BROWN No. 7715SC275	Orange (76CR6596)	No Error
STATE v. GRANT No. 7727SC284	Lincoln (76CR3614)	No Error

STATE v. GRAY No. 776SC249	Northampton (76CR3606)	No Error
STATE v. GREEN No. 7729SC278	Henderson (76CRS4889)	No Error
STATE v. INMAN No. 7713SC287	Columbus (75CRS11325)	No Error
STATE v. LATTAKER No. 7716SC313	Robeson (74CR19140)	No Error
STATE v. MOUNCE No. 7718SC294	Guilford (75CRS79107)	No Error
STATE v. PLESS No. 7719SC273	Cabarrus (76CR9743)	No Error

WILLIAM F. CARROLL v. H. HORTON ROUNTREE

No. 763SC989

(Filed 5 October 1977)

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

The court should not make findings of fact in a judgment entered on a motion for summary judgment because to do so indicates that a fact question is presented.

2. **Attorneys at Law § 5.1— attorney's breach of agreement with client—summary judgment**

In an action against an attorney for breach of an alleged agreement to withhold delivery to plaintiff's estranged wife of a check from the sale of land until the wife executed a separation agreement and a stipulation of dismissal of an alimony action, the trial court erred in entering summary judgment in favor of defendant attorney since there was a genuine issue of material fact as to whether the parties had in fact agreed that the check would be withheld until plaintiff's wife signed the documents.

3. **Attorneys at Law § 5.1— attorney's breach of agreement with client—damages**

If the jury should find that defendant attorney breached an agreement with plaintiff to withhold the delivery of a check to plaintiff's estranged wife until she executed a separation agreement and a stipulation of dismissal of an alimony action, plaintiff would be entitled to such damages as he could show were the natural and probable results of the breach and, in any event, would be entitled to nominal damages at least.

4. **Attorneys at Law § 5.1; Damages § 3.4— attorney's breach of agreement with client—damages for mental anguish**

Plaintiff is not entitled to recover damages for mental anguish for an attorney's breach of an agreement to withhold delivery to plaintiff's wife of a check from the sale of land until the wife executed a separation agreement and a stipulation of dismissal of an alimony action.

5. **Attorneys at Law § 5.1; Damages § 17.7— attorney's breach of agreement with client—subsequent misrepresentation—punitive damages—summary judgment**

Assuming that plaintiff's complaint stated a claim for punitive damages in alleging that defendant attorney breached his fiduciary obligation to plaintiff by failing to withhold delivery of a check to plaintiff's estranged wife until she had signed certain documents, that defendant subsequently misrepresented to plaintiff that the wife had signed the documents, and that defendant's actions were reckless, careless, intentional and malicious, the trial court properly entered summary judgment for defendant on the issue of punitive damages where defendant attorney's affidavit averred that he followed the customary practice of attorneys in his area by forwarding the check to the wife's attorney, who was responsible for obtaining the wife's signatures on the documents before disbursing any funds, and that he advised plaintiff that his wife had signed the documents because he thought everything had been accomplished, and where plaintiff presented no affidavits or other materials to contradict defendant's affidavit.

Carroll v. Rountree

APPEAL by plaintiff from *Webb, Judge.* Judgment entered 11 October 1976, in Superior Court, PITT County. Heard in the Court of Appeals 24 August 1977.

On 5 February 1975, plaintiff instituted this action in Durham County Superior Court seeking damages allegedly resulting from defendant's representation of plaintiff in Pitt County in the spring and summer of 1972. On motion of defendant, the matter was transferred to Pitt County for convenience of witnesses. Defendant, a practicing attorney in Pitt County, was engaged by plaintiff to represent him in an attempt to resolve the marital difficulties which existed between plaintiff and his wife, who was then a resident of Greenville, North Carolina. Plaintiff was then a resident of Durham, North Carolina. Plaintiff's complaint contained three counts. The first count contained allegations summarized as follows: During defendant's representation of plaintiff, an agreement was reached to settle his marital difficulties and have the suit against him for alimony dismissed. Plaintiff had inherited an interest in a farm, and it was agreed that the farm would be sold and the wife receive $10,969.01 of the proceeds in consideration of her executing a separation agreement, deed, and stipulation of dismissal. In consideration of fees paid or to be paid by him to defendant, defendant was: to obtain plaintiff's wife's signature on a deed conveying certain property to plaintiff, to obtain the wife's signature on a separation agreement, and to obtain the wife's signature to a stipulation of dismissal of the alimony action and deliver to the wife a check for $10,969.01. It was agreed between plaintiff and defendant, and defendant so represented to plaintiff, that the check would not be delivered to the wife until she had conveyed to plaintiff one-tenth of an acre of land and had executed a stipulation and order of dismissal in an action the wife had instituted against plaintiff for alimony and attorney fees, and had executed the separation agreement. On or about 12 July 1972, plaintiff received from defendant a letter enclosing original and copies of a separation agreement and a stipulation of dismissal and a check for $10,969.01 payable to plaintiff and defendant. Plaintiff signed the documents, endorsed the check, and returned all of them to defendant. By letter dated 17 July 1972, defendant forwarded to plaintiff the net amount due plaintiff with an accounting of the disbursement of funds of plaintiff which showed a payment of $500 fee to defendant for "appearance in court, drawing suit papers, deed of separation, deed and dismissal order, conference with client and opposing attorney, etc." The letter also advised: "If you recall, we had a hearing in the court, at which time

an order was entered last fall in your wife's case and we have completely disposed of this case by dismissal plus a separation agreement plus a deed to the 1/10th acre." Subsequently, and because the plaintiff had heard rumors that his wife had obtained the check without signing the separation agreement and dismissal of the lawsuit, plaintiff, under date of 14 October 1972, wrote defendant inquiring whether defendant had performed the fiduciary duties owed plaintiff in connection with the funds which were to be used only if plaintiff's wife executed the documents already referred to. This letter was dated 14 October 1972. By letter dated 23 October 1972, defendant advised plaintiff that plaintiff's wife "did sign the Deed of Separation and also a Judgment dismissing the non-support action against you." In the fall of 1974, plaintiff instituted in Durham County an action against his wife for absolute divorce. His wife was served with the summons and complaint in Michigan and retained counsel there, who, in turn, retained counsel in Durham to defend the action. When plaintiff learned his wife had retained counsel, he wrote to defendant and asked for a copy of the executed deed of separation and judgment dismissing the wife's action. Defendant did not answer this letter. Subsequent to 11 December 1974, plaintiff's mother telephoned defendant asking for information about the documents, but defendant refused her request and was rude and incoherent. Plaintiff contacted Durham counsel and, on 13 January 1975, learned that the action instituted by his wife was still pending and that no deed of separation had been recorded in Pitt County Registry. On or about 17 January 1975, plaintiff learned that defendant had breached his fiduciary obligations to plaintiff by delivering the check between 19 June and 27 June 1972 and allowing plaintiff's wife to cash it without executing the documents required by the agreement between plaintiff and defendant. As a result of the breach of the fiduciary duties under the agreement, plaintiff has been damaged in the amount of $11,469.01 (the $10,969.01 payment to plaintiff's wife and the $500 fee paid by plaintiff to defendant).

Count II adopted all the allegations of Count I and further alleged that as a result of "ascertaining the diabolical deceit" practiced on plaintiff by defendant, the plaintiff became emotionally disturbed, upset and physically sick to such an extent that he lost his job, is still emotionally disturbed, upset and physically ill and will continue to suffer physical and mental anguish and loss of income and has and will be damaged in the actual sum of not less than $50,000.

Count III adopts the allegations of Count I and asks for not less than $200,000 punitive damages because of the "reckless, careless, intentional, malicious and gross actions" of defendant.

Defendant filed an unverified answer in which he admitted he was employed to represent plaintiff and that plaintiff had placed trust and confidence in his ability adequately to represent plaintiff. Defendant further admitted the receiving and writing of the letters set out in the complaint; that he had made the misrepresentations as alleged; that plaintiff's wife, in fact, had not executed the documents but that he was not aware of that fact at the time he made the representations. Defendant denied that he had agreed with plaintiff that the check would be delivered only upon the wife's executing the required documents. He denied that he had breached any fiduciary duty but averred that "in eastern North Carolina, and particularly in and about Pitt County, North Carolina, it is the customary and accepted practice by attorneys involved in disputes between clients to finalize out-of-court settlements by forwarding settlement checks to the receiving party's attorney; that the attorney receiving such settlement checks will see that the funds are properly disbursed and that all agreed upon documents or agreements will be executed by the receiving client in the manner agreed upon between counsel." He further averred that in representing plaintiff, he possessed and exercised the requisite professional skill and ability as an attorney customary in the community in which defendant practiced law.

After filing answers to plaintiff's interrogatories, defendant moved for summary judgment and filed affidavits in support thereof. Plaintiff filed his affidavit in opposition thereto. The court allowed defendant's motion and entered judgment in which he found facts and made conclusions of law. From this judgment, plaintiff appealed, excepting to certain of the findings of fact and conclusions of law.

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

Teague, Johnson, Patterson, Dilthey and Clay, by Ronald C. Dilthey, for defendant appellee.

MORRIS, Judge.

[1] The purpose of the motion for summary judgment is to allow the court to determine, prior to trial, whether there exists any genuine issue with respect to a material fact. *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972); *Britt v. Britt*, 26 N.C. App. 132, 215

S.E. 2d 172 (1975), and if the court determines there is no genuine issue of material fact, an early effective disposition of the matter is possible under § 1A-1, Rule 56. *Britt v. Britt, supra.* It is not within the purview of the summary judgment procedure for the court to resolve disputed material issues of fact. Here it appears from the judgment that the court treated the hearing as a nonjury trial of the case on its merits apparently considering it his function to find facts from the pleadings, affidavits, and interrogatories, make conclusions of law and enter final judgment between the parties. We have repeatedly held that finding facts in a judgment entered on a motion for summary judgment is unnecessary and ill advised simply because to do so indicates that a fact question is presented. *Wall v. Wall,* 24 N.C. App. 725, 212 S.E. 2d 238 (1975); *cert. den.* 287 N.C. 264; *Stonestreet v. Motors, Inc.*, 18 N.C. App. 527, 197 S.E. 2d 579 (1973). Where no genuine issue of material fact exists, and the court finds facts, the implication that a fact question is presented is, of course, unwarranted. That is not the situation here. The pleadings, affidavits, and interrogatories clearly present a genuine issue of material fact.

Plaintiff alleges in his complaint and avers in his affidavit that it was agreed between him and defendant that the check would not be delivered to plaintiff's wife and her attorney until the deed of separation and stipulation of dismissal were executed by her, or at least simultaneously therewith, and that the check was delivered to defendant on or about 19 June 1972 to be held "in trust or in escrow" for the purposes stated. This was categorically denied by defendant's answer.

Plaintiff's interrogatory No. 39 was as follows: "Was there an agreement between the plaintiff and defendant that the wife would not receive her check until she had signed the Deed of Separation and the Stipulation of Dismissal?" Defendant's answer to that interrogatory is: "There was no such agreement between plaintiff and defendant. In fact, plaintiff never gave defendant the check. The check was given to defendant by Mr. R. E. Carroll whose signature appears on such check."

Plaintiff's affidavit avers the agreement to be the same as his pleadings. Defendant, in his affidavit, did not specifically again deny plaintiff's version of the agreement. However, he averred: "I was to prepare the land deed for the signature of Elizabeth R. Carroll and was to deliver to Mr. M. E. Cavendish the settlement check of $10,969.01. Mr. M. E. Cavendish was to prepare the separation agreement and stipulation of dismissal for the signatures of both he

(sic) and his client. In June, 1972, the settlement check was delivered to Mr. Cavendish's office. . . The delivery of the settlement check to the office of Mr. M. E. Cavendish was done pursuant to the method and means agreed upon in accomplishing this settlement. It is both customary and the accepted practice by the attorneys in Eastern North Carolina and particularly in Pitt County, that settlement checks are forwarded to the receiving client's attorney, who in turn will be responsible for obtaining his client's signatures to the agreed documents before the disbursement of such funds. Although the funds were disbursed to Mrs. Elizabeth Carroll before she executed the separation agreement and the stipulation of dismissal, this was done without Mr. Cavendish's knowledge and while he was not present in the office."

[2] Plaintiff's cause of action is based, not on the allegation that he never received the services for which he was paid, but on the premise that defendant delivered the check without receiving the signed documents, thereby breaching the agreement with plaintiff. It is readily apparent that there is a real dispute between plaintiff and defendant as to what the agreement was with respect to the delivery of the check. That this is a material fact is just as apparent and is one which must be submitted to a jury, defendant having requested a jury trial. Defendant concedes that he made the misrepresentations alleged but contends they were made without knowledge of their falsity.

Since it is our opinion that summary judgment was erroneously entered, we think it advisable that we discuss the question of damages.

[3] In its judgment the court's first conclusion of law was as follows: "As to the plaintiff's first count, the plaintiff has not made any allegations which entitle him to recover from the defendant. He has alleged that he delivered to the defendant the sum of $10,969.01 to settle an action between him and his former wife. This action has been settled and the defendant and his former wife are now divorced. The defendant has received what he contracted to receive and has suffered no monetary damage even if the defendant breached the contract." Plaintiff excepted to this conclusion, as he apparently felt compelled to do since the court erroneously made findings of fact and conclusions of law. We do not deem it necessary to discuss the efficacy of the conclusion of law except as it relates to damages. If the jury should find the agreement between the parties to be as plaintiff contends, and that defendant breached the agreement, plaintiff would be entitled to such damages as he could show

were the natural and probable results of the breach, *Maxwell v. Distributing Co.*, 204 N.C. 309, 168 S.E. 403 (1933), but, in any event, proof of a breach would entitle him to nominal damages at least, *Builders Supply Co. v. Midyette*, 274 N.C. 264, 162 S.E. 2d 507 (1968), and prevent a directed verdict for defendant.

[4] With respect to plaintiff's second count, wherein he sought damages for mental and emotional distress suffered by him the court concluded: "As to the second count the plaintiff is not entitled to recover in this action for being emotionally upset or physically ill. While it may be the natural, probable and foreseeable consequences for a widow to suffer mental anguish for having her deceased husband buried in a defective coffin, it should not be so for a concealment of the fact that the separation agreement had not been signed and the plaintiff's wife's action against him had not been dismissed. The law requires that men be of sterner stuff." In passing we note that we are not familiar with the legal requirement referred to in the last sentence of the conclusion of law. We assume that the court, by its remark with respect to damages to a widow "for having her deceased husband buried in a defective coffin," is referring to *Lamm v. Shingleton*, 231 N.C. 10, 55 S.E. 2d 810 (1949). There, as here, the action was essentially one for breach of contract—not an action in tort. In speaking to that question the Court said:

> "This is essentially an action for damages for breach of contract. Plaintiff alleges a contract to furnish a casket and watertight vault and conduct the funeral and inter the body, the breach thereof by failure to lock the vault, and damages resulting from the breach. The further allegation that the defendants' failure to lock the vault at the time of the burial, as a result of which water and mud entered the vault and forced its top to the surface, was due to their negligence and carelessness does not convert it into an action in tort.
>
> The defendants held themselves out as specially qualified to perform the duties of an undertaker. When they undertook to conduct the funeral of plaintiff's deceased husband they impliedly covenanted to perform the services contemplated by the contract in a good and workmanlike manner. Any breach of the duty thus assumed was a breach of the duty imposed by the contract and not by law." *Lamm v. Shingleton*, supra at 13.

So in the case *sub judice*, it becomes necessary to determine whether, should the jury find a breach of contract, mental anguish is an element of damages to be considered by the jury for the breach of

this contract. In *Lamm*, the Court noted that damages for mental anguish could be recovered in an action for breach of contract to marry, *Allen v. Baker*, 86 N.C. 91, 40 Am.Rep. 444; Anno. 41 L.R.A. n.s. 842 and for failure to transmit a death message when the import of the message and the interest of the intended recipient is made known to the transmitter at the time the message is accepted by the telegraph company. *Russ v. Telegraph Co.*, 222 N.C. 504, 23 S.E. 2d 681 (1943); *Betts v. Telegraph Co.*, 167 N.C. 75, 83 S.E. 164 (1914); *Thomason v. Hackney*, 159 N.C. 299, 74 S.E. 1022 (1912). These situations and the one in *Lamm* are, however, singular. The usual contract is commercial in nature and the pecuniary interests of the parties is the primary factor, since they relate to property, or to services to be rendered in connection with business, or to services to be rendered in professional operations. Damages for mental anguish are, therefore, generally not recoverable. There are exceptions. The death message cases and the burial contract cases are among the exceptions. Plaintiff concedes that in North Carolina, in the typical breach of contract action, damages for mental and emotional distress are not normally recoverable because they are not viewed as natural foreseeable consequences of the breach, but he contends that the defendant's breach of the contract here is analogous to the breach of a contract to marry because the subject matter of the contract was of a personal rather than commercial nature. Indeed, plaintiff asks that we take judicial notice "of the fact that when any attorney undertakes to represent a party in his domestic relations problems, then he must be held to reasonably foresee that his client's problems are so coupled with matters of a personal nature and mental concern that if he should fail to do that which he agrees to do and is paid to do, then he will be liable for any mental anguish suffered by such client as a result of his attorney's wrongful acts." This we certainly are not willing to do, nor do we find any authority which would even suggest that we should do so—certainly there is none which would compel such a result. While we readily concede that there could be contracts between attorney and client so personal in nature that the attorney could be assumed to have entered the contract with the knowledge that a failure to fulfill the obligation thereunder in the manner contemplated by the parties would naturally and probably result in the client's suffering mental anguish, we do not think the contract which is the subject of this action falls in that category. We do not regard this contract as predominantly personal in nature. It was necessary that plaintiff obtain his wife's signature to a deed in order that a farm inherited by him and other members of his family could be sold. Plaintiff's wife

had brought an action against him for alimony. The fulfilling of the obligations under the contract in the manner agreed as alleged by plaintiff would have resulted in the sale of the farm and obtaining funds with which to settle the alimony action and obtain its dismissal and settle other property and marital rights of the parties. We agree that plaintiff is not entitled to recover damages for mental anguish.

[5] The trial court also held that plaintiff is not entitled to punitive damage. We agree. The law of North Carolina with respect to this question is stated in *Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976):

> "North Carolina follows the general rule that punitive or exemplary damages are not allowed for breach of contract, with the exception of breach of contract to marry. *Oestreicher v. Stores, supra; King v. Insurance Co.*, 273 N.C. 396, 159 S.E. 2d 891 (1968). The general rule in most jurisdictions is that punitive damages are not allowed even though the breach be wilful, malicious or oppressive. *See, e.g.*, John C. McCarthy, *Punitive Damages in Bad Faith Cases* (1976). Nevertheless, where there is an identifiable tort even though the tort also constitutes, or accompanies, a breach of contract, the tort itself may give rise to a claim for punitive damages. *Oestreicher v. Stores, supra* at 134-35, *citing Saberton v. Greenwald*, 146 Ohio St. 414, 66 N.E. 2d 224 (1946) and 25 C.J.S. Damages § 120.
>
> The early case of *Richardson v. R.R.*, 126 N.C. 100, 101, 35 S.E. 235 (1900) relies on three older cases to support the proposition that '[t]here are many cases where an action for tort may grow out of a breach of contract, but punitive damages are never given for breach of contract, except in cases of promises to marry: *State v. Skinner*, 25 N.C. 564; *Purcell v. R.R.*, 108 N.C. 414; *Solomon v. Bates*, 118 N.C. [311] . . . .' While the quoted statement is arguably equivocal, *Purcell v. R.R.*, 108 N.C. 414, 12 S.E. 954 (1891), cited in support of it, recognized the rule noted in *Oestreicher*, and allowed punitive damages where a separate tort was identified, even though the tortious conduct also constituted a breach of contract. While the distinction between malicious or oppressive breach of contract, for which punitive damages are generally not allowed, and tortious conduct which also constitutes, or accompanies, a breach of contract is one occasionally difficult of observance in practice, it is nevertheless fundamental to any consideration of the question of punitive damages in contract cases. *See* 84 A.L.R. 1345,

> where an annotation upon 'Punitive or exemplary damages for breach of contract . . . .' expressly excepts from its scope '[t]he recovery of exemplary damages in tort actions for breach of a duty growing out of a contract, which are, therefore, not actions purely ex contractu for failure to comply with the contract. . . .'
>
> Even where sufficient facts are alleged to make out an identifiable tort, however, the tortious conduct must be accompanied by or partake of some element of aggravation before punitive damages will be allowed. *Oestreicher v. Stores, supra; Baker v. Winslow*, 184 N.C. 1, 113 S.E. 570 (1922). Such aggravated conduct was early defined to include 'fraud, malice, such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, wilfulness. . . .' *Baker v. Winslow, supra, citing Holmes v. R.R.*, 94 N.C. 318 (3 Davidson) (1886)."

Here plaintiff alleges that defendant failed to hold the funds until plaintiff's wife had signed all the documents she was supposed to sign. He further alleges that subsequently defendant misrepresented the facts by advising plaintiff that everything had been done in accordance with the agreement, and that the breach of contract was in violation of defendant's fiduciary obligations which he attempted to cover up "by misrepresentation and gross lies". Count II, seeking damages for mental anguish, incorporates the allegations of Count I and alleges defendant's actions were "malicious, intentional, and diabolical". Count III, seeking punitive damages, incorporates all the allegations of the first two counts and additionally alleges: "That the reckless, careless, intentional, malicious and gross actions of the defendant in violation of his fiduciary duties owed unto the plaintiff entitles the plaintiff to punitive damages . . .".

Assuming that the pleadings are sufficient to allege punitive damages, the defendant's motion for summary judgment with respect to this count was properly allowed. In support of his motion, defendant, by affidavits, admitted, as he had in his answer, that the check was delivered to plaintiff's wife before she signed the deed of separation and stipulation of dismissal and that he did advise plaintiff that everything had been accomplished. Defendant averred, however, that the transaction was handled in a manner customarily used by attorneys in his area and that his advice to plaintiff by letter was done without intent to defraud but because he thought everything had been accomplished. Plaintiff presented nothing to the contrary—either by his affidavit or by the interrogatories and defendant's answers thereto. It is clear that had the same evidence

been presented at trial defendant would have been entitled to a directed verdict in his favor with respect to claim for punitive damages. The court, therefore, properly allowed defendant's motion for summary judgment as to this phase of the lawsuit, since the plaintiff neither showed that additional affidavits with respect to this question were at that time unavailable to him nor came forward with affidavits or other materials showing that he was entitled to have an issue presented to the jury as to punitive damages. *First Fed. Sav. & Loan Assn. v. Branch Banking & Trust Co.*, 14 N.C. App. 567, 188 S.E. 2d 661 (1972), *rev'd on other grounds* 282 N.C. 44, 191 S.E. 2d 683 (1972); *see also Millsaps v. Wilkes Contracting Co.*, 14 N.C. App. 321, 188 S.E. 2d 663 (1972), *cert. den.* 281 N.C. 623, 190 S.E. 2d 466 (1972).

Reversed in part; affirmed in part.

Judges PARKER and CLARK concur.

MARGIE W. KENNEDY, WIDOW; ALMA SMALL KENNEDY HOMESLEY, GUARDIAN AD LITEM FOR ROGER DALE KENNEDY, MINOR CHILD; LOLA HOLDEN KENNEDY MILLER, GUARDIAN AD LITEM FOR TRENTON ORGLEE KENNEDY, MINOR CHILD, OF WILLIS TRENT KENNEDY, DECEASED, EMPLOYEE v. MARTIN MARIETTA CHEMICALS, SODYECO DIVISION, EMPLOYER; CONTINENTAL NATIONAL AMERICAN INSURANCE CO. CARRIER

No. 7626IC975

(Filed 5 October 1977)

1. **Master and Servant § 55.1 — workmen's compensation — accident defined**

Within the scope of the Workmen's Compensation Act, the term "accident" has often been defined as (1) an unlooked for and untoward event which is not expected or designed by the injured employee; (2) a result produced by a fortuitous cause.

2. **Master and Servant § 67 — workmen's compensation — gas in work area — heart attack — cause of death**

In an action to recover death benefits under the Workmen's Compensation Act for the death of an employee who died while welding in a large tank used for mixing chemicals, evidence was sufficient to support the finding by the Industrial Commission that there was some gaseous substance or some harmful agent which accumulated in the bottom of the tank and that this substance cut off decedent's oxygen supply, notwithstanding extensive evidence by defendants concerning the employer's precautions in preparing the tank for repair work, where such evidence consisted of testimony by one of decedent's co-workers that he went into the tank to help decedent, that there was "a heavy fume" or something which took his breath away, and that he lost consciousness and was sick as a result of breathing the fumes.

3. Master and Servant § 67.3— workmen's compensation—cause of heart attack—finding supported by evidence

Testimony by a doctor in response to a properly worded hypothetical question was sufficient to support a finding by the Industrial Commission that a sudden deprivation of oxygen accelerated or aggravated decedent's pre-existing heart condition, thereby triggering a heart attack which resulted in his death.

APPEAL by defendants from final order of the Industrial Commission, entered 7 June 1976. Heard in the Court of Appeals 25 August 1977.

This is an action to recover death benefits under the Workmen's Compensation Act for the death of Willis Trent Kennedy. Deceased, an employee of the Sodyeco Division of Martin Marietta Chemicals, died while welding inside a thionator, a large tank used for mixing chemicals.

At the hearing before Deputy Commissioner Roney, plaintiff's evidence tended to show that on 3 January 1973, decedent, in good health, went into thionator six at defendant's Mount Holly dye plant to repair metal blades. After decedent had been inside the thionator for over an hour, he slumped over and began breathing heavily. He did not answer the calls of his helpers. One helper, Gary McCorkle, entered the thionator and attempted to rescue deceased. After being inside the thionator for about five minutes, McCorkle leaned down to extricate deceased's knee, and when his head was level with the head of the deceased, "a heavy fume . . . hit . . . [him], just like it took all . . . [his] wind away from . . . [him], made . . . [him] weak . . . ." McCorkle stated that he felt a smothering sensation and that he called out that there was gas inside the tank. He began to climb out of the thionator; the next thing he remembered was that he was lying on the ramp outside the thionator. He felt weak and dizzy, and he was sick for several days. Decedent was pulled from the thionator by another employee.

An autopsy of decedent revealed that he had died of a heart attack. Dr. Hobart Wood, an expert in the field of forensic pathology, who examined the cardiovascular system of decedent, testified that decedent had suffered a rather severe coronary heart disease with several years of plaque formation in the main coronary vessels. There was evidence of a previous heart attack. It was the opinion of Dr. Wood that "the heart attack [that caused decedent's death] could or might have been brought about by deprived or reduced oxygen supply."

Defendants offered evidence tending to show that thionator six had been shut down, emptied, and boiled clean with water and caustics before decedent entered the tank. The employees of Martin Marietta did not, at the time of decedent's death, smell any hydrogen sulfide, a poisonous gas and a by-product of the chemical reaction producing dye. After Kennedy's death, an employee of defendant chemical company tested the thionator for hydrogen sulfide and found none. He also examined various parts of the thionator and found no defects except a liquid line gate valve which was not properly seated in its recess. This liquid line connected the thionator to a condenser, and, according to the evidence, hydrogen sulfide could have backed up from the condenser through the defective gate valve into the thionator if there had been a malfunction in any of the other thionators connected to the condenser. There was no evidence of malfunction in the other thionators. Decedent had carried an air blower into the thionator, and at the top of the thionator there was an air jet continuously blowing air out of the thionator. According to defendants' evidence, the blower and the air jet, together, were sufficient to exchange all of the air in the thionator approximately once a minute.

Deputy Commissioner Roney found that decedent died as a result of a heart attack when his oxygen supply was suddenly cut off by hydrogen sulfide in the thionator. He concluded that this constituted an accident arising out of and in the course of employment, and he awarded death benefits to the plaintiffs. Defendants appealed to the Full Commission and it affirmed the award. The Full Commission, however, changed the Deputy Commissioner's findings and conclusions to eliminate reference to hydrogen sulfide as the cause of decedent's death. It found that decedent's oxygen supply had been cut off by a "gaseous substance, or some other harmful agent."

Defendants appeal.

Delaney, Millette, DeArmon & McKnight, by Samuel M. Millette, for plaintiff appellee, Margie W. Kennedy.

Childers & Fowler, by Max L. Childers, for plaintiff appellees, minor children of Willis Trent Kennedy.

Kennedy, Covington, Lobdell & Hickman, by Edgar Love III, for defendant appellants.

ARNOLD, Judge.

[1] Recovery under the Workmen's Compensation Act is designed to compensate for those injuries resulting from accidents which

arise out of and in the course of employment. The term "accident" has often been defined as "(1) an unlooked for and untoward event which is not expected or designed by the injured employee; (2) a result produced by a fortuitous cause." *Harding v. Thomas & Howard Co.*, 256 N.C. 427, 428, 124 S.E. 2d 109, 110-11 (1962). Injury by accident is an injury produced by a fortuitous cause. *Brown v. Aluminum Co.*, 224 N.C. 766, 32 S.E. 2d 320 (1944).

[2] Defendants assign error to the finding by the Commission that there was some gaseous substance or some harmful agent which accumulated in the bottom of thionator six, and that this substance or agent cut off the decedent's oxygen supply. We must determine, then, if there is any evidence of substance which will directly, or by reasonable inference, tend to support the Commission's findings. If the findings of fact are supported by any such evidence they are binding on appeal even though there be evidence to support a contrary finding. *Willis v. Drapery Plant*, 29 N.C. App. 386, 224 S.E. 2d 287 (1976); *Russell v. Yarns, Inc.*, 18 N.C. App. 249, 196 S.E. 2d 571 (1973).

Gary McCorkle, the chemical company's employee who went into thionator 6 to retrieve the decedent, gave the following testimony:

> "I went down in the tank to see him sitting down on top of the coils. I called him. He still didn't answer. I grabbed him under each arm trying to pull him out. I couldn't budge him. As I looked down a little further in the tank, I noticed his leg was—it seemed to be stuck in between the coils or something, and as I stepped off the coil down into the bottom of the tank and as I leaned over to push his knee out, it was, I don't know, just a heavy fume or something hit me, just like it took all my wind away from me, made me weak, and I just hollered back up there and told them it was gas in the tank. I started crawling out. I think I remember getting to the mouth of the tank. I don't know whether I made it all the way out or somebody pulled me out. When I came to, I was out on the dock of the plant. I don't remember pulling myself out of the tank or nothing. All I remember when that heavy fume hit me it just made me dizzy and took the wind out. All I wanted to do was get some air."

Notwithstanding the extensive evidence by defendants concerning Martin Marietta's precautions in preparing thionator six for repair work, we find McCorkle's testimony to be competent evidence

which tends to support the finding that there was a harmful gaseous substance in the bottom of the thionator.

[3] The next argument presented by defendants is that the Commission erred in finding that a sudden deprivation of oxygen accelerated or aggravated Kennedy's pre-existing heart condition, thereby triggering his heart attack. According to defendants, Dr. Wood's testimony does not support that finding because (1) Dr. Wood's testimony on this point was in terms of possibilities rather than probabilities and (2) the hypothetical question directed to him did not contain all relevant facts. We disagree.

There is nothing in the record which indicates that Dr. Wood was testifying in terms of possibilities rather than probabilities. The hypothetical question posed covered two pages of the record and was propounded in the proper form, i.e., whether, in the opinion of the doctor, a particular event or condition *could* or *might* have produced the result in question. 1 Stansbury's N.C. Evidence § 137 (Brandis Rev. 1973). In *Lockwood v. McCaskill*, 262 N.C. 663, 668-69, 138 S.E. 2d 541, 545 (1964), cited by defendant appellant, Justice Moore stated that the

> " 'could' or 'might' as used by Stansbury refers to probability and not mere possibility. . . . A result in a particular case may stem from a number of causes. The expert may express the opinion that a particular cause 'could' or 'might' have produced the result—indicating that the result is capable of proceeding from the particular cause as a scientific fact . . . . If it is not reasonably probable, as a scientific fact, that a particular effect is capable of production by a given cause, *and the witness so indicates*, the evidence is not sufficient to establish *prima facie* the causal relationship . . . ." (Emphasis added)

Based on the foregoing standard, we find nothing prejudicially wrong with the doctor's opinion that the inhaling of hydrogen sulfide fumes or other irritating gases could have triggered the heart attack leading to the decedent's death. Furthermore, we reject defendants' contention that Dr. Wood's testimony was incompetent because the hypothetical question failed to incorporate the phrase "to a reasonable degree of medical certainty."

Defendants also argue that the hypothetical question was insufficient because it did not contain all relevant facts, namely that air was being introduced into the tank at various points, and that the blower was completely changing the air within the tank in a little over a minute's time. A close reading of the hypothetical question

reveals that the witness was not called upon to establish that there was a sufficient quantity of hydrogen sulfide to cut off decedent's oxygen supply; the rapidity with which the air was being replaced was not, therefore, a necessary element of the question to the expert witness. Consequently, we find no prejudicial error in the admission of Dr. Wood's answer to the hypothetical question.

In considering defendants' contention that the Commission erred in finding that a sudden deprivation of oxygen accelerated the heart condition, we have also reviewed the record to find whether or not there is any competent evidence to support the Commission's finding. In addition to the hypothetical question relating to the cause of the heart attack, there is evidence that the reddish color of the lungs of decedent could have resulted from inhalation of something other than oxygen. Evidence of the quick breathing by decedent also could have indicated a decreased supply of oxygen. Moreover, the doctor testified that decedent "[w]ith the degree of heart disease that he had . . . would be in a certain precarious state if he were in a situation of decreased oxygen supply. It would certainly be, could be a stress situation for him, and it would lead to essentially a heart attack at some point because of this decreased oxygen with his impaired coronary circulation to the heart."

Based on the foregoing evidence, we conclude that the Commission, having found from competent evidence that there was a diminished oxygen supply due to the presence of a gaseous substance, could reasonably infer that the diminished oxygen supply, combined with decedent's arteriosclerotic heart disease, caused the fatal heart attack.

The order of the Commission awarding death benefits is

Affirmed.

Judges PARKER and MARTIN concur.

STATE OF NORTH CAROLINA v. FRANKLIN DAVID HODGES

No. 7717SC297

(Filed 5 October 1977)

1. **Criminal Law § 143.10— revocation of suspension of sentence—failure to make child support payments**

The evidence, though contradictory, was sufficient to support the court's findings that defendant was in violation of a condition of suspension of his sentence by failing to make child support payments of $30.00 per week, that defendant was an able-bodied man capable of working for an electric company, and that his failure to make the support payments was willful and without lawful excuse.

2. **Criminal Law § 143.3— hearing to revoke suspension of sentence—denial of continuance**

The superior court did not err in the denial of a motion for continuance of a hearing to revoke suspension of sentence to allow defendant to obtain medical records for the purpose of showing he was disabled where the motion to continue was not made until the day of trial in January 1977, defendant had in effect received one continuance by failing to appear for a November 1976 trial date, and defendant had notice of the need to gather his evidence as of 7 September 1976 when he appealed from an order of the district court activating his sentence; furthermore, defendant was not prejudiced by the denial of the motion since defendant claimed to be disabled for only a portion of the time during which he failed to make support payments, and the defense of disability would have no effect on the violation of the condition of suspension prior to his disability.

3. **Criminal Law § 143.1— notice of intent to revoke suspension of sentence**

Defendant was given sufficient notice of the State's intent to pray revocation of the suspension of his sentence for abandonment and nonsupport of his wife and children where the arrest warrant which provided the basis for the revocation hearing stated, "The defendant named above having failed to comply with support order. The defendant is in arrears in the amount of $690.00 as of 4-27-76."

4. **Criminal Law § 143.10— revocation of suspension of sentence—failure to make support payments—moratorium on payments**

The trial court properly revoked suspension of defendant's sentence for breach of a condition requiring him to make child support payments without altering an order which declared a moratorium on the payments where there was evidence that defendant had willfully refused to make the payments when he was able to pay prior to the time the moratorium was ordered.

5. **Criminal Law § 143.4— revocation of suspension of sentence—failure to appoint counsel in district court—appointment in superior court**

Defendant was not prejudiced by failure of the court to appoint counsel to represent him at a hearing to revoke his suspended sentence held in the district court where defendant was awarded a trial *de novo* in superior court upon his appeal of the district court order, and counsel was appointed for him in superior court in ample time to prepare for his defense. G.S. 7A-451(a).

State v. Hodges

APPEAL by defendant from *Seay, Judge.* Judgment entered 24 January 1977 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 31 August 1977.

Defendant was charged with a violation of a condition of the suspension of a prison sentence imposed 14 October 1975 upon a conviction for abandonment and nonsupport of his wife and children in violation of G.S. 14-322. A condition of the suspension of sentence was that defendant pay $30 weekly to the Clerk of Superior Court for the use and benefit of two minor children to be paid to Carolyn Holt. At a hearing conducted in District Court 30 December 1975, defendant was found to be $270 in arrears and was ordered to pay the arrearage and to keep future payments current. The defendant, on 22 July 1976, plead nolo contendere to a charge of failure to comply with the support order, and the judge ordered a moratorium on payments accruing after 7 May 1976. On 7 September 1976, defendant was again before the District Court on a charge of failure to comply with the support order and was found to be in willful noncompliance with the support order, and the suspension of sentence was revoked. Defendant appealed the District Court order activating his sentence to Superior Court. From a judgment in Superior Court ordering the activation of the suspended sentence and imprisonment of defendant for 60 days, defendant appealed.

The State presented evidence tending to show that on 14 October 1975 the defendant had been ordered to pay $30 per week for the support of his two minor children and that the defendant had paid only $25 for support since 1972. It was stipulated that the defendant had made no payments since his 14 October 1975 conviction in District Court for nonsupport.

The defendant offered evidence which tended to show: that he had been disabled as a result of knee injuries since April 1976; that he had received no income since he became disabled; that he was receiving no disability benefits; and that the knee had been x-rayed and he was told it was badly bruised. The defendant also testified that he had told his wife he would pay her $30 a week if she would let him see the children.

Attorney General Edmisten, by Associate Attorney Donald W. Grimes, for the State.

Bethea, Robinson, Moore & Sands, by Alexander P. Sands III, for defendant appellant.

MORRIS, Judge.

The defendant preserves six assignments of error in five arguments to the court. The arguments in appellant's brief contain assignments of error which are misnumbered and three of the assignments of error are conclusory broadsides containing no legal issue, which we have repeatedly held to be inadequate to bring a question before this Court. *Hudson v. Hudson*, 21 N.C. App. 412, 204 S.E. 2d 697 (1974). In the exercise of our discretion, however, we have searched the record to discern defendant's contentions as to error, and we conclude there was no prejudicial error.

[1] The defendant's first assignment of error is directed to the court's failure to dismiss the case at the close of the State's evidence and in entering judgment revoking defendant's suspended sentence. By this assignment of error, the defendant would have this Court review the sufficiency of the evidence. Exceptions to the signing and entry of judgment present the face of the record for review. *State v. Robinson*, 26 N.C. App. 620, 216 S.E. 2d 497 (1975). We have reviewed the organization of the court, the plea, and the judgment and find no error. Exception to judgment activating sentence also challenges the sufficiency of the findings of fact by the trial judge to support his judgment. *State v. Caudle*, 7 N.C. App. 276, 172 S.E. 2d 231 (1970), *rev. on other grounds*, 276 N.C. 550 (1970). In the instant case the judge found that the defendant was in violation of a condition of the suspension of sentence by not making payments to his wife, and that the defendant is an able-bodied man capable of working for an electric company and, therefore, without legal excuse for nonpayment. The findings are sufficient to support the judgment. Defendant argues that the evidence is insufficient to support the finding that defendant is an able-bodied man. The trial judge is accorded discretion in activating a suspended sentence, and all that is required is that the evidence shall satisfy the judge in the exercise of his sound discretion that the defendant has violated, without lawful excuse, a valid condition upon which the sentence was suspended and that the judge's findings of fact in the exercise of his sound discretion are to that effect. *State v. Robinson*, 248 N.C. 282, 287, 103 S.E. 2d 376, 380 (1958). The evidence relating to the physical condition of defendant was contradictory, and it was within the discretion of the trial judge to find that the defendant was "able-bodied" and "capable of working for an electric company" and that his refusal to make payments was willful. This assignment of error is overruled.

[2] The defendant's second assignment of error is directed to the court's failure to allow the defendant's motion to continue.

> "A motion for a continuance is ordinarily addressed to the discretion of the trial court, and its ruling thereon is not subject to review absent an abuse of discretion, but when the motion is based on a right guaranteed by the federal and state constitutions, the motion presents a question of law and the order of the court is reviewable." 4 Strong, N.C. Index 3d, § 91.1, pp. 442-443.

Defendant asserts that the continuance was requested to allow time to prepare an adequate defense and the ruling is, therefore, subject to review. Reviewing the record, we conclude there was no error. In actuality, the defendant received one continuance *de facto* by not appearing for a November 1976 trial date. The hearing in January was scheduled only after the defendant failed to appear before the court in November. The defendant had notice of the January trial and of the need to gather his evidence as of 7 September 1976 when the District Court activated his sentence. The motion to continue was not made until the day of trial. The burden is on the defendant to act in a more timely fashion and it was within the judge's discretion not to allow a continuance. Assuming, *arguendo*, that a continuance should have been granted, the defendant, by his own evidence, discloses there was no prejudice. The continuance was requested to enable the defendant to prove his disability by obtaining medical records. The evidence shows, however, that the defendant claims he was not disabled until April 1976, and this defense would have no effect on the violation of the condition of suspension of sentence prior to April. This assignment of error is overruled.

[3] The defendant's third assignment of error is that he was given no notice of the State's intent to pray revocation of the suspension of sentence in violation of G.S. 15-200.1. *State v. Dawkins*, 262 N.C. 298, 136 S.E. 2d 632 (1964), is controlling. In *Dawkins* the Court stated that no particular form of writing is required to give proper notice and the Court held that a capias "in writing and directed [to the] defendant to answer 'on a charge against him of failure to comply—$80.00 in arrears in alimony as of 10-25-63' " was sufficient notice. *State v. Dawkins*, *supra* at 300. The chain of proceedings in the instant case is not clear from the record on appeal. We think it logical to assume, as did the parties in their briefs, that the 7 September revocation hearing was based on the 29 April arrest

warrant. The warrant providing the basis for the revocation hearing in the instant case stated:

> "The defendant named above having failed to comply with support order. The defendant is in the arrears in the amount of $690.00 as of 4-27-76 . . . ."

This warrant was sufficient notice to comply with G.S. 15-200.1. Additionally, the court, in its judgment, recited that after the order was entered directing defendant to make payments for the support of his children, he noted an appeal but withdrew the appeal; that thereafter, and on 22 July 1976, the court declared a moratorium on payments from 7 March 1976, until defendant became able to pay and directed defendant to report to the court on 10 August 1976; that defendant appeared in court 7 September 1976 and the court found that he was able to support his children but refused to do so and activated the suspended sentence and defendant appealed to Superior Court; that defendant failed to appear in Superior Court on 23 November 1976, but did appear at the 17 January 1977 session at which time counsel was appointed for him. It is difficult to imagine a situation where a defendant has been accorded more leniency nor where it is more obvious that he has been completely aware and on notice of the purpose of the hearing. This contention is without merit.

[4] The defendant's fourth assignment of error is directed to the court's failure to dismiss or remand to the District Court because the suspension of sentence was revoked without altering the 22 June 1976 order declaring a moratorium on payments of support from 7 May 1976. The moratorium could not affect defendant's liability on payments accrued before 7 May 1976 and the defendant stipulated that he had made no payments since the order of 14 October 1975. There was evidence that the defendant had willfully refused to make the payments when he was able to pay. In his testimony defendant stated that he had told his wife he would pay the $30 per week if she would allow him to see the children. If the trial judge believed this testimony it would prove that the defendant had willfully refused to make the payments for a reason other than a lawful excuse. In activating a sentence, all that is required is that the judge find that the defendant has violated a condition of the suspension, without lawful excuse. *State v. Robinson, supra.* The judge was justified in revoking the suspension of sentence for failure to comply with the court order between 14 October 1975 and 7 May 1976. This assignment of error is overruled.

[5] The defendant's last assignment of error is that he was not appointed counsel prior to the revocation hearing in District Court and that G.S. 7A-451 requires appointment of counsel "as soon as feasible". It is conceded that G.S. 7A-451(a), which provides indigents with the right to counsel, would apply to revocation of a suspended sentence. The defendant received the aid of counsel, however, for upon his appeal of the District Court order he was awarded a trial *de novo* in Superior Court, and counsel was appointed for him in the Superior Court in ample time to prepare for his defense. The record clearly shows that defendant's appointed counsel represented him in a most adequate fashion. No prejudice has been shown, and this assignment of error is overruled.

Affirmed.

Chief Judge BROCK and Judge BRITT concur.

STATE OF NORTH CAROLINA v. KENNETH WAYNE WADDELL

No. 7718SC342

(Filed 5 October 1977)

Criminal Law § 76.5— confession—conflicting evidence on voir dire—failure to make finding of fact—error

Where there was conflicting evidence on *voir dire* as to whether defendant requested counsel during interrogation, the trial court erred in failing to make a specific finding of fact with respect thereto.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 9 December 1976 in Superior Court, GUILFORD County. Heard in the Court of Appeals 22 September 1977.

By bill of indictment proper in form, defendant was charged with felonious breaking and entering on 16 February 1976. He pleaded not guilty, the jury returned a verdict of guilty, and the court rendered judgment that defendant be imprisoned for the term of three years in the custody of the Secretary of Correction as a "Committed Youthful Offender" and be assigned to work under supervision of the Department of Correction. Defendant appealed.

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

Clark, Wharton, Tanner & Sharp, by Eugene S. Tanner, Jr., for the defendant.

MARTIN, Judge.

Defendant contends the trial court erred in admitting into evidence statements by defendant in the nature of a confession for the reason that "[t]he Court made no specific findings of fact with respect to whether the defendant had requested an attorney prior to termination of the interrogation and before making any confession." In light of the conflict in evidence on *voir dire* relative to this material point, defendant argues not only that a specific finding of fact was required, but also that the absence of such finding of fact renders without support and ineffective the trial court's conclusion that "[defendant's] statement was freely, understandingly and voluntarily given. . . ." We agree.

On the *voir dire* examination conducted by the trial court to determine the admissibility of the confession, evidence for the State discloses that defendant signed a waiver of rights statement in the presence of Officers Farlow and Ballance at 4:30 a.m. on the 16th day of February 1976. Officer C. F. Allen, testifying for the State, stated that he arrived at the police station sometime around 5:00 a.m. and to his knowledge was the first person to interrogate the defendant. Officer Allen further testified:

> "Patrolman Ballance asked me out in the hall, or I went out in the hallway there and I asked him if there were footprints found near the burglary scene and he stated yes, there were, that they were sort of, I guess, a ripple sole affair, I call it. He found—it appears that the footprint was found where the suspects had run from Mrs. Vickory's home. At that point I went back into the interview room and Ballance came in right behind me, and I asked Mr. Waddell—I said, 'Kenneth, let me see your shoes.' He lifted his foot like this and I said, 'un huh.' I said, 'That's the same kind of footprint that was found down there at that crime scene.' At that time he said, 'All right, I'll tell you about it.' He started making a statement how they had been over at his house at 1608 Hook Street, I believe it is, and he—
>
> ". . . I might have spent an hour altogether with Kenneth, and the reason I say that was because I was trying to get things coordinated so that the other defendants could also be interviewed, and at one time or another, I spoke briefly with all of them. While I was talking with Kenneth Waddell, Officer Ballance came into the room about the time I asked Kenneth, 'Let's see your feet, your shoes.' Nobody else came in."

Cross-examination of Officer Allen on *voir dire* produced the following testimony relevant to defendant's alleged request for an attorney before making the confession:

> "I don't recall hearing Mr. Waddell ask anyone that he wanted to make a telephone call to his mother. I don't know that he did not.
>
> "As to whether I know that he did not make one to me, or ask me to make it, I don't recall him asking me. Now, he talked not only to myself but to the uniformed Officer Ballance, Officer Farlow, and I believe Detective Cook and Sergeant Bishop. He could have asked one of them, but I don't recall him asking me.
>
> "I can't testify that he did not ask me, but the best I can recall he did not.
>
> "As to whether I didn't testify that he did not ask me to make a telephone call, the best that I can recall he did not ask me to make a telephone call."

Defendant's evidence on *voir dire* reveals that he signed the waiver of rights statement and "was going to go ahead and talk with [the officers] without a lawyer. . . ." However, defendant also testified as follows:

> ". . . I told them I didn't break in no house so that Officer—I think it was Ballance—him and the detective, they came and took my shoes. They said they found feetprints there at the house and they told me to take my shoes off up there. I took them off and they took them to the evidence room or somewhere. Then I asked to use the telephone to call my mother, but he just kept saying that we'll let you use it in a few minutes, and I asked him about three or four times and I never did get to use the telephone that night to call home.
>
> "It was about 5:00 when I asked to use the telephone. As to whether I told them why I wanted to use the telephone, yes, I wanted to get this contact with my mother to try to get me a lawyer. I made the request to the detective right there in the dark suit and to Ballance."

Upon the conclusion of the evidence on *voir dire*, the trial court made the following findings and conclusions:

> "Now, with respect to the confession, after hearing the evidence offered both by the State and the defendant and the

argument of counsel, the Court makes the following finding of fact:

"That Officer Ballance of the Greensboro Police Department went to an interrogation room with Officer Farlow at approximately 4:20 a.m.; that the defendant was in the interrogation room by himself at that time; that Officer Ballance advised the defendant that he had a right to remain silent; that anything he said could be used against him; that he had a right to an attorney; and that if he could not afford one, one would be appointed to represent him; that the defendant acknowledged that he understood these rights and signed a written waiver of these rights wherein he stated that he understood his rights; that he did not want an attorney and he agreed to make a statement; that at that time the defendant was not under the influence, and that no threats or promises were made to him; that thereafter Captain Allen came into the interrogation room about 5:00 a.m.; that he told the defendant that a co-defendant had made a statement and that if he, the defendant, would make a statement, he would also tell the District Attorney that the defendant was cooperative; that the defendant stated that no threats were made to him and stated that he freely and voluntarily made his statement; that no promise was made to the defendant concerning bond; that the defendant did not remember any officer saying that the officer would recommend to the Court anything if the defendant made a statement.

"Based on the foregoing findings of fact, the Court concludes that even though Captain Allen told the defendant he would tell the District Attorney if the defendant was cooperative, the defendant did not understand this and it was not considered by the defendant as a hope of reward or a hope of leniency; that the defendant was fully advised of his Constitutional rights and that his statement was freely, understandingly and voluntarily given without any threat or reward or hope of reward, and, therefore, the defendant's statement is admissible in the trial of this case."

It is well established in this jurisdiction that when the admissibility of an in-custody confession is challenged, the trial judge must conduct a *voir dire* to determine whether defendant has been informed of his right to remain silent and right to counsel as prescribed by *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), and whether the confession was in fact voluntarily made. *State v. Jenkins*, 292 N.C. 179, 232 S.E. 2d 648 (1977); *State v.*

Riddick, 291 N.C. 399, 230 S.E. 2d 506 (1976); see *State v. Mills*, 6 N.C. App. 347, 170 S.E. 2d 189 (1969). At the conclusion of the *voir dire*, the trial judge *should* make findings of fact to indicate the basis of his ruling. However, when there is a conflict in the evidence on *voir dire* as to a material fact, the trial judge *must* make appropriate findings in order to resolve the crucial conflicts. *State v. Siler*, 292 N.C. 543, 234 S.E. 2d 733 (1977); *State v. Biggs*, 289 N.C. 522, 223 S.E. 2d 371 (1976).

In the instant case, the trial court's findings of fact omit any reference as to whether defendant requested an attorney before making his confession. The existence or nonexistence of such a request is a *material* consideration in determining the admissibility of a confession arising out of in-custody interrogation. In laying down the ground rules for protecting an accused's privilege against self-incrimination and assuring his right to counsel during custodial interrogation, the Supreme Court of the United States in the *Miranda* decision emphasized that if at any time during the questioning the accused states that he wants an attorney, the interrogation must cease until an attorney is present. Thus, defendant's contention, in essence, requires us to ascertain whether he had been denied the assistance of counsel at the time of the interrogation which produced his confession. If during interrogation the defendant made known his desire for counsel to either Officer Allen or Officer Ballance and thereafter Officer Allen continued to interrogate defendant, any incriminating statement thus elicited cannot be received in evidence against him.

Officer Allen testified on *voir dire* that he could not recall whether defendant had asked to use the telephone to call his mother for the purpose of contacting an attorney. No testimony was elicited from Officer Ballance on *voir dire* relative to this matter; however, during the trial, Officer Ballance did state that while he was present in the interrogation room defendant made no request to call his mother. Defendant, in his testimony, was unequivocal in his assertion that he repeatedly requested to use the telephone to contact his mother for the purpose of obtaining counsel and was in each instance denied. He stated specifically that his requests were directed to "the detective right there in the dark suit [referring to Officer Allen] and to Ballance." In light of this material conflict in the evidence on *voir dire*, we find that the failure of the trial judge to make a finding of fact with respect thereto was error. *State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492 (1968); see *State v. Williford*, 275 N.C. 575, 169 S.E. 2d 851 (1969).

Accordingly, we hold that in the absence of a finding as to whether defendant requested counsel during interrogation and a ruling thereon, the admissibility of any confession the defendant may have made must be determined at a new trial.

New trial.

Judges PARKER and ARNOLD concur.

LIZZIE W. ENGLISH v. GLORIA JEAN ENGLISH

No. 764SC1027

(Filed 5 October 1977)

Insurance § 29.1 — group life insurance — change of beneficiary — insurance review form

An insured complied with a provision of a group life insurance policy requiring "written notice" to effectuate a change of beneficiary when, on an insurance review form distributed by his employer, the insured marked through defendant's name and added plaintiff's name as designated beneficiary, and he then signed the form and returned it to his employer, the execution of a change of beneficiary form provided by the insurance company not being required under the policy.

APPEAL by plaintiff from *Bailey, Judge*. Judgment entered 24 September 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 20 September 1977.

Plaintiff Lizzie W. English instituted this action seeking to be declared sole beneficiary under a group insurance policy insuring the life of James Allen English, thereby entitling plaintiff to the $10,000 proceeds of the policy to the exclusion of the defendant.

Defendant Gloria Jean English filed answer and counterclaim alleging that as of the date of the accidental death of James Allen English defendant was still the named beneficiary under the aforesaid group insurance policy and is, therefore, entitled to the benefits under the policy to plaintiff's exclusion.

Upon stipulation and agreement by all parties, plaintiff Lizzie W. English and defendant Gloria Jean English took a voluntary dismissal of their respective actions against defendant Provident Life and Accident Insurance Company upon its agreement to pay into the office of the clerk of superior court the sum of $10,000.00.

This matter came to be heard in the superior court before Judge Bailey upon separate motions for summary judgment duly

filed by both plaintiff and defendant. The respective motions were submitted and heard upon admissions and stipulations of parties, plaintiff's supporting affidavits and defendant's deposition of Jack Cottle. This evidence established that at the time of his accidental death on 19 July 1975, James Allen English was the son of plaintiff Lizzie W. English and the husband of defendant Gloria Jean English; that prior to his death, James A. English was employed by J. P. Stevens & Co. and insured in the amount of $10,000 for accidental death under a group insurance policy written by Provident Life and Accident Insurance Co.; that plaintiff Lizzie W. English was originally designated as beneficiary under this policy, but on 31 May 1973 the designated beneficiary was changed to Gloria B. English, being the same as defendant Gloria Jean English. This change of beneficiary was accomplished by the insured's signing and returning, with the name of Lizzie W. English struck out, an insurance review form distributed by J. P. Stevens & Co. Insured subsequently executed the change of beneficiary form provided by Provident on which he designated Gloria B. English as beneficiary. On or sometime after April 1975, a similar insurance review form was distributed to the insured James A. English on which he marked through the name of then beneficiary Gloria B. English and added the name of Lizzie W. English before returning it to J. P. Stevens & Co. No change of beneficiary form was executed by James A. English after the return of this particular insurance review form and prior to his death on 19 July 1975.

By stipulation, the parties submitted that the sole issue to be determined by the court was whether the insurance review form signed and returned by James A. English during April or May 1975 was sufficient to change the beneficiary from defendant to plaintiff within the meaning of the policy requirement of ". . . giving written notice. . . ." The relevant policy provision reads as follows:

> "You may designate anyone you wish as your beneficiary by filing such designation at the office of the group policyholder on a form satisfactory to the Provident. You may change your beneficiary at any time by giving written notice, and the change will become effective on the date the request is signed, except that the Provident is not liable for any payment made prior to the receipt of your request."

The trial court granted defendant's motion for summary judgment and denied plaintiff's motion for summary judgment basing its decision on its findings that James English knew the procedure for changing beneficiaries, was aware of the official change of

beneficiary form and, by not filing this form, failed to effectuate his intent to change the beneficiary of his policy. Plaintiff appealed to this Court.

Wells, Blossom & Burrows, by Richard L. Burrows, for the plaintiff.

Canoutas and Carter, by Stuart V. Carter, for the defendant.

MARTIN, Judge.

In assigning error to the trial court's ruling on the respective motions for summary judgment, plaintiff contends in the first instance that the trial court went beyond the record and found facts—specifically, insured's intent—contrary to the function of the trial court on a motion for summary judgment. It is well established that on a motion for summary judgment the court is called upon not to decide issues of fact, but to determine whether there exists a genuine issue as to any material fact. *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972); *Kessing v. Mortgage Co.*, 278 N.C. 523, 180 S.E. 2d 823 (1971); *Furst v. Loftin*, 29 N.C. App. 248, 224 S.E. 2d 641 (1976). However, in the instant case we find, and plaintiff does not contend otherwise, that the sole issue submitted by stipulation of the parties to the trial court was a proper question for summary judgment. Thus, the questionable findings of fact made by the trial court have no effect on this appeal and are irrelevant to our decision. See *Lee v. King*, 23 N.C. App. 640, 209 S.E. 2d 831 (1974).

The only question which this Court must now decide is whether the April/May 1975 insurance review form was sufficient to change the beneficiary under the insured's policy within the meaning of the policy requirement of "written notice." This presents an issue of law which must be determined by application of relevant insurance principles.

At the outset, we note that defendant appellee has relied extensively on the doctrine of "substantial compliance" as applied to change of beneficiary situations. This equitable principle is applicable where an insured, under an insurance policy providing *specific* and *clear* requirements for effectuating a change of beneficiary, has less than completely complied with these requirements in an attempt to change the beneficiary of his policy. Where it appears that the insured has done all that he reasonably could do to comply with the specific policy provisions but was unable to fully comply by reason of circumstances beyond his control, the courts will give effect to the intention of the insured and

hold that the change of beneficiary has been accomplished. *Meadows Fertilizer Co. v. Godley*, 204 N.C. 243, 167 S.E. 816 (1933); *Teague v. Pilot Life*, 200 N.C. 450, 157 S.E. 421 (1931); *Wooten v. Order of Odd Fellows*, 176 N.C. 52, 96 S.E. 654 (1918); *see* Annot., 19 A.L.R. 2d 5 (1951). Defendant argues, in support of the trial court's ruling, that insured failed to comply with specific policy requirements by not executing the change of beneficiary form and did not do *all* that he reasonably could do to comply with this requirement in that insured made no effort to file such a form in the nearly two months which transpired before his death.

It is plaintiff's contention that the foregoing application of the substantial compliance doctrine is based upon defendant's improper assumption that execution of the change of beneficiary form provided by Provident is specifically required to effectuate a change of beneficiary under the policy in question. She argues that a proper interpretation of the policy provisions relating to changing beneficiaries reveals that "written notice," signed and delivered to the employer, will effectuate a change of beneficiary. Accordingly, she contends that the insurance review form on which insured clearly designated plaintiff as beneficiary fully complied with the written notice requirement, and thereby entitles plaintiff to a judgment in her favor as a matter of law. We must agree.

A fundamental rule in the construction of insurance contracts is that common, nontechnical terms are to be given their plain and ordinary meanings, absent a special definition of the term in the policy. *Trust Co. v. Insurance Co.*, 276 N.C. 348, 172 S.E. 2d 518 (1970); *Peirson v. Insurance Co.*, 249 N.C. 580, 107 S.E. 2d 137 (1959); *DeBerry v. Insurance Co.*, 33 N.C. App. 639, 236 S.E. 2d 380 (1977). Examining the pertinent policy language in light of this rule, we are unable to hold that "written notice" must be restrictively construed to mean notice only on the forms provided by Provident. We are not unmindful of the language in the first sentence which authorizes an insured to designate a beneficiary by filing "a form satisfactory to the Provident." However, it does not follow that this same restriction is to be implied in the next sentence which speaks specifically to *changing* the beneficiary "by giving written notice." Moreover, language following the written notice requirement which provides that "the change [of beneficiary] will become effective on the date the request is signed . . ." is inconsistent with the notion that an official change of beneficiary form provided by Provident must be obtained and properly filed in order to effectuate a change of beneficiary.

In so construing the language of the policy before us, we hold that the issue submitted to the trial court should have been decided in plaintiff's favor. Accordingly, we reverse and remand the matter for entry of judgment in accordance with this opinion.

Reversed and remanded.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. DUANE ALTON ABSHER

No. 7723SC290

(Filed 5 October 1977)

1. **Searches and Seizures § 4— ledger in plain view—prior knowledge of ledger's existence—seizure under plain view rule proper**

Officers who possessed a valid search warrant and who were lawfully in defendant's trailer properly seized a ledger book containing a record of defendant's drug transactions which was in plain view in the kitchen. The fact that officers had some information that a record book existed, but not enough information to give probable cause for its specific search, did not render discovery of the ledger advertent so as to make seizure pursuant to the plain view rule improper.

2. **Narcotics § 3— chemist's expert opinion—random sample of contraband as basis**

In a prosecution for possession with intent to sell controlled substances, the trial court properly admitted an expert chemist's opinions as to the identity of certain uncoded tablets and green vegetable material, though the chemist tested only a random sample of the tablets and vegetable material, since expert chemists may give an opinion as to the whole when only a few or parts of the whole have been tested.

APPEAL by defendant from *Seay, Judge*. Judgments entered 3 December 1976 in Superior Court, WILKES County. Heard in the Court of Appeals 31 August 1977.

Defendant was charged in ten separate indictments with felonious possession with intent to sell and deliver controlled substances including cocaine, phencyclidine, marijuana, "LSD," and heroin.

Prior to trial, defendant made written motion to suppress evidence seized during a search of his trailer pursuant to search warrant, which evidence was a small notebook containing ledger entries showing names and dollar signs beside the names. The Court held a *voir dire* hearing and denied defendant's motion.

State's evidence tended to show that, as a result of confidential information, officers of the Wilkes County Sheriff's Department and S.B.I. agents went to the area of defendant's house trailer where they found well-worn paths leading from the trailer to a laurel thicket. In the thicket the officers found burlap and plastic bags containing green vegetable matter. The officers testified that they saw defendant enter the laurel thicket.

The officers later secured a search warrant and returned to defendant's trailer. Defendant admitted them. The officers searched the trailer and found vegetable matter in a partially burned plastic bag, scales, and a ledger book was discovered in the kitchen. From the defendant's parked car the officers removed a brick consisting of a green leafy material. From the laurel thicket the officers took more such material, and plastic bags containing pills, capsules and powders. All the materials were transferred directly to State Bureau of Investigation Chemist McDonald, in Raleigh.

Dr. McDonald identified certain of the drugs as phencyclidine, cocaine, three-four methylenedioxyamphetamine, lysergic acid diethylamide, heroin, oxazepam, methaqualone, hashish, meprobamate and marijuana.

The State also offered evidence tending to show that defendant's fingerprints were found on various plastic bags containing the controlled substances found.

Defendant presented no evidence but moved for nonsuit. Defendant's motion was denied and the jury found him guilty as charged on all ten counts. From the judgment imposing imprisonment defendant appeals.

Attorney General Edmisten by Associate Attorney Thomas H. Davis, Jr. for the State.

Vannoy, Moore & Colvard by Morris W. Keeter; Max F. Ferree, P.A. by William C. Gray, Jr. for defendant appellant.

CLARK, Judge.

[1] The defendant makes eight assignments of error in his brief. The first five involve the contention that the court erred in denying his motion to suppress the ledger notebook seized pursuant to the search warrant. The court held a *voir dire* hearing on his motion. Defendant maintained, first, that the ledger book was not listed as an item to be seized in the warrant, and, second, that its seizure was

not inadvertent, as the officers had been informed of its existence and location prior to the issuance of the warrant.

The application for the search warrant reads in pertinent part:

"... There is probable cause to believe that certain property, to wit: Marijuana (constitutes evidence of) . . . a crime, to wit: violation of the North Carolina Controlled Substances Act ....

The applicant swears to the following facts to establish probable cause for the issuance of a search warrant: the affiant states that he has received information from a confidential informant who has given information in the past that had proven to be true and reliable, that the informant saw a quantity of marijuana at and inside the above described dwelling and that Duane Absher had narcotics on his person. *Further Det. Garris has received information from other true and reliable informants that Duane Absher was a big pusher of narcotics in Wilkes County and that he keeps a record inside the trailer of his drug transactions. . . .*" [Emphasis added.]

It is not necessary that a specific item be named in a search warrant in order for it properly to be seized. The Fourth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, indeed requires that no search warrant "shall issue . . . but upon probable cause . . . particularly describing the place to be searched and the persons or things to be seized." But *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed. 2d 685 (1969), created an exception to the requirement of specific description, the Plain View Rule. An item is lawfully seized, although not specifically described, if the officer is in a place lawfully and if the item seized is in plain view. Detective Garris and the others were possessed of a valid search warrant, were in the trailer lawfully, and the ledger book was lying in plain view in the kitchen.

Defendant contends that, although the above be true, yet, because the application for the warrant clearly indicates that the officers had some knowledge of the existence of the record book, its seizure was not warranted by the plain view exception, because not truly inadvertent.

N.C. G.S. 15A-253 requires inadvertence of discovery of items not specified in a search warrant. The recent case of *State v. Zimmerman*, 23 N.C. App. 396, 209 S.E. 2d 350 (1974), *cert. denied*, 286

N.C. 420, 211 S.E. 2d 800 (1975), defined inadvertence so as clearly to include the discovery of defendant's record book:

> ". . . Thus, we hold it is permissible to seize an item, constituting 'mere evidence' while *properly* [emphasis in original] executing a search warrant for another item when (1) there exists a nexus between the item to be seized and criminal behavior, and (2) the item is in plain view, and (3) the discovery of that item is inadvertent, *that is, the police did not know its location beforehand and intend to seize it. . . .*" [Emphasis added.] *State v. Zimmerman*, 23 N.C. App. at 402, 209 S.E. 2d at 355.

The officers had had some information that a record book existed, but not enough information to give probable cause for its specific search. Mere suspicion of a thing's existence is clearly not destructive of inadvertence. Knowledge, presumably such as would generate probable cause, is required and a positive intent to search. Defendant does not disprove the inadvertence of the discovery of the ledger book and the lawfulness of its seizure by showing that the officers had some suspicion that he kept such a book. Although the court made no findings of fact or conclusion of law on the issue of inadvertence, its denial of defendant's motion to suppress is not reversible error because clearly supported by the evidence presented on *voir dire*.

The ledger book, being lawfully seized, was properly admitted in evidence and properly passed among the members of the jury.

[2] Defendant's last three assignments of error challenge the court's admission of Dr. McDonald's opinions as to the identity of certain uncoded tablets and green vegetable material. Dr. McDonald admitted that, out of 400 tablets contained in a number of various bags, he tested only 5, and that he did not remember examining all eight bags of green vegetable material. McDonald was permitted to give his expert opinion that all the 400 tablets were phencyclidine and that the larger part of all the vegetable material was marijuana.

Defendant acknowledges that expert chemists may give opinion as to the whole when only a few or parts of the whole have been tested. *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970); *State v. Wooten*, 20 N.C. App. 499, 201 S.E. 2d 696 (1974); *State v. Hayes*, 291 N.C. 293, 230 S.E. 2d 146 (1976). But he attempts to distinguish these cases from his. In *Riera, supra*, all the capsules were coded. In this case they were not. In *Wooten*, the 29 bags allegedly containing

heroin were similar in shape and weight. In *Hayes* the expert examined the contents of all the envelopes, decided that each appeared to be the same and then selected 5 envelopes at random before reaching the opinion that all contained marijuana. The cases are not distinguishable. Dr. McDonald followed accepted scientific practice. He testified that he examined all the tablets and that they appeared identical to him. The random selection of five for chemical analysis and his opinion based on the analysis' result was not, as defendant contends, an unqualified guess of mathematical probability, but a scientific opinion based on accepted methods, as was his opinion that all the bags contained marijuana.

As Dr. McDonald's opinion evidence was clearly admissible, the court's denial of defendant's motion for nonsuit on the basis of insufficient evidence on the issue of possession with intent to sell was not error. "[I]f there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury." *State v. Johnson*, 199 N.C. 429, 431, 154 S.E. 730, 731 (1930).

No error.

Judges VAUGHN and HEDRICK concur.

JOANN SNYDER LINDSEY v. SAMUEL L. LINDSEY

No. 7626DC956

(Filed 5 October 1977)

1. **Divorce and Alimony § 21.7— past due alimony and child support—statute of limitations**

When the obligor under a judgment awarding alimony and child support is in arrears in the periodic payment of alimony and child support the court may, upon motion in the cause, judicially determine the amount then properly due and enter its final judgment for the total then properly due, and execution may issue thereon; however, periodic sums of alimony and child support which become due more than 10 years prior to the motion in the cause are barred by the 10 year limitation of G.S. 1-47.

2. **Divorce and Alimony § 24.10— child support—court order—child living with obligor—child reaching majority**

The trial court erred in failing to reduce defendant father's obligation for past due child support pursuant to a court order for the time the children lived with him and for the time after which one child reached eighteen years of age.

3. Divorce and Alimony § 17.2— alimony—court order—remarriage

Defendant's obligation to make alimony payments to plaintiff pursuant to a court order terminated upon plaintiff's remarriage. G.S. 50-16.9(b).

4. Divorce and Alimony §§ 20.3, 27— past due alimony and child support—attorney's fees—insufficient findings

In a hearing on a motion in the cause for a determination of the amount owed by defendant to plaintiff for past due alimony and child support, the trial court erred in awarding judgment against defendant for counsel fees to plaintiff's counsel where, with respect to the child support portion of the judgment, the court failed to determine that plaintiff had insufficient means to defray the expense of the suit, and where the court failed to make sufficient findings of fact upon which it can be determined that the allowance was reasonable.

APPEAL by defendant from *Hicks, Judge*. Judgment entered 5 July 1976 in District Court, MECKLENBURG County. Heard in the Court of Appeals 23 August 1977.

The judgment appealed from was entered upon plaintiff's motion in the cause for a determination of the total sum in arrears upon judgments requiring defendant to make monthly payments of alimony and child support.

On 22 April 1964 plaintiff and defendant entered into a consent judgment awarding to plaintiff custody of the two minor children of the parties, and requiring, *inter alia*, that defendant pay to the plaintiff monthly the sum of $200.00 alimony and $75.00 support for each of the minor children (a total of $350.00 monthly).

On 10 March 1965 an order was entered in this cause which modified the original judgment by reducing the monthly payments and requiring that defendant, beginning with 10 April 1965, pay to plaintiff monthly the sum of $114.00 alimony and $43.00 support for each of the minor children (a total of $200.00 monthly).

On 21 October 1975 plaintiff filed the present motion in the cause. She alleged that Diane Lindsey (born 27 June 1952) began living with defendant in January 1969, and that Scott Lindsey (born 2 September 1960) lived with defendant from August 1970 until 1 November 1974. She also alleged that she remarried on 10 February 1973.

Plaintiff further alleged that defendant was obligated under "the terms of the orders entered in this cause" to pay the total sum of $20,049.00 through 15 September 1975. She further alleged that defendant had made certain payments during years beginning in 1964 through 15 September 1975. In her motion she alleged by the year the amounts paid to her during each of those years, totaling

$5,580.78. The amount plaintiff alleged was required to be paid under the previous orders less the total amount she alleged had been paid left a balance of $14,468.22. The trial judge found that the total of the payments required under the judgment dated 22 April 1964 and the order dated 10 March 1965 was $20,049.00; that defendant had paid the total sum of $5,580.78 through 15 September 1975; and awarded judgment for plaintiff in the sum of $14,468.22.

Thomas R. Cannon for the plaintiff.

Francis O. Clarkson, Jr., and Stephen D. Poe, for the defendant.

BROCK, Chief Judge.

[1] A judgment awarding alimony and child support is a judgment directing the payment of money, generally in future installments. When the obligor under such judgment is in arrears in the periodic payment of the alimony and child support the court may, upon motion in the cause, judicially determine the amount then properly due and enter its final judgment for the total then properly due, and execution may issue thereon. *See Barber v. Barber*, 217 N.C. 422, 8 S.E. 2d 204 (1940). However, periodic sums of alimony and child support which became due more than 10 years before the institution of this motion in the cause for a judicial determination of the amount due are barred by the ten year limitation of G.S. 1-47. *Arrington v. Arrington*, 127 N.C. 190, 37 S.E. 212 (1900). Statutes of limitation run as well between spouses as between strangers. *Fulp v. Fulp*, 264 N.C. 20, 140 S.E. 2d 708 (1965). Plaintiff's argument that G.S. 1-306 provides that there shall be no statute of limitations to bar alimony misses the point. G.S. 1-306 excepts "any judgment directing the payment of alimony" from the provision that execution may not issue on a judgment requiring "the payment of money . . . at any time after ten years from the date of the rendition thereof." The decree for periodic payments of alimony and support, in the absence of a provision in the decree itself which constitutes it a specific lien upon the property of the obligor, is not enforceable by execution until the arrears are reduced to judgment by a judicial determination of the amount then due. G.S. 50-16.7(i). *See*, 2 Lee, N.C. Family Law, § 165, p. 270. This is so because the decree for alimony and support may be modified as circumstances may justify.

It seems from a reading of plaintiff's motion and from a reading of the judgment from which this appeal was taken that the trial

judge took into consideration payments which became due more than ten years before the filing of this motion in the cause.

[2] Diane Lindsey reached her eighteenth birthday on 27 June 1970. She lived with defendant from January 1969. Defendant is entitled to have his obligation to plaintiff reduced by $43.00 per month beginning January 1969 and continuing to 27 June 1970 because Diane was living with him, and is entitled to have it reduced by $43.00 per month thereafter because she attained her majority. It does not appear from the judgment that such reduction was allowed.

Scott Lindsey will not reach his eighteenth birthday until 2 September 1978. However, Scott lived with defendant from August 1970 until 1 November 1974. Defendant is entitled to have his obligation to plaintiff reduced by $43.00 per month beginning in August 1970 and continuing to 1 November 1974 because Scott was living with him. It does not appear from the judgment that such reduction was allowed.

[3] Plaintiff was remarried on 10 February 1973. At the time of her remarriage the alimony and child support payments were required by the order dated 10 March 1965, which was not a consent decree. "If a dependent spouse who is receiving alimony under a judgment or order of a court of this State shall remarry, said alimony shall terminate." G.S. 50-16.9(b). It does not appear from the judgment that the trial judge took into consideration the termination on 10 February 1973 of plaintiff's right to alimony.

Defendant's argument that plaintiff is barred by laches from pursuing payments which became due within ten years next preceding the filing of this motion in the cause is untenable.

Defendant's argument that Diane, having reached her majority, is the only person who can assert a claim for any delinquency in the payment of the $43.00 per month for her support is likewise without merit. The plaintiff provided for the support of Diane until Diane went to live with defendant. Plaintiff is entitled to be reimbursed by defendant to the extent of the $43.00 per month defendant was obligated to pay.

[4] The trial judge awarded judgment against defendant for counsel fees to plaintiff's counsel. However he failed to make sufficient findings of fact upon which it can be determined that the allowance was reasonable. *See, Austin v. Austin*, 12 N.C. App. 286, 296, 183 S.E. 2d 420, 427 (1971). Additionally, with respect to the child support portion of the judgment, G.S. 50-13.6 requires that

reasonable attorney fees may be ordered only when it is determined that plaintiff had "insufficient means to defray the expense of the suit." No such determination was made by the trial court.

For the failure of the trial judge specifically to exclude from consideration those payments which became due more than ten years before the filing of this motion in the cause; for the failure of the trial judge to specifically reduce defendant's obligations to pay plaintiff for the support of the children while they were living with him; for the failure of the trial judge specifically to reduce defendant's obligation to pay plaintiff for the support of Diane after she became eighteen on 27 June 1970; for the failure of the trial judge specifically to take into consideration the termination under G.S. 50-16.9(b) of plaintiff's right to alimony; and for the failure of the trial judge to find sufficient facts to support an order for defendant to pay plaintiff's counsel fees, the judgment entered must be vacated in its entirety and this cause remanded for a new hearing.

Judgment vacated.

Cause remanded.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. JOHN FRANCIS LEFFINGWELL

No. 7712SC322

(Filed 5 October 1977)

Criminal Law § 116— defendant's failure to testify—jury instructions

Where defendant offered evidence by several witnesses but did not testify himself, he was entitled, upon proper request, to have the court tell the jury in substance that his failure to take the witness stand and testify in his own behalf did not create any presumption against him.

APPEAL by defendant from *Hall, Judge*. Judgment entered 2 December 1976 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 20 September 1977.

Defendant was indicted for (1) possession of a controlled substance with intent to sell and deliver a controlled substance, lysergic acid diethylamide (Schedule I); (2) sale and delivery of a controlled substance, lysergic acid diethylamide (Schedule I) to Special

Agent N. C. Mills of the State Bureau of Investigation for the price of $1,800.00. He pled not guilty.

The jury found defendant guilty of both offenses. The charges were consolidated for judgment, and defendant was sentenced for the term of not less than two years nor more than four years in the State's prison. Defendant appealed.

Attorney General Edmisten, by Special Deputy Attorney General James L. Blackburn, for the State.

Seavy A. Carroll, for the defendant.

MARTIN, Judge.

The defendant assigns as error the refusal of the court, upon request, to charge the jury as follows: "The burden to overcome the presumption of innocence rests upon the government. The failure of any defendant to testify does not create any presumption of guilt against him. The defendant is never required to prove his innocence." The defendant offered evidence by several witnesses but he did not testify. Thus, this assignment of error raises the question of whether a non-testifying defendant has the indefeasible right, upon proper request, to have the court tell the jury in substance that his failure to take the witness stand and testify in his own behalf does not create any presumption against him. The briefs of the parties and our own research indicate that this question has not been presented to the appellate courts of this State. We note that the substantive right upon which defendant sought instruction relates to a subordinate feature of the case; failure to instruct on subordinate matters ordinarily will not be held for error unless a request for instructions has been made. *State v. Rankin*, 282 N.C. 572, 193 S.E. 2d 740 (1973); *State v. Barbour*, 278 N.C. 449, 180 S.E. 2d 115 (1971). In the case at bar, the defendant has requested the specific instruction and has done so in apt time. Upon the court's failure to charge on this circumstance, defendant preserved and now presents this question of first impression to the Court for determination.

In *Bruno v. United States*, 308 U.S. 287, 84 L.Ed. 257, 60 S.Ct. 198 (1939), the United States Supreme Court was faced with the same question. Some of Bruno's co-defendants took the witness stand. He did not. The trial court gave the following instruction:

> " 'It is the privilege of a defendant to testify as a witness if, and only when, he so elects; and when he does testify his credibility is to be determined in the light of his interest, which usually is

> greater than that of any other witness, and is therefore a matter which may seriously affect the credence that shall be given to his testimony.' " 308 U.S. at 291.

Similar to defendant in the case at bar, defendant Bruno requested this additional instruction:

> " 'The failure of any defendant to take the witness stand and testify in his own behalf does not create any presumption against him; the jury is charged that it must not permit that fact to weigh in the slightest degree against any such defendant, nor should this fact enter into the discussions or deliberations of the jury in any manner.' " 308 U.S. at 292.

The trial judge declined this request, saying "I feel that I've already covered that."

In finding error in the trial judge's refusal to give the requested instruction, the Supreme Court stated that the Act of March 16, 1878, 20 Stat. at L. 30, Chap. 37, now 18 U.S.C.A. § 3481 (1948),

> "... freed the accused in a federal prosecution from his common law disability as a witness. But Congress coupled his privilege to be a witness with the right to have a failure to exercise the privilege not tell against him.... The only way Congress could provide that abstention from testifying should not tell against an accused was by an implied direction to judges to exercise their traditional duty in guiding the jury by indicating the considerations relevant to the latter's verdict on the facts. [Citation omitted.] By legislating against the creation of any 'presumption' from a failure to testify, Congress could not have meant to legislate against the psychological operation of the jury's mind. It laid down canons of judicial administration for the trial judge to the extent that his instructions to the jury, certainly when appropriately invoked, might affect the behavior of jurors. Concededly the charge requested by Bruno was correct. The Act of March 16, 1878, gave him the right to invoke it." 308 U.S. at 292-93.

We find the Supreme Court's interpretation of 18 U.S.C.A. § 3481 (1948) to be persuasive authority on the issue before this Court as the operative portion of the federal statute is almost identical to N.C. G.S. 8-54.

This Court is also guided by the authority of cases dealing with the right of the accused, upon proper request, to an instruction

which calls upon the jury to scrutinize the testimony of a witness on the ground of interest or bias. This instruction is likewise related to a subordinate feature of the trial. *State v. Vance*, 277 N.C. 345, 177 S.E. 2d 389 (1970); *State v. Reddick*, 222 N.C. 520, 23 S.E. 2d 909 (1943); *State v. Sauls*, 190 N.C. 810, 130 S.E. 848 (1925).

In *State v. White*, 288 N.C. 44, 215 S.E. 2d 557 (1975), the defendant, in writing, requested an instruction bearing upon the testimony of an interested witness which the court refused to give because the instruction was in part erroneous. The Court stated:

> "The trial judge was not, however, relieved of his duty to give a correct accomplice testimony instruction, there being evidence to support it, merely because defendant's request was not altogether correct."

Similarly, in *State v. Bailey*, 254 N.C. 380, 119 S.E. 2d 165 (1961), the Court stated:

> "... It is a well established rule with us that if a request is made for a specific instruction as to the rule of scrutiny in the event of an accomplice testifying for the prosecution, which is correct in itself and supported by evidence, the trial judge, while not required to parrot the instructions 'or to become a mere judicial phonograph for recording the exact and identical words of counsel,' must charge the jury in substantial conformity to the prayer. [Citations omitted.]"

Regarding the trial judge's duty in general upon a request for special instructions, our Supreme Court, in *State v. Spicer*, 285 N.C. 274, 204 S.E. 2d 641 (1974), said:

> " 'While the court is not required to give the instruction in the exact language of the request, if request be made for a specific instruction, which is correct in itself and supported by evidence, the court must give the instruction at least in substance.' [Citations omitted.]
>
> * * *
>
> "Failure to give the requested instructions when justified is reversible error. [Citations omitted.]"

In the case *sub judice*, the subject charge was intermingled with requests for instructions governing nearly three pages of the record. In all probability the requests were handed to the judge just before he commenced his charge. The omission of the requested instructions can be easily understood. Nevertheless, the defendant was entitled to the special instructions and its omission from the

charge constitutes prejudicial error for which the defendant is entitled to a new trial.

New trial.

Judges PARKER and ARNOLD concur.

ISABELLE YOUNG MILLER v. JOHN ALBERT MILLER

No. 7622SC1012

(Filed 5 October 1977)

1. **Partition § 12— cross-deeds—erroneous boundary course—effective partition—ineffectiveness of subsequent cross-deeds**

Where respondent and his brother acquired land in 1939 as tenants in common and divided the land equally by a plat which contained an erroneous boundary course, the two brothers and their wives executed cross-deeds to partition the tract in 1942 which also contained the erroneous boundary course, and respondent was the sole grantee of the deed from his brother and his brother's wife, the 1942 deeds were effective to partition the land and to give respondent his share in severalty; therefore, a 1959 cross-deed from respondent's brother and the brother's wife to respondent and respondent's wife which recited that its purpose was to correct errors in the prior deed "and to create an estate by the entireties" was ineffective to give respondent's wife an interest in the land as a tenant by the entirety, since respondent's brother could not convey in 1959 what had already been effectively conveyed in 1942.

2. **Rules of Civil Procedure § 56— authority to vacate denial of summary judgment—notice**

The court had authority to vacate its previous order denying a motion for summary judgment, since the order denying summary judgment was not *res judicata*, and where nothing pertinent to the motion was filed subsequent to the prior order, it was not necessary to issue new notice.

APPEAL by petitioner from *Graham, Judge*. Judgment entered 14 September 1976 in Superior Court, DAVIE County. Heard in the Court of Appeals 1 September 1977.

On 14 April 1975 petitioner Isabelle Miller filed a special proceeding before the Clerk of Superior Court for Davie County seeking a partition order for two tracts of land which she allegedly owned as a tenant by the entirety with respondent John Albert Miller prior to their absolute divorce, and now shared with the respondent as a tenant in common. Respondent answered, agreeing to the partition of tract two but denying that of tract one. He pled

sole seisin of tract one as a defense. Respondent then made timely motion for summary judgment.

From the pleadings, answers to interrogatories and affidavits, the following facts appear: (1) On 24 February 1939 respondent and his brother, Daniel B. Miller, acquired a 282.5-acre tract, which included Tract One, as tenants in common; in the same month the brothers divided the tract equally by a plat, which contained an erroneous boundary course (8 1/2 deg. west) conflicting with that in the deed (80 1/2 deg. west); (2) petitioner and respondent were married 24 February 1939, divorced 14 March 1975; and (3) on 26 October 1942 respondent and petitioner and respondent's brother and his wife, executed cross-deeds to partition the 282.5-acre tract. The respondent was the sole grantee of the deed from his brother and wife; respondent's brother was the sole grantee of the deed from respondent and petitioner. The error in the 1939 plat was carried over into the 1942 deeds; (4) on 15 January 1959 a new plat was prepared containing the correct course description; (5) on 24 January 1959 respondent's brother and wife and respondent and petitioner executed cross-deeds conveying the same interests conveyed in the 1942 deeds. The 1959 deeds contained the following recital: "The purpose of this deed is to correct certain errors in a prior deed . . . and to create an estate by the entireties."

On 2 March 1976 the court entered an order denying respondent's motion for summary judgment. On 14 September 1976 the court struck the order of 2 March 1976 and granted respondent's motion for summary judgment. From this judgment petitioner appeals.

Carlton, Rhodes and Thurston by Graham M. Carlton and Gary C. Rhodes for petitioner appellant.

Peter W. Hairston for respondent appellee.

CLARK, Judge.

The sole question raised by this appeal is whether the trial court erred in rendering summary judgment under G.S. 1A-1, Rule 56 for respondent.

[1] The parties do not contend that the course error on the original 1939 division plat and carried forward in the 1942 division deeds was such that there was no effective partition between respondent and his brother. The course error was obviously an inadvertent one, which would not and did not result in misunderstanding as to the

true boundaries of the lands partitioned. It has been long established that a mistake or apparent inconsistency in a deed description shall not be permitted to defeat the intent of the parties if the intent appears in the deed. See *Moore v. Whitley*, 234 N.C. 150, 66 S.E. 2d 785 (1951) and cases cited therein. Cotenants may partition lands among themselves, and no particular form is required. 2 Tiffany, Real Property (3rd ed.) § 468. However, a parol partition may not be enforced if the statute of frauds is invoked. *Duckett v. Harrison*, 235 N.C. 145, 69 S.E. 2d 176 (1952).

There being an effective partition under the 1942 division deeds the respondent became the sole owner in severalty of the lands in question. The partition assigned to respondent what was already his and merely fixed the boundaries to his share which he then held in severalty. *Smith v. Smith*, 249 N.C. 669, 107 S.E. 2d 530 (1959).

The petitioner's claim of ownership as tenant by the entirety of the tract in question is based on the cross-deeds made in 1959 between former cotenant (respondent's brother) and his wife, and respondent and petitioner as husband and wife. But at that time the respondent's brother owned no interest in the land because respondent was then the sole owner in severalty. The brother could not convey in 1959 what he had already effectively conveyed in 1942. The 1959 deed recited that the purpose of the deed was to correct the description error in the 1942 partition deed and to create an estate by the entireties. But the grantors in the 1959 deed had no interest to convey, regardless of their intention, and this deed conveyed no interest or estate to either of the grantees. See *Combs v. Combs*, 273 N.C. 462, 160 S.E. 2d 308 (1968). It is noted that the 1959 deed was executed before the effective date (1969) of G.S. 39-13.5, which establishes a procedure for creating entirety estates by partition deeds and in partition proceedings.

The petitioner relies on *Wallace v. Phillips*, 195 N.C. 665, 143 S.E. 244 (1928). In that case it was alleged in the petition for partition that the husband was the owner of a life estate and that she was the owner of the reversionary interest in lands owned as tenants in common with others. The husband and wife agreed to take their allotted share as tenants by entirety. The court held that by their consent and agreement they changed their title and created a new one, a tenancy by the entirety in their share as allotted by the Commissioner. The court recognized the solemnity of the agreement in the judicial proceeding, and added that the husband had the right to

make a gift to his wife if it be assumed that he and not she was the true owner of the reversionary interest.

The *Wallace* decision is clearly distinguishable. *Sub judice*, we do not have a claimed interest by the wife which was settled by an agreement in a judicial proceeding. We have only an expressed intent to create an estate by the entirety in a deed which conveyed no interest. Further, there was no evidence that the wife relied on the ineffective 1959 deed to her detriment. We conclude that the principle of estoppel is not applicable in this case. Nor do we find a contract to convey enforceable by specific performance. Equity demands valuable considerations before forcing specific performance. *Dunn v. Dunn*, 242 N.C. 234, 87 S.E. 2d 308 (1955); 71 Am. Jur. 2d Specific Performance, § 113.

[2] Petitioner's second assignment of error, that the court erred by reversing its previous order denying respondent's motion of summary judgment, is without merit. An order denying summary judgment is not *res judicata* and a judge is clearly within his rights in vacating such denial. Where nothing pertinent to the motion has been filed subsequent to the previous order, it is even not necessary to issue new notice. 6 Moore, Federal Practice (2d ed. 1976) §§ 56.15(6), 56.20 (3-4), 56.21(1-3).

Affirmed.

Judges VAUGHN and HEDRICK concur.

THOMAS CLYDE TRIPLETT, JR. BY LILLIE STAMEY TRIPLETT, HIS GUARDIAN AD LITEM v. THOMAS CLYDE TRIPLETT, SR.

No. 7625SC993

(Filed 5 October 1977)

Parent and Child § 2— father operating motor vehicle—injury to child—parental immunity

In an action by a minor, unemancipated child to recover damages from his father for injuries received by the child when he fell from and was run over by a truck driven by his father on 1 September 1975, the trial court properly granted defendant father's motion for summary judgment on the ground of parental immunity, since the restriction of that doctrine to allow suit between parent and child arising from a motor vehicle accident as provided in G.S. 1-539.21 applied only to causes of action accruing on and after 1 October 1975.

Triplett v. Triplett

APPEAL by plaintiff from *Ferrell, Judge.* Judgment entered out of session 21 August 1976. Heard in the Court of Appeals 30 August 1977.

Plaintiff, Thomas Clyde Triplett, Jr., instituted a civil action against his father claiming damages for injuries received by the plaintiff when he fell from and was run over by a truck driven by the defendant, father. The complaint alleged that the injuries were received while working for the defendant and that they were a result of the negligent operation of the truck by the defendant. Plaintiff's father answered, denied that he was negligent, and pleaded parental immunity. Answers to interrogatories propounded by defendant disclosed that the plaintiff is the unemancipated minor child of defendant, lives at home with his parents, and is dependent upon them for support. The defendant moved for summary judgment on the ground of parental immunity. From an order granting defendant's motion for summary judgment, plaintiff appealed.

Donald T. Robbins for plaintiff appellant.

Patrick, Harper & Dixon, by Charles D. Dixon, for defendant appellee.

MORRIS, Judge.

Plaintiff's sole contention on appeal is that this Court should retroactively abrogate the doctrine of parental immunity in effect in this State at the time of the accident. In two recent cases we have addressed the contention that we should abrogate the doctrine of parental immunity, and in each case it was held that this Court "is bound by the rule heretofore announced and consistently followed by our Supreme Court. . .". *Evans v. Evans*, 12 N.C. App. 17, 18, 182 S.E. 2d 227, 228 (1971), *cert. den.* 279 N.C. 394, 183 S.E. 2d 242 (1971), *cert. den.* 405 U.S. 925, 30 L.Ed. 2d 797, 92 S.Ct. 972 (1972); *Mabry v. Bowen*, 14 N.C. App. 646, 188 S.E. 2d 651 (1972). Parental immunity from suit by a minor, unemancipated child has been the law in North Carolina since *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12 (1923). Parental immunity has also been held to extend to actions of the child against the parent arising from motor vehicle accidents. *Warren v. Long*, 264 N.C. 137, 141 S.E. 2d 9 (1965); *Skinner v. Whitley*, 281 N.C. 476, 189 S.E. 2d 230 (1972); *Morgan v. Johnson*, 24 N.C. App. 307, 210 S.E. 2d 503 (1974).

Appellant contends that we should join a minority of other jurisdictions and judicially restrict the application of the parental immunity doctrine. He cites cases from other jurisdictions that do

not apply the doctrine to cases involving a motor vehicle accident. *Smith v. Kauffman*, 212 Va. 181, 183 S.E. 2d 190 (1971). There is also authority which does not apply the doctrine to causes of action arising out of a dual relationship such as master and servant between a parent and child. *Teramano v. Teramano*, 6 Ohio St. 2d 117, 216 N.E. 2d 375 (1966). Other departures from the general rule are discussed with citations of authority listed in *Skinner v. Whitley, supra.* Our cataloging and discussing them here would serve no useful purpose.

As recently as 1972 our Supreme Court addressed a challenge to the parental immunity doctrine and reviewed the exceptions to the doctrine adopted judicially in other states, including the two exceptions that the plaintiff, appellant, would have us adopt. *Skinner v. Whitley*, supra. In refusing to allow the administrator of an unemancipated minor child to bring an action against the administrator of the father for the wrongful death of the child caused by the negligence of the deceased father, Justice Huskins, writing for the Court, stated:

> "Piecemeal abrogation of established law by judicial decree is, like partial amputation, ordinarily unwise and usually unsuccessful. . . .
>
> If the immunity rule in ordinary negligence cases is no longer suited to the times . . . we think innovation upon the established law in the field should be accomplished *prospectively* by legislation rather than *retroactively* by judicial decree." *Skinner v. Whitley*, supra at 484.

The Court, in refusing to adopt an exception to the immunity doctrine, reasoned that partial abrogation of the doctrine of parental immunity by judicial decree would create more problems and inequities than it would cure. This Court, as was the trial court, is bound by the rule consistently followed by the Supreme Court since *Small v. Morrison, supra,* and reiterated in *Skinner. Lehrer v. Manufacturing Co.*, 13 N.C. App. 412, 185 S.E. 2d 727 (1971).

Appellant also argues that the Legislature has recently restricted the immunity doctrine to allow suit between parent and child arising from a motor vehicle accident and that we should accelerate the effect of the statute to further the intent of the Legislature. The Legislature responded to the *Skinner v. Whitley* decision and limited the doctrine of parental immunity by enacting G.S. 1-539.21 which provides:

> "The relationship of parent and child shall not bar the right of action by a minor child against a parent for personal injury or property damage arising out of the operation of a motor vehicle owned or operated by such parent."

The Legislature also provided, however, that the law would apply prospectively to causes of action accruing on and after 1 October 1975. 1975 N.C. Session Laws, Chapter 685, § 2. The intent of the Legislature is clearly stated as to when the law should take effect. Since the cause of action in the instant case accrued on 1 September 1975, it is clear that the statute gives no right of action. The prior case law as discussed remains applicable and for the reasons stated, defendant's motion for a summary judgment was properly allowed.

Affirmed.

Chief Judge BROCK and Judge BRITT concur.

GENE COMBS v. KEN TERRELL

No. 763DC1003

(Filed 5 October 1977)

Trial §§ 32, 37— confusing jury instructions—instructions on credibility of witnesses

In an action to recover the alleged balance due on the agreed purchase price of a boat, motor, and trailer, the defendant is entitled to a new trial where the court so instructed the jury that its prerogative to pass upon the credibility of the evidence was usurped and where the court's instructions were confusing, contradictory and misleading.

APPEAL by defendant from *Wheeler, Judge.* Judgment entered 21 July 1976. Heard in the Court of Appeals 31 August 1977.

Plaintiff instituted this action to recover the alleged balance due on agreed purchase price of a boat, motor, and trailer. He alleged that the agreed contract price was $1500; that defendant had paid $550; and the balance due by defendant was $950 which defendant refused to pay.

Defendant answered, admitting the payment of $550, but denying that any payment at all was due plaintiff. By further answer and second defense and by counterclaim he pled breach of warranty and averred entitlement to return of the $550 paid plaintiff. The jury found for plaintiff, and defendant appealed.

McNeill, Graham, Coyne and Kirkman, P.A., by Kenneth M. Kirkman, for plaintiff appellee.

Wheatly, Mason, Wheatly and Davis, P.A., by L. Patten Mason, for defendant appellant.

MORRIS, Judge.

Defendant's second assignment of error is directed to the court's failure to dismiss plaintiff's action at the close of plaintiff's evidence for that the plaintiff's evidence showed that plaintiff had made certain warranties and there was a breach. We disagree. We agree with the court that whether there was an express warranty and if so, a breach of that warranty, was properly a question for the jury upon the evidence presented by plaintiff.

The record contains 24 assignments of error. Twenty-two of them are directed to the court's instructions to the jury.

By assignments of error Nos. 14 and 17, the defendant urges that the court so instructed the jury that its prerogative to pass upon the credibility of the evidence was usurped. We agree. As to the third issue: the amount, if any, plaintiff was entitled to recover of defendant, the court instructed as follows:

> "All the parties agree that there was a contract to sell the boat. And that the contract price was $1,500.00. And all of the evidence in this case, by both the plaintiff and the defendant, has been that the defendant paid to the plaintiff the sum of $550.00. All of the evidence. And if you believe all of the evidence by both the plaintiff and defendant, then the court directs that you answer that issue in the amount of $950.00."

And in concluding the charge, the court instructed:

> "Well, in conclusion, let me say this to the jury: the original contract was $1,500.00. The amount that was paid by the defendant on the contract was $550.00, which all of the evidence supports —$550.00 was paid, which would have left a balance owed on the contract would be $950.00. Now that is the amount that the jury would be instructed to place into Issue No. 3."

The error with respect to this portion of the charge is readily apparent, particularly when there is some evidence in the record that plaintiff had agreed to reduce the purchase price some $200 if certain repairs could not be made.

By assignments of error Nos. 9, 12, 16, 17, 18, 19 and 22 defendant contends that the charge was confusing, contradictory and misleading. A few examples will suffice.

> "An injury approximately results from a breach of warranty if it would not have occurred without the breach of a warranty, and if a reasonable and careful and prudent person would foresee that some such injury would likely result from the breach.
>
> So I finally instruct you upon this issue, that if you find by the greater weight of the evidence that the defendant has sustained some amount of damages under the rule which I have explained to you, then he is entitled to recover the difference between the value of the goods between the time and place of acceptance and value of those goods would have and the time and place accepted, if they had been as warranted."
>
> "On the other hand, the defendant on his counterclaim says and contends that on the first issue that, that is the plaintiff warranted to the defendant that the boat, motor and trailer were in good condition and fit for the use intended. That he has offered evidence to show, and he has carried his burden of proof on that issue; and that you ought to answer that issue YES. That it was warranted by the Seller to the Buyer; and that it was not intended—well, that there was a statement made, and that he relied upon it. And that you ought to so find.
>
> And on the other hand, defendant says and contends that you ought to answer that issue NO, that the plaintiff has failed to carry his burden of proof and that the statements made was one, that he has stood behind what he stated that he would do. That he would prepare the gear. That the trailer was such that he could observe and see for himself. That there was nothing hidden about it. That the boat, he advised him, leaked. And that he had not used the boat since March, and that he had stood behind everything that he told the defendant that he would do. And that he has not made an express warranty as such, as to the second issue: 'Was there a breach of the warranty?' Plaintiff says and contends—defendant says and contends that he has carried the burden of proof on this issue; and that you ought to answer that issue YES."
>
> "The third issue, 'What amount, if any, is the plaintiff entitled to recover of the defendant?' cannot be in any amount in excess of $950.00. The amount that would be arrived at in Issue No. 4,

if you get to the No. 4 issue, would be the amount of No. 3 subtracted No. 4, from the purchase price."

Although the remaining assignments of error to the charge have merit, we do not think any useful purpose would be served by discussing all of them. Suffice it to say that in our opinion the charge was so confusing, contradictory, and misleading as to require a new trial.

New trial.

Chief Judge BROCK and Judge BRITT concur.

WALDO H. KNIGHT, JR. AND WIFE, NELL J. KNIGHT; FLETCHER H. KNIGHT AND WIFE, ALICE H. KNIGHT; GWENDOLYN F. BAKER AND HUSBAND, ROBERT A. BAKER, JR.; MARY SUE K. REID AND HUSBAND, JAMES M. REID, JR. v. DUKE POWER COMPANY AND WOCASAR, INC.

No. 7617SC1053

(Filed 5 October 1977)

Appeal and Error § 6.9; Rules of Civil Procedure § 16— pretrial order on admissibility of evidence— premature appeal

A judge's pretrial order declaring certain evidence inadmissible at the trial is an interlocutory order which is not appealable. G.S. 1A-1, Rule 16.

APPEAL by plaintiffs from *Walker, Judge*. Order entered 14 September 1976 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 22 September 1977.

On 18 April 1969 plaintiffs and others sold to Wocasar, Inc., agent for Duke Power Company, defendants, 14/15ths of a tract of land consisting of 184 acres for a total price of $47,750.00. The remaining 1/15th interest in the tract of land belonged to Jack Knight. Wocasar, Inc., defendant, as agent for Duke Power Company, defendant, further agreed with plaintiffs and others as follows:

"If Jack Knight and wife, Louise W. Knight are paid by said Wocasar, Inc., more than 1/15th of the option price of $47,750.00, then and in such event, each of the persons paid previously for the conveyance of Knight tract will be paid additional amounts proportionate to the excess over the 1/15th paid to Jack Knight and wife, Louise W. Knight."

In March of 1972 three law suits involving the same property were filed between Duke Power Company and Jack and Louise Knight: the Knights filed a trespass action and a partitioning proceeding against Duke and Duke filed a condemnation proceeding against the Knights. On 30 May 1973 consent judgments were entered and filed in each of the three cases. In the partitioning proceeding 12.3 acres of the 184 acre tract was allotted to the Knights and 172.24 acres to Duke Power Company. In the condemnation case Duke was given title to 7.87 of the Knights' 12.3 acre tract in return for $7,500.00. In the trespass case Duke consented to pay the Knights the sum of $2,500.00. Also in late May of 1973 Duke and the Knights entered into an agreement whereby the Knights were given limited access to the lake being constructed by Duke adjacent to the Knights' 4.43 acres. In their complaint filed 29 May 1975 plaintiffs allege that the 4.43 acres of lake front property allotted to Jack Knight and wife has a fair market value of $150,000 and that, pursuant to their agreement with Wocasar, Inc., they are entitled to additional payments for their share of the land pursuant to their agreement with the defendants.

A pre-trial hearing was held as part of which the parties requested the court to determine prior to trial whether plaintiffs are entitled to have the value of the 4.43 acre tract owned by Jack Knight and wife considered by the jury in calculating the additional amounts, if any, due plaintiffs under the agreement.

The court entered a pre-trial order which reads in pertinent part:

> "This court is of the opinion that the value as of 30 May, 1973, of the 4.43 acres now owned by Jack Knight and wife is NOT a proper element to be considered by the jury in calculating the answers to the ultimate issue and, furthermore, that such evidence would be prejudicial to the rights of the Defendants;
>
> "NOW, THEREFORE, IT IS ORDERED that the value of the 4.43 acres now owned by Jack Knight and wife shall not be introduced into evidence nor considered by the jury in calculating the answers to the issue of damages or compensation due the Plaintiffs."

Plaintiffs appealed.

J. Bruce Morton for plaintiff appellants.

Griffin, Post, Deaton & Horsley by Hugh P. Griffin, Jr., and Peter M. McHugh, and William I. Ward, Jr., for defendant appellees.

HEDRICK, Judge.

It is well-established that pre-trial orders entered pursuant to G.S. 1-169.1, now G.S. 1A-1, Rule 16, are interlocutory and unappealable. *Amodeo v. Beverly*, 13 N.C. App. 244, 184 S.E. 2d 922 (1971); *Smith v. Rockingham*, 268 N.C. 697, 151 S.E. 2d 568 (1966); *Whitaker v. Beasley*, 261 N.C. 733, 136 S.E. 2d 127 (1964); *Green v. Insurance Co.*, 250 N.C. 730, 110 S.E. 2d 321 (1959). In *Whitaker v. Beasley, supra*, at 734-5, 136 S.E. 2d at 128, our Supreme Court said:

> "A pre-trial conference under G.S. 1-169.1 is just what the name implies. Its purpose is to *consider* specifics mentioned in the statute; among them, motions to amend pleadings, issues, references, admissions, judicial notice, and other matters which may aid in the disposition of the cause. . . . It is not a grant of authority to hear and determine disputed facts. Its order is interlocutory in nature. *Green v. Ins. Co.*, 250 N.C. 730, 110 S.E. 2d 321. 'Following the hearing the judge shall enter an order reciting the stipulations made and the action taken. Such order shall control the subsequent course of the case *unless in the discretion of the trial judge* the ends of justice require its modification.' "

Judge Walker's pre-trial order in this case declaring certain evidence inadmissible is clearly indeterminate and subject to later modification. Neither the judge nor the parties before trial can anticipate the various circumstances which may arise from the evidence at trial which necessarily determines the ruling of the trial judge on the admissibility or exclusion of evidence. A pre-trial ruling on the admissibility or exclusion of evidence must be treated simply as an expression of one judge's opinion based on the limited information available at the time. Appellate review of such an indeterminate opinion would result in fragmented trials and multiple appeals, and would defeat all efforts to expedite the administration of justice.

All parties cite *Highway Commission v. Nuckles*, 271 N.C. 1, 155 S.E. 2d 772 (1967), in support of their contention that Judge Walker's pre-trial order is reviewable. Suffice it to say their

reliance upon the cited case is misplaced since the cases are clearly distinguishable.

Since both parties requested the judge at the pre-trial conference to make a ruling as to the admissibility of the evidence, and both parties requested that this Court review Judge Walker's decision on its merits, we think it only fair that the cost of this purported appeal be taxed by the clerk, one half to the plaintiffs and one half to the defendants.

Appeal dismissed.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. RODGER HAROLD GOODMAN

No. 7719SC317

(Filed 5 October 1977)

1. **Criminal Law § 33.4— defendant's conversation outside courtroom — evidence not prejudicial**

In a prosecution for receiving a stolen motorcycle, defendant was not prejudiced where the trial court allowed the thief's wife to testify that she had a conversation with defendant in the hall outside the courtroom during trial wherein defendant said he was going to "plead innocence" to protect himself, and that he still liked the thief and that he would not use any more against him than he had to.

2. **Criminal Law § 89.2— corroborating evidence — admissibility**

In a prosecution for receiving a stolen motorcycle, the trial court did not err in allowing witnesses to testify as to statements made to them by the thief regarding the theft of the motorcycle and the receiving thereof, since the court in each instance instructed the jury that it could consider the testimony only for the purpose of corroborating the thief, if in fact it did corroborate him.

APPEAL by defendant from *Wood, Judge*. Judgment entered 2 December 1976 in Superior Court, ROWAN County. Heard in the Court of Appeals 20 September 1977.

Criminal prosecution on a bill of indictment, proper in form, charging the defendant, Rodger Harold Goodman, with feloniously receiving a 1974 Honda 450 motorcycle which had been stolen by Charles Willis and Wayne Nash from Eva Trexler having a value of $1,250.00.

Upon the defendant's plea of not guilty, the state offered evidence tending to show the following:

On 28 July 1976 Eva Trexler's 1974 Honda 450 motorcycle having a value of $1,250.00 was stolen from her residence. Several days before the motorcycle was stolen Charles Willis had a conversation with defendant during which defendant stated that he would buy a Honda 350 from Willis even if defendant knew the motorcycle was hot. Pursuant to this conversation Charles Willis and Wayne Nash stole the Trexler motorcycle on 28 July 1976. Willis drove the motorcycle to defendant's residence and defendant told Willis to stash the motorcycle for several days until he could get some money. Willis then hid the motorcycle in the woods. A couple of days later, under instructions from defendant, Willis drove the motorcycle to defendant's mother's house and parked the motorcycle in the basement of the house. The next day defendant gave Willis a check for $50 with the notation "for loan on a motorcycle." Several days later defendant told Willis that the law had been looking for the motorcycle and asked Willis to get rid of it. Willis then took the motorcycle to High Rock Dam and pushed it into the water.

Defendant offered evidence tending to show that Charles Willis came to him to borrow some money, that he loaned Willis $50 and took the motorcycle as collateral, that he later stopped payment on the check he gave to Willis, that he returned the motorcycle to Willis and that he was not involved in either the theft or the receiving of the motorcycle.

The defendant was found guilty as charged, and from a judgment imposing a prison sentence of 4 years, he appealed.

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

Robert M. Davis for defendant appellant.

HEDRICK, Judge.

[1] Based on exceptions duly noted in the record the defendant first contends the court erred in allowing Charles Willis' wife to testify that she had a conversation with the defendant in the hall outside the courtroom during the trial wherein the defendant said he was going to "plead innocence" to protect himself, and that he still liked "Chuck" and that he would not use any more against him than he had to. Defendant argues that this testimony was not relevant and its only purpose was to excite the prejudice of the jury against him. The testimony complained of merely reiterated the defendant's plea of not guilty. When the defendant testified he did exactly what he told Mrs. Willis he was going to do. While we must

say we do not understand why the state wanted to introduce the challenged testimony, we cannot say it was irrelevant. In any event its admission could not have been prejudicial to the defendant. Defendant's first assignment of error has no merit.

[2] By assignments of error two, three and four the defendant contends the court erred in allowing Mrs. Willis, Bobby Wayne Nash and Officer Glenn Sides to testify as to statements made to them by Charles Willis regarding the theft of the motorcycle and the receiving thereof. In each instance the court instructed the jury that it could consider the testimony only for the purpose of corroborating Charles Willis, if, in fact, the testimony did corroborate Willis. Defendant simply argues the challenged testimony was inadmissible hearsay because it did not corroborate Willis' testimony. We disagree. The challenged testimony was substantially the same as that given by Willis, and it was for the jury to say whether it corroborated Willis' testimony. These assignments of error have no merit.

Defendant's fifth assignment of error is based on the court's denial of his motion for judgment as of nonsuit. The evidence was sufficient to require the submission of this case to the jury and to support the verdict.

Assignments of error seven through twelve relate to the court's instructions to the jury. We have carefully examined each exception upon which these assignments of error are based and find them to be without merit.

The defendant had a fair trial free from prejudicial error.

No error.

Judges VAUGHN and CLARK concur.

ROSE HILL POULTRY CORPORATION v. AMERICAN MUTUAL INSURANCE COMPANY, INC.

No. 764SC1021

(Filed 5 October 1977)

1. **Insurance § 103— automobile liability policy—forwarding of legal process to insurer**

Policy provisions in an insurance contract requiring prompt forwarding of legal process as a condition precedent to recovery on the policy are valid so long as they do not conflict with the Motor Vehicle Financial Responsibility Act.

2. **Insurance § 103— automobile liability insurance—failure to forward suit papers to insurer—reimbursement from insurer**

An insured is not entitled to reimbursement from its automobile liability insurer for sums paid to a third party in satisfaction of a default judgment obtained by the third party against the insured in South Carolina in an action arising out of a motor vehicle accident where the insured breached a condition of the policy requiring it to forward suit papers to the insurer or to otherwise notify the insurer of the suit.

APPEAL by plaintiff from *Bailey, Judge*. Judgment entered 15 September 1976 in Superior Court, DUPLIN County. Heard in the Court of Appeals 20 September 1977.

Plaintiff, the insured, filed a complaint against defendant, its automobile liability insurance carrier, seeking reimbursement from defendant for $20,000, or a part thereof, which plaintiff paid to Clarence Vereen as a result of a default judgment which Vereen obtained against plaintiff in South Carolina in August 1972 following a motor vehicle accident between one of plaintiff's employees and Vereen on 5 March 1970. In March 1975 Vereen brought an action in North Carolina to enforce the South Carolina judgment. The defendant refused to defend the action in North Carolina. Vereen obtained a judgment in North Carolina for $20,000 which plaintiff paid.

In its answer, defendant denied liability because plaintiff had breached a condition of the insurance policy by failing to forward the summons and complaint served on it in 1972 or to otherwise notify defendant of the South Carolina action and because even if defendant had paid the judgment, it would have been entitled to reimbursement of said amount by plaintiff pursuant to G.S. 20-279.21(h) so that plaintiff would have borne the ultimate loss in any event. In response to a Request for Admission of Facts filed by defendant, plaintiff admitted that it had failed to forward to defendant the summons and complaint served on it in 1972 by Clarence Vereen until March 1974.

Each party moved for summary judgment. Plaintiff's motion for summary judgment was denied, and summary judgment for defendant was entered. Plaintiff appealed.

E. C. Thompson III for plaintiff appellant.

Marshall, Williams, Gorham & Brawley by Lonnie B. Williams for defendant appellee.

HEDRICK, Judge.

Plaintiff bottoms its claim against the insurer on G.S. 20-279.21 (f)(1) which in pertinent part provides:

> "(f) Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:
>
> (1) Except as hereinafter provided, the liability of the insurance carrier with respect to the insurance required by this Article shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; said policy may not be canceled or annulled as to such liability by any agreement between the insurance carrier and the insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy."

Citing *Jones v. State Farm Mutual Automobile Insurance Co.*, 270 N.C. 454, 155 S.E. 2d 118 (1967), plaintiff asserts that the insurer's liability is absolute under the Motor Vehicle Financial Responsibility Act even though the insured breached a condition of the policy requiring it to forward suit papers to the insurer. The precise holding in *Jones* with respect to this point is that violations of the insurance policy which would constitute a valid and complete defense in regard to coverage in excess of, or not required by, the Motor Vehicle Financial Responsibility Act, do not constitute a defense in regard to compulsory coverage required by the statute, and as to compulsory coverage no violation of policy provisions by the insured after the infliction of damages for which insured is legally responsible can exonerate insurer. In *Jones* the Supreme Court further declared that the Motor Vehicle Financial Responsibility Act is a remedial statute and must be liberally construed to effectuate its purpose to provide compensation for innocent victims injured by financially irresponsible motorists.

[1] An insurance policy is a contract, and is to be construed and enforced in accordance with its terms insofar as they are not in conflict with pertinent statutes and court decisions. *Hawley v. Insurance Co.*, 257 N.C. 381, 126 S.E. 2d 161 (1962). Policy provisions in an insurance contract requiring prompt forwarding of legal process as a condition precedent to recovery on the policy are valid so long as they do not conflict with the Financial Responsibility Act. *Davenport v. Indemnity Co.*, 283 N.C. 234, 195 S.E. 2d 529 (1973).

[2] Clearly the plaintiff, in the present case, is not an innocent victim of a financially irresponsible motorist. Obviously, the condition in the policy requiring the insured to promptly forward to the insurer suit papers is not in conflict with the Motor Vehicle Financial Responsibility Act.

While plaintiff's failure under the terms of the policy to forward suit papers or otherwise notify the defendant, insurer, of the action instituted against plaintiff in South Carolina by Vereen, did not defeat or void defendant's liability under the policy with respect to Vereen, it did relieve the insurance carrier of its obligations under the policy to afford protection for the plaintiff, insured. Thus, plaintiff, because of its breach of one of the conditions of the insurance contract, is not entitled to reimbursement from defendant for sums paid by it to Vereen. Summary judgment for defendant is affirmed.

Affirmed.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. KENT HADLOCK

No. 7729SC193

(Filed 5 October 1977)

False Pretense § 2.2— insufficiency of indictment to charge offense

An indictment which purportedly charged defendant with a violation of G.S. 14-100 was insufficient to charge a crime where it did not allege that defendant obtained or attempted to obtain anything.

APPEAL by defendant from *Griffin, Judge*. Judgment entered 14 October 1976 in Superior Court, TRANSYLVANIA County. Heard in the Court of Appeals 28 June 1977.

Defendant was tried on his plea of not guilty to the charge contained in the following bill of indictment:

STATE OF NORTH CAROLINA
COUNTY OF TRANSYLVANIA

IN The General Court of Justice, Superior Court Division

The State of North Carolina
vs.
Kent Hadlock
Defendant

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 3rd day of February, 1976, in Transylvania County Kent Hadlock (MLL) unlawfully and wilfully did feloniously, knowingly and designedly and with false pretense made with the intent to deceive and which did deceive Hubert G. Bryson by representing to said Hubert G. Bryson that a tract of land of 19.2 acres described in Deed Book 200 at page 97 was free and clear of all encumbrances when in truth and fact the property was covered by a Deed of Trust in Deed Book 89 at Page 369 and a Deed of Trust in Book 91 at Page 362. Based upon representation that the land was clear, Hubert G. Bryson conveyed property valued at $35,000.00 known as Mill Hill Grocery described in Book 198 Page 685.

s/M. L. LOWE
District Attorney

The jury found defendant guilty, and from judgment imposing a suspended sentence, defendant appealed.

Attorney General Edmisten by Assistant Attorney General Elizabeth C. Bunting for the State.

Max O. Cogburn for defendant appellant.

PARKER, Judge.

Defendant was found guilty of violating G.S. 14-100. The indictment charged that the offense occurred on or about 3 February 1976. Effective 1 October 1975 G.S. 14-100 was rewritten to provide that "[i]f any person shall knowingly and designedly by means of any kind of false pretense whatsoever, whether the false pretense is of a past or subsisting fact or of a future fulfillment or event, *obtain or attempt to obtain from any person within this State any money, goods, property, services, chose in action, or other thing of value*

with intent to cheat or defraud any person of such money, goods, property, services, chose in action or other thing of value, such person shall be guilty of a felony . . . ." (Emphasis added.) An essential element of the offense proscribed by the statute is that the accused "obtain or attempt to obtain" something of value by means of any kind of false pretense. The indictment in the present case failed to allege that defendant obtained or attempted to obtain anything. The allegation that "[b]ased upon representation that the land was clear, Hubert G. Bryson conveyed property valued at $35,000.00 known as Mill Hill Grocery described in Book 198 Page 685" falls short of alleging that defendant obtained or attempted to obtain anything.

For failure of the indictment to charge an essential element of the offense, this Court on its own motion will arrest the judgment. *State v. Fowler*, 266 N.C. 528, 146 S.E. 2d 418 (1966); *State v. Lucas*, 244 N.C. 53, 92 S.E. 2d 401 (1956); *State v. Thorne*, 238 N.C. 392, 78 S.E. 2d 140 (1953); 4 Strong's N.C. Index 3rd, Criminal Law § 127.2. The legal effect of arrest of judgment is to vacate the verdict and judgment entered in the Superior Court in this case. *State v. Covington*, 267 N.C. 292, 148 S.E. 2d 138 (1966); *State v. Fowler, supra.*

Judgment arrested.

Judges MORRIS and CLARK concur.

IN THE MATTER OF: CHARLES GOSSETT BALLARD

No. 7625DC1022

(Filed 5 October 1977)

1. **Insane Persons § 1.2— imminent danger—overt act not necessary**

Evidence of a recent overt act is not necessary to a finding that a respondent is imminently dangerous to himself or others.

2. **Insane Persons § 1.2— imminent danger—sufficiency of evidence**

The court's finding that respondent was imminently dangerous to himself or others was supported by evidence that respondent had assaulted his daughter-in-law while she was lying in bed; respondent explained that he had whipped his son and daughter-in-law because they were going to take him back to the hospital and were "no account"; while a patient in a State hospital, defendant concealed a knife and soft drink bottle on his person; at the time the bottle was discovered, respondent explained that he was "going to get them before they got him"; and respondent has suffered irreversible brain damage and is paranoid.

In re Ballard

APPEAL by respodnent from *Edens, Judge.* Judgment entered 21 October 1976 in District Court, BURKE County. Heard in the Court of Appeals 20 September 1977.

Respondent is an elderly patient at Broughton Hospital in Morganton. The Chief of Medical Services at that facility determined that he was in need of further care and treatment beyond the period for which he was committed. A hearing was held, and the judge found that respondent was mentally ill, imminently dangerous to himself or others and in need of continued hospitalization. He ordered that respondent be recommitted for a period not to exceed one year.

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

Prentiss Anne Allen, for respondent appellant.

VAUGHN, Judge.

Respondent does not except to that part of the order finding that he is mentally ill. Through counsel, however, he argues that the evidence is insufficient to support the court's finding that he was imminently dangerous to himself or others.

To support a recommitment order, the court is required to find "by clear, cogent, and convincing evidence that the respondent is mentally ill . . . and imminently dangerous to himself or others, and in need of continued hospitalization." G.S. 122-58.11(d). The court must record the facts which support its findings.

[1] The thrust of respondent's argument appears to be as follows: It is very difficult to predict potentially dangerous behavior. The Court should, therefore, require that any potentially dangerous behavior be evidenced by a recent overt act.

This Court has previously rejected respondent's argument.

> "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." *In re Salem*, 31 N.C. App. 57, 61, 228 S.E. 2d 649, 652 (1976).

[2] There is ample evidence in the record to support the judge's findings. It includes evidence of an unprovoked and potentially

deadly assault with a cane on his daughter-in-law while she was lying in bed. While a patient at the hospital, respondent concealed potentially dangerous weapons about his person—a knife and a soft drink bottle. At the time the bottle was discovered, he explained he "were going to get them before they got him." During an examination by a hospital physician about three weeks before the hearing, respondent explained that he had whipped his son and daughter-in-law because they were going to bring him back to the hospital and that they were "no account." Respondent has suffered irreversible brain damage and is paranoid. In the doctor's opinion he is imminently dangerous to himself or others.

The order is affirmed.

Affirmed.

Judges HEDRICK and CLARK concur.

STATE OF NORTH CAROLINA v. RAYMOND EDWARD BARBOUR

No. 7515SC479

(Filed 13 October 1977)

Homicide § 24.2— reduction of crime from murder to manslaughter—burden of proof—erroneous instructions

Upon remand from the U.S. Supreme Court, a defendant convicted of second degree murder in January 1975 is granted a new trial because of the court's instructions which placed the burden on defendant to show circumstances that would reduce the offense from second degree murder to manslaughter.

ON order from the United States Supreme Court, 432 U.S. ---, 97 S.Ct. ---, 53 L.Ed. 2d 1087, entered 27 June 1977, granting defendant's petition for a writ of certiorari to review our decision reported in 28 N.C. App. 259, 220 S.E. 2d 812 (1976), vacating said decision and remanding the cause to this court for further consideration in light of *Patterson v. New York*, 432 U.S. ---, 97 S.Ct. ---, 53 L.Ed. 2d 281 (1977), and *Hankerson v. North Carolina*, 432 U.S. ---, 53 L.Ed. 2d 306, 97 S.Ct. --- (1977).

Defendant was charged with, and in January 1975 was placed on trial for, the first-degree murder of William Samuel Abner on 13 June 1974. He pled not guilty. Evidence presented at the trial is summarized in our former opinion.

The jury found defendant guilty of murder in the second degree and from judgment imposing prison sentence of not less than 35 nor more than 40 years, defendant appealed to this court. In the decision above referred to, we found no error in the trial. On 2 March 1976 the Supreme Court of North Carolina denied defendant's petition for discretionary review and dismissed his appeal for lack of substantial constitutional question. 289 N.C. 452, 223 S.E. 2d 160.

Our decision finding no error in defendant's trial having been vacated by the United States Supreme Court, and the cause remanded to us for further consideration as above stated, we now proceed to reconsider our former decision.

Attorney General Edmisten, by Assistant Attorney General Thomas B. Wood, for the State.

Fred Darlington III, Felix B. Clayton and Thomas B. Anderson, Jr., for defendant appellant.

BRITT, Judge.

Defendant contends he is entitled to a new trial for the reason that certain instructions given by the trial court to the jury violated the rule established by the United States Supreme Court in *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508 (1975), and followed by the North Carolina Supreme Court in *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975). The challenged instructions are as follows:

> Now, in order to reduce the crime to manslaughter, the defendant must prove, not beyond a reasonable doubt but simply to your satisfaction, that there was no malice on his part. To negate malice and thereby reduce the crime to manslaughter, the defendant must satisfy you of three things:
>
> First, that he shot William Abner in the heat of passion. Now, this doesn't mean mere anger; it means that the defendant's state of mind was at the time so violent as to overcome his reason, so much so that he could not think to the extent necessary to form the intent necessary to form the deliberate purpose and control his actions;
>
> Second, he must satisfy you that this passion was produced by some action on the part of William Abner which the law regards as adequate provocation. That would consist of anything which has a natural tendency to produce such passion or frame of mind in a person of average mind and disposition;

> Third, he must satisfy you that the shooting took place so soon after the provocation, whatever you may find that may be, that the passion of a person of average mind and disposition would not have cooled.

Clearly, the instructions placing the burden on defendant to show circumstances that would reduce the offense from second-degree murder to manslaughter were erroneous in view of *Mullaney* and *Hankerson*. We hasten to add, however, that the trial of the instant case took place in January of 1975, previous to the *Mullaney* and *Hankerson* decisions, and the able trial judge gave the substance of instructions that had been approved by the appellate courts of this jurisdiction for more than 100 years.

In *Hankerson* our State Supreme Court declared no longer valid instructions similar to those challenged in the instant case. We quote from the Hankerson opinion, 288 N.C. 632 at 643, 220 S.E. 2d 575 at 584: "We hold that by reason of the decision in *Mullaney* the Due Process Clause of the Fourteenth Amendment prohibits the use of our long-standing rules in homicide cases that a defendant in order to rebut the presumption of malice must prove to the satisfaction of the jury that he killed in the heat of a sudden passion and to rebut the presumption of unlawfulness, that he killed in self-defense. . . ."

Although our Supreme Court in *Hankerson* declared no longer valid instructions similar to those challenged in this case, said court held that *Mullaney* would be given retroactive effect in North Carolina only to trials conducted on or after 9 June 1975. Thereafter, the U.S. Supreme Court allowed certiorari in *Hankerson* and, in an opinion filed 17 June 1977 and reported in 432 U.S. ---, 53 L.Ed. 2d 306, 97 S.Ct. ---, held that our State Supreme Court erred in declining to hold the Mullaney rule retroactive.

Of course, we are bound by the opinion of the United States Supreme Court. Consequently, we hold that defendant in the case at hand is entitled to a new trial and it is so ordered.

New trial.

Judges PARKER and CLARK concur.

STATE OF NORTH CAROLINA v. DAVID LEE FULCHER

No. 7721SC255

(Filed 19 October 1977)

1. **Kidnapping § 1— new kidnapping statute—asportation**

The new kidnapping statute, G.S. 14-39, supersedes the common law crime of kidnapping and removes asportation as an essential element of the crime.

2. **Kidnapping § 1— unlawful restraint or confinement—substantial duration—asportation—substantial distance**

Under the new kidnapping statute, the unlawful restraint or confinement must be substantial in terms of duration and not merely incidental to the commission of another crime, and if asportation is charged, the asportation must be substantial in terms of distance and not merely incidental to another crime.

3. **Kidnapping § 1.2— sufficiency of evidence**

The State's evidence was sufficient for the jury on two charges of kidnapping under G.S. 14-39 where it tended to show that defendant bound and restrained each victim for a substantial period of time and forced each victim to have oral sex with him, and that the unlawful restraint was not merely incidental to the commission of the felony of crime against nature upon each victim but was committed against each victim while defendant was committing the crime against nature upon the other.

4. **Kidnapping § 1.3— unlawful confinement—instructions—substantial duration**

If a charge against a defendant is kidnapping by *unlawful confinement*, the trial judge in instructing the jury must define such term in substance as meaning restraint for a substantial period and not merely incidental to the commission of another crime.

5. **Kidnapping § 1.3— unlawful restraint—instructions—substantial duration**

If a defendant is charged with kidnapping by *unlawful restraint*, the trial judge in instructing the jury must define such term in substance as meaning restraint for a substantial period and not merely incidental to the commission of another crime.

6. **Kidnapping § 1.3— removal from one place to another—substantial distance**

If a defendant is charged with kidnapping by *removal from one place to another*, the trial judge must define the required asportation in substance as meaning a movement from one place for a substantial distance and not merely incidental to the commission of another crime.

7. **Kidnapping §§ 1, 1.3— charge of unlawful restraint in all kidnapping cases—instructions on unlawful restraint**

Since any unlawful confinement or any unlawful removal from one place to another must necessarily involve unlawful restraint, the State in any kidnapping case may confine the charge to kidnapping by unlawful restraint; and if the defendant is charged disjunctively in the language of the statute, the trial judge may limit his definition and explanation to the term "unlawful restraint," even though the evidence tends to show confinement, asportation, or both.

8. **False Imprisonment § 1; Kidnapping § 1— false pretense—lesser offense of kidnapping**

The common law crime of false imprisonment, a general misdemeanor, has not been superseded by the new kidnapping statute because there may be an unlawful restraint without the purposes specified in the statute, and in appropriate cases the trial judge should instruct the jury on false imprisonment as a lesser offense of kidnapping.

9. **Criminal Law § 43.1— admission of "mug shots"**

In this prosecution for kidnapping and crime against nature, defendant was not prejudiced by the admission of "mug shots" of defendant for the purpose of illustrating testimony by the victims.

APPEAL by defendant from *Kivett, Judge*. Judgment entered 9 December 1976 in Superior Court, FORSYTH County. Heard in the Court of Appeals 24 August 1977.

The defendant pled not guilty to two charges of crime against nature and two charges of kidnapping.

State's evidence tended to show that Katherine Angers and Frances McCrory arrived from Canada in Winston-Salem on 8 September 1976 and that they checked into a motel. They tried for 20 or 30 minutes to telephone friends from a well-lit booth outside their room. Defendant came in and stayed around for about 15 minutes and on one occasion he made a comment to Angers. Angers testified that she looked at defendant's face three to four times. The women returned to their room. At 10:30 p.m. defendant knocked on their door and told them that they had a telephone call. Angers left the room to take the call but found the phone dead. Defendant commented that perhaps someone was playing a trick on her. Defendant knocked at the women's door again at 11:00 p.m. to tell them they had a call. Again, Angers found the phone dead. As she started back to the room defendant pulled a knife and forced her to let him in. The defendant told the girls that he had a knife and could kill them, but that all he wanted was their car. After several moments defendant forced the women to lie down on a bed and bound their wrists behind their backs with tape. He put gags over their mouths. Later, he forced them to have oral sex with him. The women were able to loosen their hands and defendant ran away. The women called for help. Angers still had several pieces of tape on her wrists for the police to see.

The motel manager testified as to a registration card produced by the State such as was customarily filled out when a person checked into the motel. The card showed that a David L. Fulcher leased a motel room on 8 September 1976.

Detective Worsham testified that he investigated the alleged crimes, arriving at the motel around midnight, and that the women told him substantially what they later testified to in court, that they described the defendant in some detail and later picked out his photograph from five presented to them. Police Sergeant Benbow further corroborated the witnesses' description of defendant. Defendant's brother-in-law testified as to the discovery of the roll of tape which he found in defendant's car on the day following the alleged crimes.

Defendant's evidence tended to show that defendant was at a truck stop in Lexington, 25 miles from the motel at the time of the alleged crimes. He offered the testimony of three witnesses.

After defendant rested, the State was allowed, over objection, to reopen its case. Angers testified that she had noticed a wart on defendant's penis, the existence of which was substantiated by medical examination of defendant.

The jury found defendant guilty on all counts. He received sentence of two 10-year consecutive sentences on the crime against nature charges, to run concurrently with 28- to 40-year sentence on the consolidated kidnapping charges. From this judgment imposing sentence, defendant appeals.

Attorney General Edmisten by Associate Counsel Henry H. Burgwyn for the State.

Harper and Wood by J. Randolph Cresenzo for defendant appellant.

CLARK, Judge.

The defendant challenges the constitutionality of the new kidnapping statute, a rewriting of G.S. 14-39, effective 1 July 1975, contending that subsection (a)(2) of the statute subjects him to conviction for two crimes where only one was committed, a violation of the due process and equal protection clause of the Federal Constitution.

The new statute reads in pertinent part:

> "Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kid-

napping if such confinement, restraint or removal is for the purpose of:

* * * *

(2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; . . ." G.S. 14-39(a)(2).

The old statute (G.S. 14-39) merely provided that kidnapping was unlawful and did not define the crime. The failure of the old statute to define kidnapping did not render the statute vague or uncertain since the common-law definition of the offense was incorporated into the statute by construction. *State v. Lowry*, 263 N.C. 536, 139 S.E. 2d 870 (1965); 22 C.J.S., Criminal Law, § 21.

Kidnapping was defined by common law as the unlawful taking and carrying away of a person by force or fraud and against his will. 8 Strong, N.C. Index 3d, Kidnapping, § 1. Bishop's definition of kidnapping as "false imprisonment aggravated by conveying the imprisoned person to some other place," was quoted with approval in *State v. Harrison*, 145 N.C. 408, 59 S.E. 867 (1907), the first kidnapping conviction to be reviewed by the North Carolina Supreme Court. North Carolina does not have a statute making false imprisonment a crime, but it was a crime at common law, and the common law was adopted as the law of this State (G.S. 4-1). False imprisonment is a general misdemeanor at common law. *State v. Ingland*, 278 N.C. 42, 178 S.E. 2d 577 (1971).

Though asportation was an essential element of kidnapping the case law offered no definition of the element. In *State v. Ingland, supra*, the court observed that "*any* carrying away is sufficient." However, there was a departure from this view in two cases, which treated the subject of asportation and offered some guidelines for determining it: (1) *State v. Dix*, 282 N.C. 490, 193 S.E. 2d 897 (1973), and (2) *State v. Roberts*, 286 N.C. 265, 210 S.E. 2d 396 (1974). It is possible that the two decisions had some influence on the enactment of the new statute which defined kidnapping and eliminated asportation as a necessary element of the crime.

Dix reversed the kidnapping conviction of the defendant on the ground of insufficient asportation. The defendant, with gun pointed, marched the jailer 62 feet, down the jail vestibule, through the office, into a hall, and compelled him to open a cell-block door. The jailer was then locked in the cell. Justice Sharp (now Chief Justice) for the Court wrote that common-law kidnapping had never been

based on a "mere technical asportation," but that it was rather based on the issue of increased risk to the victim. 282 N.C. at 501, 193 S.E. 2d at 904. She found that the victim jailer although technically asported 62 feet and locked in a cell, was exposed to no more risk by this asportation and detention than was inherent in the escape itself. The jailer's asportation had been "incidental to defendant's assault upon the jailor and to the rescue or jail delivery which he accomplished." 282 N.C. at 502, 193 S.E. 2d at 904. The court, however, gave no other definition to help distinguish degrees of asportation, to separate incidental from "primary" taking and carrying away.

Roberts reversed the kidnapping conviction of a man who grabbed a seven-year-old child from a playground and dragged her through the yard to a patio door leading to a nursery building, a distance of approximately 80 to 90 feet in all. The court found that there was insufficient evidence to show either real asportation or true unlawful restraint. Chief Justice Bobbitt redefined such unlawful restraint, which he called false imprisonment, to demand what has been called "substantiality" of restraint. He also added some qualification of asportation:

> ". . . To constitute the crime of kidnapping the defendant (1) must have falsely imprisoned his victim by acquiring complete dominion and control over him *for some appreciable period of time*, and (2) must have carried him *beyond the immediate vicinity of the place of such false imprisonment*. . . ." [Emphasis added.] 286 N.C. at 277, 210 S.E. 2d at 404.

Since the child was "rescued immediately, unharmed, the offense under consideration cannot be considered the sort of conduct for which life imprisonment is permissible and for which a sentence of sixty years was actually imposed." 286 N.C. at 278, 210 S.E. 2d at 405. This observation seems to be in line with Justice Sharp's demand that the asportation be primary, not just incidental, and we do not construe it to require actual harm incurred as a criterion for determining whether kidnapping had taken place rather than to the mere risk of harm to which the victim was exposed.

Justice Huskins wrote vigorous dissents to both *Dix* and *Roberts*. He emphasized that the quantitative measurement added by the court to the asportation requirement was a burden almost impossible to comprehend let alone meet. He did not address the underlying consideration of risk exposure. Speaking of *Roberts*, he wrote, "The majority decision is the first offspring of *Dix*. There

will be others; and the law of kidnapping will become, if in fact it has not already, a jumble which officers and prosecutors can neither understand nor enforce. Meter sticks and measuring tapes are strange but necessary aids in determining whether a kidnapping has been committed. Perhaps divining rods are next." 286 N.C. at 282, 210 S.E. 2d at 407.

[1] The new statute (G.S. 14-39) supersedes the common law crime of kidnapping. It removes asportation as an essential element of the crime. A person is guilty of kidnapping if he unlawfully confines or restrains, or removes from one place to another for the purposes set out in the statute. 12 Wake Forest Law Review 434, 439. It seems that any unlawful asportation involves unlawful restraint. Too, it seems that any unlawful confinement must involve unlawful restraint. Therefore, if a case were to involve asportation or confinement, it would not be necessary to charge on either. A charge on unlawful restraint would be sufficient.

Though the new statute is broader than common-law kidnapping in that it eliminates asportation as a necessary element of the crime, it is restrictive in that, by limiting kidnapping to unlawful confinement, restraint or asportation for the purposes enumerated it does not include some of the situations covered by the common-law crime. In *Roberts*, *supra*, if we assume that there was unlawful restraint or asportation within the meaning of the statute, it is questionable that State's evidence was sufficient to show that the defendant's purpose was one of those enumerated in the statute. In the recent case of *State v. Hoots*, 33 N.C. App. 258, 234 S.E. 2d 764 (1977), defendants' kidnapping convictions were reversed. Although they had aided others in tying two victims to a tree out in the country after the victims had been "hogtied" and loaded into another's car, State's evidence tended to show no other purpose than solicitation of information about stolen marijuana. Such purpose was not one of those enumerated in the statute. Regardless of the danger to which such victims are exposed, unless the purpose of the exposure is either felonious, or otherwise enumerated, not merely unlawful, the statutory crime of kidnapping has not been committed.

On the other hand, it is difficult to imagine a felony against the person that does not involve unlawful restraint of some sort. And it is clear that if the new statute is literally construed, a person could be convicted of the felony against the person and also of kidnapping, though the restraint was minimal and incidental to the commission of the other crime. This strict statutory construction could, and in some states has, resulted in prosecutions for kidnapping for the sole

purpose of securing the more severe statutory punishment for crimes not subject to such severe penalties. See *State v. Dix*, 282 N.C. at 498, 193 S.E. 2d at 904. California repudiated this strict construction in *People v. Daniels*, 80 Cal. Rptr. 897, 459 P. 2d 225 (1969), and held that asportation necessitated substantial increased risk of harm. New York, under an old statute which, like our new statute, did not necessitate asportation, refused to uphold a conviction of kidnapping where it held that the asportation of a couple in their own car was *incidental* to the commission of armed robbery. *People v. Levy*, 15 N.Y. 2d 159, 204 N.E. 2d 842 (1965). Subsequently, the New York legislature adopted this judicial interpretation by amending its kidnapping statute to require asportation, called "abduction," and to define asportation in terms of substantiality. N.Y. Penal Code § 135.20 *et seq.*, (MacKinney, 1975). Unlawful restraint constitutes the crime of "unlawful imprisonment." § 135.05 *et seq.*

Thus, it is obvious that a literal interpretation of the new kidnapping statute would create two crimes instead of one, with resulting unfairness and the potential for abusive prosecutions. And this in turn would call into question the constitutionality of the statute under the due process clause. The prosecutorial application of the same could violate the equal protection clause of the Federal Constitution. These problems can be avoided only by a broader judicial construction of the statute which provides basic guidelines for prosecutions thereunder by highlighting the difference between incidental and primary kidnapping by dealing directly with the qualitative risk to which the victim is exposed.

The Court of Appeals in *State v. Bryant*, 20 N.C. App. 223, 201 S.E. 2d 211 (1973), and the Supreme Court on appeal of the same case, 285 N.C. 27, 203 S.E. 2d 27 (1974), upon remand by the United States Supreme Court, 413 U.S. 913, 93 S.Ct. 3065, 37 L.Ed. 2d 1036 (1973), for reconsideration in light of *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed. 2d 419 (1973), by judicial construction, limited the application of an obscenity statute (G.S. 14-190.1), establishing in this State the principle of law that where a question of constitutionality is raised, a construction of the statute is fairly possible by which the question may be avoided. *See In re Dairy Farms*, 289 N.C. 456, 223 S.E. 2d 323 (1976).

In approaching the problem of judicial construction of the new statute, we find some guidance from our Supreme Court in its construction of the old kidnapping statute in the *Dix* and *Roberts* cases. We trust that our understanding of these guidelines is such that we

may construe the new statute so as to maintain judicial consistency without doing violence to the legislative intent to change the elements of common-law kidnapping.

We have also available for guidance the Model Penal Code's kidnapping statute which is similar to ours except that it does define both asportation and unlawful restraint. It reads in pertinent part:

> "A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a *substantial distance from the vicinity* . . . or he unlawfully confines another *for a substantial period in a place of isolation*, . . ." [Emphasis added.] Model Penal Code, § 212.1, Tent. Draft (1962).

The Model Penal Code clearly intends to exclude from kidnapping "trivial changes of location having no bearing on the evil at hand" and to eliminate "the absurdity of prosecuting for kidnapping in cases where the victim is forced into his own home to open the safe, or to the back of his store in the course of a robbery." Model Penal Code, § 212.1, Comment 16, Draft #11 (1960). Its definition aids a bit in refining asportation and carries the definition of unlawful restraint beyond Justice Bobbitt's demand for substantial duration. The Model Penal Code's unlawful confinement must take place in a "place of isolation" and clearly speaks to the special risk to which the kidnapping victim is exposed.

[2] We conclude that a fitting judicial definition must demand consideration of whether the unlawful restraint or confinement was substantial in terms of duration and not merely incidental to the commission of another crime. The asportation element similarly requires a consideration of substantiality in terms of distance and again not merely incidental to another crime. The risk of harm analysis in the *Dix* case does not appear to be necessary as a separate guideline since substantial confinement, restraint or asportation not merely incidental to the commission of another crime would seem necessarily to involve some increased risk of mental or physical harm.

[3] In the case before us the evidence for the State tended to show that the defendant bound and restrained each victim for a substantial period of time, and that the unlawful restraint was not merely incidental to the commission of the felony of crime against nature upon each victim, but was gratuitously committed against one victim while he was committing the crime upon the other. Under these

circumstances, the evidence was sufficient to demonstrate kidnapping as we have defined it, sufficient to go to the jury. The defendant's motion for nonsuit was properly denied.

In *sub judice*, no exceptions having been made to the instruction of the court, the charge was not included in the record on appeal. However, we believe that our judicial definition of statutory kidnapping is best explicated by a consideration of proper jury instructions. We note that North Carolina Pattern Instructions on Kidnapping (Crim. 210.10, revised January 1976), lists six things that the State must prove beyond a reasonable doubt. The first two are as follows:

> "First, that the defendant (confined) (restrained) (removed from one place to another) (*name victim*).
>
> Second, that the defendant did this unlawfully. . . ."

It is clear that these instructions which merely list but do not define and explain the elements to the jury are not sufficient.

In instructing the jury, the second element need not be separated from the first, and the appropriate element or elements used as the basis for the prosecution (unlawfully confined, unlawfully restrained, and unlawfully removed from one place to another) should be defined and explained to the jury. By way of summary and clarification we conclude the following:

[4] 1. If the charge against the defendant is kidnapping by *unlawful confinement*, the trial judge in instructing the jury must define the term in substance as meaning confinement for a substantial period and not merely incidental to the commission of another crime.

[5] 2. If the charge against the defendant is kidnapping by *unlawful restraint*, the trial judge in instructing the jury must define the term in substance as meaning restraint for a substantial period and not merely incidental to the commission of another crime.

[6] 3. If the charge against the defendant is kidnapping by *moving from one place to another*, the trial judge in instructing the jury must define the term in substance as meaning movement from one place for a substantial distance and not merely incidental to the commission of another crime.

[7] 4. Since "confinement" and "restraint" are practically synonymous, and there must be restraint if there is confinement,

and since unlawful removal from one place to another must involve unlawful restraint, in any kidnapping case the State may confine the charge against the defendant to kidnapping by unlawful restraint. And if the defendant is charged disjunctively in the language of the statute the trial judge could limit his definition and explanation to the term "unlawful restraint," even though the evidence also tended to show confinement or asportation, or both. The trial judge should instruct the jury in substance that the State must prove beyond a reasonable doubt that defendant unlawfully restrained the victim, that the term "unlawfully restrained" means that the restraint was for a substantial period of time and was not merely incidental to the commission of the other crime. It would, of course, be appropriate for the trial judge to apply the law to the evidence in the final mandate by describing the circumstances of the restraint as the evidence tends to show.

[8] 5. The common-law crime of false imprisonment, a general misdemeanor, has not been superseded by the new kidnapping statute because there may be an unlawful restraint without the purposes specified in the statute. In appropriate cases the trial judge should instruct the jury on false imprisonment as a lesser offense of kidnapping.

[9] Defendant also objected to the in-court identification, to the admission into evidence of a roll of tape allegedly used to bind the victims, and to the admission of "mug shots." There was a *voir dire* hearing on each of these evidentiary issues. In North Carolina admission of such mug shots has been held unprejudicial. *State v. Hatcher*, 277 N.C. 380, 177 S.E. 2d 892 (1970). We find that the evidence fully supports the trial court's finding of facts and conclusions. These assignments of error are overruled.

There is no merit to defendant's other assignments of error.

Affirmed.

Judges VAUGHN and HEDRICK concur.

STATE OF NORTH CAROLINA v. BOBBY EUGENE WHEELER, WILLIAM RAY WHEELER, AND ROBERT NABORS BRIDGES

No. 7726SC365

(Filed 19 October 1977)

1. **Criminal Law § 92— consolidation—discretionary matter**

The question of consolidating offenses arising out of a single scheme or plan ordinarily is a matter within the discretion of the trial judge and his decision will not be disturbed absent a showing of abuse of discretion.

2. **Criminal Law § 66.13— identification of defendant—pretrial confrontations—no taint**

Evidence was sufficient to support the findings of the trial judge in an armed robbery and assault case that the victim had ample opportunity to observe defendants at the time of the offenses, and that the victim's in-court identification of defendants was not tainted by a photographic identification several hours after the crimes occurred, identification of one defendant while in a police car at the scene of the crimes, or identification of another defendant at a hospital shortly after the crimes were committed.

3. **Robbery § 5— robbery with a firearm—failure to instruct on lesser offenses—no error**

Where the State's uncontradicted evidence showed that defendants took possession of a safe, a pistol, and a blackjack in the presence of their victim, that the safe was carried several feet and the pistol and blackjack were forcibly taken from the victim, that the victim did not voluntarily consent to the taking and carrying away of the property, that defendants intended to keep the property permanently, that each defendant had a firearm at the time they obtained the property, and that they obtained the property by repeatedly threatening the victim's life, the trial court did not err in failing to instruct on the lesser included offenses of robbery with a firearm.

4. **Criminal Law § 113.7— acting in concert—failure to repeat jury instructions—no error**

Where the trial court properly explained the legal principle of acting in concert and then instructed that "the legal principle of acting in concert is equally applicable to each defendant, and I will not define this legal principle again but I instruct you to remember it and apply it to each case against each defendant," such instruction was not peremptory.

5. **Criminal Law § 21— taking defendant before magistrate—one hour delay—no undue delay**

G.S. 15A-501(2) and G.S. 15A-511(a)(1) require only that defendant be taken before a magistrate "without unnecessary delay," and a delay of only one hour after the defendant had been taken into custody and advised of his rights could not be considered undue delay under the facts of the case.

6. **Criminal Law § 66.10— inadvertent viewing of defendant at law enforcement center—in-court identification not tainted**

An armed robbery victim's inadvertent observation of defendant at a Law Enforcement Center where defendant was taken shortly after his arrest was not

an illegal lineup, since proceedings had not yet been filed against defendant, nor was the inadvertent viewing of the defendant by the victim so impermissibly suggestive that it tainted a photographic identification or an in-court identification.

7. **Assault and Battery § 15.4— assault on law officers—officers performing duties —instructions proper**

In a prosecution for assault upon law enforcement officers, evidence was sufficient to support the trial court's instructions that the officers were acting in the performance of their duties when allegedly assaulted by defendant where the evidence tended to show that one officer was in the process of investigating an apparent assault on a security guard at a lounge when defendant pulled a gun and with the other two defendants began shooting at the officer, and the second officer was responding to a call for help from other officers and participating in the investigation of an assault and robbery at the lounge when defendants fired at him.

8. **Assault and Battery § 17; Robbery § 6— guilty of armed robbery—not guilty of assault—verdicts not inconsistent**

Defendant's contention that, since he was found not guilty of feloniously assaulting a security guard, the verdict of guilty of armed robbery of the guard was inconsistent with that verdict and should not be allowed to stand is without merit, since assault with a deadly weapon with intent to kill inflicting serious injury and the offense of armed robbery are separate and complete, and an acquittal on the assault charge would not bar a conviction on the armed robbery charge.

APPEAL by defendants from *Barbee, Judge.* Judgments entered 11 December 1976 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 27 September 1977.

Each defendant was charged with the following five offenses in fifteen separate bills of indictment: (1) armed robbery of Golmone Calloway, (2) three counts of felonious assault on law enforcement officers James Hooper, Henry McKiernan and M. R. Kelly, and (3) assault on Golmone Calloway with a deadly weapon with intent to kill, inflicting serious injuries. Over their objections, defendants were tried together. They pled not guilty.

The State's evidence tends to show:

On 9 July 1976 Calloway, a security guard for Investigations Unlimited, was on duty at the Tree House Lounge on Independence Boulevard in Charlotte. After the lounge closed about 3:00 a.m., Calloway secured the building, set the burglar alarm, and went into the office to telephone his wife. While talking on the telephone, he heard a noise outside the office door. He instructed his wife to call him back and went to investigate. As Calloway cracked the door and pulled his gun, defendant Bridges forced the door open and grabbed Calloway's hand which was holding the pistol while defendant Bobby Wheeler hit Calloway on the back of his head with a pistol. As

defendants Bridges and Bobby Wheeler were threatening Calloway and demanding that he tell them where the money was hidden, Calloway's wife telephoned. Calloway was instructed to answer the telephone; at gunpoint he told his wife that everything was all right after which one of the defendants jerked the phone out of his hands and slammed it down. Mrs. Calloway called the police.

Defendants Bridges and Bobby Wheeler then forced Calloway to break down a door to a small room where a safe was kept. Thereafter, they threw him back on the couch, told him to cover his face and proceeded to remove the safe. During this period said defendants beat Calloway about his head and threatened to "blow his damn brains out." As one of them cocked a pistol, a police officer tapped on the window with a flashlight; they then told Calloway to wipe the blood off his face and tell the officer that they were the clean-up crew. As defendant Bridges escorted Calloway to talk with the officer, Calloway observed defendant William Wheeler in the partially lighted poolroom area of the lounge.

Calloway talked with Officers McKiernan and Hooper in the well-lighted parking lot as he had been instructed, but when Officer McKiernan requested Calloway to step to the rear of the patrol car, defendant Bridges pulled a revolver and Officer Hooper grabbed his hand. Defendant Bobby Wheeler came out of the Tree House Lounge and ordered Officer Hooper to release defendant Bridges and began shooting. Officer McKiernan returned fire. Defendant Bobby Wheeler went back into the lounge, but came back outside while Officer McKiernan was reloading his gun; he again ordered Officer Hooper to release Bridges. Officer Hooper released Bridges who then pulled a pistol out of his pocket, pointed it at Officer Hooper's head and pulled the trigger two or three times; the gun failed to fire and Officer Hooper ran while all three defendants fired shots at him.

A short time later Officer Kelly arrived and observed the three defendants running along the side of the Tree House Lounge in an area brightly illuminated by the parking lot lights and the streetlights. Defendants shot at Officer Kelly who returned the gunfire. Shortly thereafter the three defendants were apprehended and Calloway made an on-the-scene identification of the three. Officers McKiernan, Hooper and Kelly also confronted the defendants shortly after the alleged crimes had been committed. Later that morning the three officers and Calloway selected pictures of the three defendants from a photographic display of seven or eight persons of various ages.

Following a voir dire hearing, Judge Barbee found that the confrontations and subsequent identifications of the three defendants by the officers and Calloway were not "so unnecessarily suggestive or conducive to lead to irreparable mistaken identification to the extent that either of the three defendants would be denied due process of the law", and that the in-court identifications of the three defendants by the officers and Calloway were based on independent observations at the time of the alleged crimes. He concluded that the evidence of the confrontations and subsequent identifications of the three defendants by the officers and Calloway was competent.

The defendants offered no evidence.

The jury found defendants Bridges and Bobby Wheeler each guilty on all five counts. The court entered judgments sentencing each of them to prison for 50 years on the armed robbery charge, and for five years on each of the assault on police officer charges. The court arrested judgment on the felonious assault on Calloway charges.

The jury found defendant William Wheeler guilty of armed robbery, guilty of two of the counts of assault on a police officer, and not guilty of the felonious assault on Calloway charge. The court declared a mistrial on the third charge of assault on a police officer. The court entered judgments sentencing defendant William Wheeler to prison for 20 years as a regular youthful offender on the armed robbery charge, and for five years each on the two assault on police officer charges.

From the judgments entered, all defendants appealed.

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

Bailey, Brackett & Brackett, by Martin L. Brackett, Jr., and Terry D. Brown, for defendant appellant Robert Nabors Bridges; Paul J. Williams for defendant appellant Bobby Eugene Wheeler; and James F. O'Neill for defendant appellant William Ray Wheeler.

BRITT, Judge.

APPEAL OF BOBBY WHEELER AND ROBERT BRIDGES

By their first assignment of error, defendants Bobby Wheeler and Bridges contend that the court erred in failing to grant their motions to sever and to allow each defendant a separate trial. The assignment has no merit.

[1] The question of consolidating offenses arising out of a single scheme or plan ordinarily is a matter within the discretion of the trial judge and his decision will not be disturbed absent a showing of abuse of discretion. 4 Strong's N.C. Index 3d, Criminal Law § 92. *See State v. Jones*, 280 N.C. 322, 185 S.E. 2d 858 (1972); *State v. Greene*, 30 N.C. App. 507, 227 S.E. 2d 154 (1976). Defendants have failed to show any abuse of discretion in this case.

[2] By the next assignments of error argued in their brief defendants Bobby Wheeler and Bridges contend the court erred in failing to suppress their in-court identifications by Calloway. They argue that the identifications were tainted by two illegalities: (1) the display of photographs by police to Calloway several hours after the crimes occurred; and (2) identification by Calloway of defendant Bobby Wheeler while in a police car at the scene of the crimes, and of defendant Bridges at a hospital shortly after the crimes were committed. These assignments have no merit.

The trial court conducted a lengthy voir dire hearing on defendants' motions to suppress the identification testimony. Calloway and the officers testified at the hearing. Following the hearing the court found facts with respect to Calloway's opportunity to observe defendants at the time of the offenses, his observation of defendants at that time, his viewing the photographs and his seeing defendants shortly after the crimes were committed. The court found and concluded that no illegal identification procedures relating to defendants were used and that the in-court identifications of all three defendants by Calloway were of independent origin, based solely on what he saw at the time the alleged crimes were committed, and did not result from any subjective pretrial identification procedures.

It is well settled that "when the admissibility of in-court identification testimony is challenged on the ground it is tainted by an out-of-court identification 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." 4 Strong's N.C. Index 3d, Criminal Law § 66.20, p. 276.

The trial court's findings of fact in the instant case were fully supported by evidence presented at the voir dire hearing and the conclusions of law are fully supported by the findings of fact. The assignments of error are overruled.

Defendant Bridges assigns as error the admission of testimony by Calloway that he identified Bridges from a photograph shown him a few hours after the crimes were committed. This assignment is based on the premise that the display of photographs to Calloway was unduly suggestive. As stated above, the trial court made findings of fact and conclusions that the display of photographs was not suggestive and the findings and conclusions are fully supported by the evidence. The assignment is overruled.

[3] Defendants Bobby Wheeler and Bridges next assign as error the failure of the trial court to instruct the jury on the lesser included offenses of robbery with a firearm. We find no merit in this assignment.

> "The trial court is not required to charge the jury upon the question of the defendant's guilt of lesser degrees of the crime charged in the indictment when there is no evidence to sustain a verdict of defendant's guilt of such lesser degrees. Thus, the court is not required to submit to the jury the question of 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." 4 Strong's N.C. Index 3d, Criminal Law § 115, pp. 610-611. *See also State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972); *State v. Bryant*, 280 N.C. 551, 187 S.E. 2d 111, *cert. denied*, 409 U.S. 995, 34 L.Ed. 2d 259, 93 S.Ct. 328 (1972).

With respect to the armed robbery charges, defendants argue that the trial court should have submitted as alternative verdicts the lesser included offenses of common law robbery, assault with a deadly weapon and simple assault. Since the State's evidence was positive and without conflict on all seven elements of the charge of robbery with a firearm, and there was no evidence to the contrary, instructions on the lesser included offenses were not required. The State's evidence showed that the defendants took possession of a safe, a pistol, and a blackjack in the presence of Calloway; that the safe was carried several feet and the pistol and blackjack were forcibly taken from Calloway; that Calloway did not voluntarily consent to the taking and carrying away of the property; that the defendants intended to keep the property permanently; that each defendant had a firearm at the time they obtained the property; and that they obtained the property by repeatedly threatening Calloway's life. On each of these points, the State's proof was positive and there was no conflict in the evidence.

[4] Finally, defendants Bobby Wheeler and Bridges assign as error the trial court's instructions to the jury on the legal principle of acting in concert. Defendants argue that since the court gave one basic charge on acting in concert and then instructed the jury to apply the charge to each defendant, the charge amounted to a peremptory instruction. We find no merit in this assignment.

"If the defendant is present with another and with a common purpose does some act which forms a part of the offense charged, the trial judge must explain and apply the law of 'acting in concert' . . . ." 4 Strong's N.C. Index 3d, Criminal Law § 113.7, p. 592. In this case, the trial judge was required to give an instruction on "acting in concert" with respect to the three defendants. The general rule is that a "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." *State v. Ware*, 31 N.C. App. 292, 294, 229 S.E. 2d 249, 251 (1976). Here, the court gave instructions on the legal principle of "acting in concert" at three points in the charge: (1) before defining the elements of robbery with a firearm, (2) before explaining the charge of assault with a deadly weapon with intent to kill, and (3) before instructing on the charge of assault with a firearm upon a law enforcement officer. The instructions contained the following language:

> "Members of the jury, at this time I will instruct you on the law as to each charge against each defendant separate. First, I instruct you that for a person to be guilty of a crime it is not necessary that he himself do all of the acts necessary to constitute the crime. If two or more persons act together with a common purpose to commit a crime each of them is held responsible for the acts of the others done in the commission of that crime. Members of the jury, this legal principle is referred to as acting in concert.
>
> "As I instruct you on the law on each case against each defendant separately, the legal principle of acting in concert is equally applicable to each defendant, and I will not define this legal principle again but I instruct you to remember it and apply it to each case against each defendant."

As required by *State v. Forrest*, 262 N.C. 625, 626, 138 S.E. 2d 284, 285 (1964), the court's charge went to all "material aspects of the offense[s]" and was "complete within itself." The charge in this case did not involve the error of *State v. Forrest, supra*, since it did not require the jurors to rely on instructions which the court had

given in other cases or which the jurors may have heard in other cases. Nor was the instruction on the legal principle of acting in concert a peremptory instruction. The court was only advising the jury as required of a legal theory which they could accept or reject as being applicable to this particular case. The court was not directing the jury to answer the issue of acting in concert in a particular manner if they found or did not find from the greater weight of the evidence that the facts were as the evidence tended to show. 7 Strong's N.C. Index 2d, Trial § 31.

For the reasons stated, we conclude that defendants Bobby Wheeler and Bridges received fair trials free from prejudicial error.

APPEAL OF WILLIAM RAY WHEELER

By his first assignment of error, this defendant contends that the court committed prejudicial error by failing to sever the five charges against him from the five identical charges against each of the other two defendants. For the reasons stated in the discussion above concerning the denial of the motions to sever by defendants Bobby Wheeler and Bridges, we find no merit in this assignment of error.

[5] By his second assignment of error, defendant William Wheeler contends that the court erred in failing to quash the five indictments against him because the officers failed to take him before a magistrate for an initial appearance immediately after the on-the-scene identification by Calloway. We find no merit in this assignment.

G.S. 15A-501(2) and G.S. 15A-511(a)(1) provide that a law enforcement officer making an arrest with or without a warrant must take the person arrested before a magistrate "without unnecessary delay." In this case, defendant William Wheeler was identified at the scene immediately after the alleged crime, at approximately 4:00 a.m., and was then taken to the Charlotte Law Enforcement Center where Calloway happened to see him again around 5:00 a.m. The statutes only require that the defendant be taken before a magistrate "without unnecessary delay" and a delay of only one hour after the defendant had been taken into custody and advised of his rights could not be considered undue delay under the facts of this case.

[6] Under this assignment, defendant William Wheeler also contends that there was an illegal lineup a short while after the crimes were committed. This contention has no validity.

The fact that Calloway inadvertently observed the defendant when he arrived at the Law Enforcement Center was not an illegal lineup since proceedings had not yet been filed against him. *See* 4 Strong's N.C. Index 3d, Criminal Law § 66.3; *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974), *modified on other grounds*, 428 U.S. 902, 49 L.Ed. 2d 1205, 96 S.Ct. 3202 (1976). Nor was the inadvertent viewing of the defendant by Calloway so impermissibly suggestive that it tainted the photographic identification or the in-court identification. *State v. Thomas*, 292 N.C. 527, 234 S.E. 2d 615 (1977). *See also State v. Vawter*, 33 N.C. App. 131, 234 S.E. 2d 438 (1977). According to the order following the voir dire hearing, both the photographic and in-court identifications were found to be based on independent observations made at the time of the alleged crimes. For the reasons stated in the appeal discussed above, the trial court's findings of fact and conclusions of law after the voir dire concerning the identification of the defendant by Calloway and the three police officers are conclusive and binding on this court. We hold that defendant's motions to quash the five indictments were properly denied.

By his third and fourth assignments of error, defendant William Wheeler contends the court erred in permitting his identification at the voir dire and before the jury by Calloway, Officer McKiernan, Officer Hooper and Officer Kelly. For the reasons stated in the above discussion concerning Calloway's photographic and in-court identifications of defendants Bobby Wheeler and Bridges, we find no merit in either of these assignments of error.

By his seventh assignment of error, defendant William Wheeler argues that the trial court erred in its instructions to the jury in several respects. We find no merit in this assignment of error.

Defendant's contentions that the instructions on robbery with a firearm and acting in concert were peremptory instructions are without merit for the reasons set forth above in a similar argument made by defendant's Bobby Wheeler and Bridges. Defendant's assertion that these two instructions were expressions of the trial judge's opinion in violation of G.S. 1-180 is equally without merit. These two instructions involved applicable legal principles which required instruction, 4 Strong's N.C. Index 3d, Criminal Law §§ 111, 113.7, 114, p. 592, and when viewed in the context of the charge as a whole were neither improper nor misleading to the jury. *State v. Ware*, *supra*.

[7] Defendant's contention that there is no evidence to support the trial court's instructions that Officers Hooper and Kelly were acting in the performance of their duties when allegedly assaulted by defendant is also without merit. As to Officer Hooper, the evidence showed that Officers McKiernan and Hooper arrived at the Tree House Lounge in response to a report by Calloway's wife of suspicious circumstances at the lounge; that upon arrival both officers observed security officer Calloway and defendant Bridges approach the police car; that Calloway was without a shirt, his gun holster was empty and he was bleeding about his head; that Calloway told the officer he had fallen on a beer bottle and that Bridges was part of the clean-up crew; and that when Calloway made a motion with his eyes toward Bridges, Officer McKiernan requested Calloway to step to the patrol car while Officer Hooper attempted to prevent defendant Bridges from pulling a gun. This evidence tended to show that Officer Hooper was in the process of investigating an apparent assault on Calloway when Bridges pulled a gun and with the other two defendants began shooting at Officer Hooper.

In a similar manner the evidence shows that Officer Kelly was acting in the line of duty as a police officer when he was assaulted. He responded to a call for help at the Tree House Lounge around 3:30 a.m. Upon his arrival he saw the three defendants running and ordered them to stop, but they kept running and started firing in his direction. Officer Kelly returned fire. This evidence clearly tended to show that Officer Kelly was acting in the line of duty when assaulted since he was responding to a call for help from other officers and participating in the investigation of an assault and robbery at the Tree House Lounge.

Finally, defendant William Wheeler contends in his eighth assignment of error, that the trial court erred in failing to set aside the armed robbery conviction. We find no merit in this contention.

[8] Defendant William Wheeler argues that since he was found not guilty of feloniously assaulting Calloway, the verdict of guilty of armed robbery of Calloway was inconsistent with that verdict and should not be allowed to stand. This argument is not persuasive.

In *State v. Teel*, 24 N.C. App. 385, 386, 210 S.E. 2d 517, 518 (1975), the court stated:

> "The crime of armed robbery includes an assault on a person with a deadly weapon. However, where the assault charged contains a necessary ingredient which is not an essential ingre-

dient of armed robbery, the fact that the assault is committed during the perpetration of the armed robbery does not deprive the assault of its character as a complete and separate offense. *State v. Richardson*, 279 N.C. 621, 185 S.E. 2d 102. Consequently, an assault with a deadly weapon inflicting serious injury, as charged against defendant and as defined in G.S. 14-32(b), is not a lesser included offense of armed robbery because the infliction of serious injury is not an essential ingredient of armed robbery. *State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844."

Applying this reasoning to the present situation, the defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injury under G.S. 14-32. This offense cannot be considered a lesser included offense of armed robbery. The two offenses are separate and complete and an acquittal on the assault charge would not bar a conviction on the armed robbery charge. *State v. Teel, supra.*

In addition, there is no requirement in North Carolina that verdicts be consistent. In 4 Strong's N.C. Index 3d, Criminal Law § 124.5, p. 653, the following rule is stated: "It is not required that the verdict be consistent; therefore, a verdict of guilty of a lesser degree of the crime when all the evidence points to the graver crime, although illogical and incongruous, or a verdict of guilty on one count and not guilty on the other, when the same act results in both offenses, will not be disturbed."

We conclude that defendant William Wheeler received a fair trial, free from prejudicial error.

No error.

Judges HEDRICK and MARTIN concur.

CHESTER A. COGBURN AND WIFE, RUBY D. COGBURN AND WESLEY VRABEL AND WIFE, MYRTLE VRABEL v. JOSEPH E. HOLNESS, JR., OF PALM BEACH COUNTY, FLORIDA

No. 7628SC1045

(Filed 19 October 1977)

1. Dedication § 2.1 — golf course — use by subdivision lot owners — insufficient acts of dedication

There was no valid dedication of rights in a golf course tract to the owners of lots in a subdivision where the plats referred to in the form deeds to the lot

owners do not show and contain no reference to a golf course, and there is no language expressly dedicating the golf course to the use of the lot owners in either the form deeds or the plats.

2. **Dedication § 2.1— golf course—use by subdivision lot owners—booklet publicizing subdivision—no dedication**

A booklet publicizing a subdivision which was distributed by the subdivision developer did not effectuate a dedication of rights in a golf course tract to the owners of lots in the subdivision where the booklet was never placed on public record and was not referred to in recorded plats of the subdivision or the deeds to purchasers of lots in the subdivision.

3. **Deeds § 20— golf course tract—insufficiency of language to create restriction on use**

Language in a booklet distributed by a subdivision developer which related to the developer's intent to transfer a golf course tract to owners of lots in the subdivision was insufficient to create a restriction on the use of such tract where it recited only that a meeting of lot owners may be held to consider the disposition of the golf course and that "no definite plan" for the transfer of the tract would be decided upon until a mutually agreeable understanding was effected by the lot owners, and no plan of transfer was ever proposed or mutually agreed upon.

4. **Dedication § 2.1; Deeds § 20— golf course tract—subdivision—no dedication of rights—no restriction on use**

There was no dedication of rights in a golf course tract to owners of lots in a subdivision and no creation of a restriction on the use of the tract by deeds which excepted "such rights as may have heretofore been granted . . . relating to the use . . . of the golf course" or by deeds which were made subject to "any outstanding right, privilege or easement in any third party (if there should be any such outstanding right, privilege or easement, which the party of the first part does not admit) to have the property . . . for use as a golf course."

APPEAL by defendant from *Martin (Harry), Judge*. Judgment entered 21 September 1976 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 22 September 1977.

Plaintiffs instituted this action seeking specific performance of a contract entered into by plaintiffs and defendant on 9 September 1974 in which plaintiffs agreed to sell and defendant agreed to purchase, in fee simple and free from all liens and encumbrances, 1.01 acres out of a 46-acre tract situated in the city of Asheville.

Defendant filed answer admitting the existence of the contract but alleging that plaintiffs were unable to convey a good and sufficient title to the land described in the contract for the reason that such land was encumbered by certain restrictions and/or easements appurtenant limiting its use to that of a golf course.

In reply to defendant's allegations, plaintiffs denied that restrictions or easements so limiting the use of the land in question

were effectively created by any of the deeds or other documents constituting plaintiffs' chain of title and as further relief, prayed the court to remove any cloud on plaintiffs' title arising from such restrictions or easements.

The parties stipulated that the court hear and determine the case on the pleadings, certain stipulated facts and authenticated documents and the deposition of plaintiff Wesley Vrabel.

According to plaintiffs' chain of title, which included twenty-four (24) documents authenticated by stipulation of the parties, the land in question was part of a 46-acre tract conveyed with adjoining lands by Asheville School, Inc. to Malvern Hills, Inc. by deed dated May, 1925. In April of 1925, prior to this conveyance, Newton M. Anderson had recorded three plats indicating a proposed subdivision of these lands; in two of these plats is an undefined area marked "golf course." Subsequent to the May, 1925 conveyance, Malvern Hills, Inc. recorded four new plats containing metes and bounds descriptions of the lots and blocks and referring to the property as "Malvern Hills." No mention of a "golf course" appears in the four later plats.

Between May, 1925 and June, 1929, Malvern Hills, Inc. sold one hundred thirteen (113) subdivision lots, all such conveyances referring to the four plats recorded by Malvern Hills, Inc. which make no mention of a "golf course." Each of the one hundred thirteen (113) conveyances was executed on a form deed which contained in part the following language:

> "WHEREAS, the land above described is a part of a boundary of land shown on the plat [one of the four subsequently recorded plats], which said boundary has been divided into parcels or lots, and laid off and designed to be used exclusively for residential purposes except so much thereof as is designated 'Golf Course' . . . ."

In conjunction with the sale of lots in the subdivision, Malvern Hills, Inc. prepared and distributed a booklet publicizing the subdivision and making the following pertinent statements concerning the "club house" and "golf course":

> "DISPOSITION OF GOLF COURSE AND CLUB HOUSE
>
> When two hundred lots shall have been sold in Malvern Hills, or after two years from April 1, 1925, at the option of Malvern Hills, Inc., a meeting of the property owners may be called for the purpose of considering a disposition of the golf

course and club property. It is Mr. Anderson's purpose to transfer these properties to the owners of homesites in Malvern Hills, under due provisions, assuring their continued use by the entire community as a golf property or community part. As to whether this transfer should take the form of a lease or conveyance, and as to the numerous details involved by the arrangement, it is felt that the voice and opinion of the property owners should be heard, and accordingly no definite plan will be proposed until the above mentioned meeting can be held, at which time the interested parties will consult to effect a mutually agreeable understanding and action. Mr. Anderson wishes it clearly understood that he is bound in all good faith to transfer the Club House and golf course substantially without remuneration for their value to the owners and also those who buy in additional areas that may later be developed for residences will have the benefit of this transfer."

In 1929, Malvern Hills, Inc. executed a deed of trust to Central Bank and Trust Company as trustee, conveying among other property the 46-acre tract pertinent to this case and on which, at that time, existed a nine-hole golf course. The deed of trust contained the following language with reference to any alleged limitations on or rights in the use of the 46-acre tract:

> "Excepting also such rights as may have heretofore been granted to [prior] purchasers of lots . . . under deeds or contracts from Malvern Hills, Inc., relating to the use and enjoyment of the portion of said hereinabove described land used as a golf course."

This deed of trust was foreclosed in June, 1933 and the property, including the 46-acre golf course, was purchased at public auction by Consolidated Realty Company. The trustee's deed conveying such property recited the same "exception" concerning the golf course as appeared in the deed of trust. Shortly after acquisition of the Malvern Hills, Inc. property, Consolidated Realty executed a deed of trust to Asheville Safe Deposit Company, as trustee, which included a description of the 46-acre tract citing it as "Golf Course Tract." This deed of trust contained no reference to an exception for any rights granted in the use of the golf course.

By deed dated August, 1938, Consolidated Realty conveyed in fee simple the 46-acre tract referred to as the "golf course tract" to Hilliard Green, again making no reference to rights of third persons regarding the use of the land. Green conveyed the "golf course

tract" in September, 1939 to Ralph Overton by deed which recited the following pertinent language:

> "This conveyance is also made subject to any outstanding right, privilege or easement in any third party (if there should be any such outstanding right, privilege or easement, which the party of the first part does not admit) to have the property above described, or any portion thereof, maintained in perpetuity or for any limited period, for use as a golf course."

Approximately one month after the Green to Overton conveyance, certain Malvern Hills property owners and other persons having an interest in the subdivision lots as either trustee, mortgagee or beneficiary, executed an agreement impressing restrictive covenants on the lots for a period of twenty-five (25) years. With reference to use of the golf course tract, the agreement recited:

> "In signing this consent to the changes in the restrictions applying to the Malvern Hills Development the signers hereof do not waive any of their rights, if any, either as owners of the rights, if any, of the lots owned by them have in and to the area shown on the plats of Malvern Hills as a golf course, or the rights, if any, vested in them under and by virtue of certain agreements heretofore executed by previous owners of Malvern Hills and now of record in the Office of the Register of Deeds of Buncombe County, North Carolina. That is to say, the signers hereof reserve all their rights and the rights of their lots, if any, under the original general plan of development of Malvern Hills insofar as the golf course is concerned."

Ralph Overton, then owner of the 46-acre "golf course" tract did not join in this agreement.

In March, 1942, Overton conveyed the golf course tract to L. B. Jackson and R. H. Edney by deed which recited the same language quoted above from the Green to Overton deed. Jackson and Edney conveyed the golf course tract, along with other lands, to plaintiffs Chester Cogburn and wife, Ruby Cogburn, in September, 1944. Their deed also contained the above referred to language (in the Green to Overton deed) regarding any rights of third persons to the use of the golf course tract. Plaintiffs Wesley Vrabel and wife, Myrtle Vrabel came into possession of a one-half (1/2) undivided interest in the golf course tract by virtue of a conveyance of the same from plaintiffs Cogburn in 1945.

Plaintiff Wesley Vrabel's deposition tended to show that from approximately 1925 until 1946 the 46-acre tract was used as a nine-hole golf course. None of the property has been used for golfing purposes since 1946 (over thirty years); but at various times the tract has been planted in corn, used for commercial purposes, condemned in part by the State of North Carolina for highway purposes, and rezoned for business purposes by the city of Asheville.

Finding facts substantially as detailed above, the trial judge concluded that no restrictions or easements appurtenant existed in favor of any third persons with reference to the use of the 46-acre tract or any part thereof; accordingly a judgment granting specific performance to plaintiffs was entered. Defendant appealed to this Court.

Redmond, Stevens, Loftin & Currie, Professional Association, by John W. Mason and Carl W. Loftin, for the plaintiffs.

Long, McClure & Dodd, by Robert B. Long, Jr. and Jeff P. Hunt, for the defendant.

MARTIN, Judge.

The question posed by this appeal is whether the "golf course tract" is encumbered by any restriction, easement appurtenant, or rights in the Malvern Hills lot owners requiring the golf course tract to be maintained as such. The pertinent language of the documents constituting plaintiffs' chain of title must be interpreted in light of the applicable rules of construction to resolve this matter.

The trial judge made extensive conclusions of law in construing the documents before him and determined that no restriction, dedication, easement or other right in Malvern Hills lot owners has ever existed with respect to the use of the golf course tract. It is defendant's contention that the trial judge erred in this conclusion. We cannot agree with defendant.

[1] Viewing the documents comprising the record before us, we are unable to find a valid dedication of any rights in the golf course tract to lot owners in Malvern Hills Subdivision. We recognize the rule established in *Cleveland Realty Co. v. Hubbs*, 261 N.C. 414, 135 S.E. 2d 30 (1964), a case similar to the instant case, that the sale of lots in a subdivision by deed referring to a recorded plat showing lots, streets, and a golf course, and containing restrictions that the developers were dedicating the golf links and the playground for the use and pleasure of the owners of the lots, is a valid dedication of

the golf course to the purchasers of lots in the subdivision. However, in the instant case, the plats referred to in the form deeds do not show nor even contain a reference to a golf course. Nor is there language expressly dedicating the golf course to the use of the lot owners in either the form deeds or the plats as the court found in the *Cleveland Realty* case.

[2, 3] Defendant further argues that the descriptive booklet distributed by Malvern Hills, Inc. in conjunction with the sale of subdivision lots effectuated a dedication of certain rights in and to the use of the golf course tract, and at the least, created a valid restriction on its use. We must agree with the trial judge's conclusion that the booklet amounted to no more than an attractive advertisement of the subdivision. The booklet was never placed on public record in Buncombe County and was in no way referred to in the form deeds and recorded plats, the instruments determining the legal rights created by conveyances of lots in the subdivision. Moreover, the language in the booklet relating to the disposition of the golf course is vague and ambiguous and thus, unenforceable at law or in equity as a restriction on the use of the same. As was stated by our Supreme Court in *Edney v. Powers*, 224 N.C. 441, 31 S.E. 2d 372 (1944),

> ". . . [T]he universal interpretation . . . of . . . restrictions in deeds has been in favor of the free and untrammeled use of the property and against any restriction upon the use thereof, and that any doubt arising or ambiguity appearing will be resolved against the validity of the restriction upon and in favor of the extended use of the property."

The pertinent language recites only that a meeting of lot owners may be held to consider the disposition of the golf course; and as to any proposed transfer of such property, "no definite plan" would be decided upon until a mutually agreeable understanding was effected by the lot owners. As no plan of transfer was ever proposed or mutually agreed upon, we cannot hold that a valid restriction was created by the language in the booklet.

[4] We are also unable to find any merit in the contention that certain language appearing in the later deeds and deeds of trust constituting plaintiffs' chain of title effectively created a restriction on the use of the golf course tract. We note simply that each such reference to the use of the golf course tract was phrased in the following equivocal terms:

"Excepting . . . such rights as may have heretofore been granted . . . relating to the use . . . [of the] golf course." [Form deeds used by Malvern Hills, Inc.]

". . . subject to any outstanding right, privilege or easement in any third party (if there should be any such outstanding right, privilege or easement, which the party of the first part does not admit) to have the property . . . for use as a golf course." [Green to Overton, Overton to Jackson and Edney, Jackson and Edney to Cogburn deeds]

In view of our interpretation of the plats and form deeds and the booklet, we hold that these later references to the use of the golf course tract are likewise ineffective as a dedication of or restriction on the use thereof.

Accordingly, the judgment entered by the trial judge granting specific performance of the subject contract to plaintiffs is

Affirmed.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. JERRY WAYNE ALLEN

No. 7718SC301

(Filed 19 October 1977)

1. **Criminal Law § 86.5— impeachment—prior acts of criminal conduct**

The trial court did not err in permitting the district attorney to cross-examine defendant with respect to two murders for which he had been charged but not tried, since a defendant may be cross-examined for impeachment purposes about specific acts of criminal conduct, and such cross-examination is not limited to offenses for which defendant has been indicted and convicted.

2. **Criminal Law § 86.3— impeachment—admission of conviction—assertion of innocence—further questions**

When defendant admitted on cross-examination that he had pled guilty to a charge of breaking and entering in 1973 but stated that he was not in fact guilty, the trial court did not err in permitting the district attorney to ask defendant several additional questions about the 1973 case.

3. **Criminal Law § 163— objections to review of evidence—time for making**

Objections to the trial court's review of the evidence in the charge must be made before the jury retires so as to afford the trial judge an opportunity for correction.

4. Conspiracy § 6; Criminal Law §§ 9.1, 10; Assault and Battery § 10— conspiracy to rob—accessory before fact to robbery—felonious assault—sufficiency of evidence

The State's evidence was sufficient for the jury on issues of defendant's guilt of conspiracy to commit armed robbery and accessory before the fact to armed robbery where it tended to show that defendant procured, counseled and encouraged two others to commit an attempted armed robbery of a store proprietor, that the two perpetrators committed a felonious assault on the victim in their attempt to carry out the armed robbery, and that while defendant was in his automobile near the store when the two perpetrators entered the store, he was not there when they came out, and there was no evidence that he remained there after they entered the store; however, the evidence was insufficient for submission to the jury on the issue of defendant's guilt of felonious assault as an aider and abettor since he was not actually or constructively present at the scene of the assault.

5. Criminal Law § 10.3— accessory before the fact—instructions—absence from crime scene

Defendant was not prejudiced by failure of the trial court to instruct the jury that absence from the scene of the principal crime was an element of the offense of accessory before the fact to an attempted armed robbery where the absence of defendant from the scene of the attempted robbery was not an issue at trial since witnesses for the State testified that he was not present and defendant himself testified that he was elsewhere at the time of the attempted robbery.

APPEAL by defendant from *Crissman, Judge.* Judgment entered 10 December 1976 in Superior Court, GUILFORD County. Heard in the Court of Appeals 31 August 1977.

Upon pleas of not guilty defendant was tried on bills of indictment charging him with (1) assault with a deadly weapon with intent to kill inflicting serious injury, (2) conspiracy to commit armed robbery, and (3) accessory before the fact to attempted armed robbery. The alleged offenses occurred on 26 August 1976 and Joseph West was the alleged victim.

Evidence presented by the State, including the testimony of Levard Caldwell and David Hayes, tended to show:

At about 9:00 or 9:30 p.m. on 26 August 1976 Levard Caldwell and David Hayes were standing outside the home of the latter. Defendant approached them and stated that he knew where they could pull an armed robbery. He then drove Caldwell and Hayes to his home where he obtained a loaded gun and gave it to Caldwell, after which he drove them to the store operated by Joseph West. On the way to the store, defendant instructed Caldwell and Hayes how to commit the robbery.

Upon arrival at the store, defendant circled the block several times, observing the store as he passed it. He let Caldwell and

Hayes out of the car after which Caldwell went across the street to "check things out". Defendant shouted to Caldwell to go ahead and enter the store and Caldwell and Hayes did so.

Hayes attempted to get the attention of West, the operator of the store, after which Caldwell drew a gun and told West that it was a hold up. Shots were then exchanged between West and Caldwell, resulting in all three of them being shot. Hayes and Caldwell left the store without any money and ran to where defendant was supposed to be waiting but defendant was not there. They then ran to Hayes' house and later defendant joined them.

Thereafter, defendant drove Caldwell and Hayes to the Thomasville hospital, telling them to use fake names and not to mention his name. In response to a call Detective Price of the High Point Police Department went to the store. Defendant walked up to Price and asked him what had happened. Later Price went to the Thomasville hospital and observed defendant in the lobby. Defendant told Price he had picked up Caldwell and Hayes and had taken them to the hospital but refused to state where he picked them up.

Defendant offered alibi evidence to the effect that on 25 and 26 August 1976 he was in Atlanta on a business trip; that he returned around 8:00 or 8:15 p.m. and was with his girl friend between 9:00 and 10:15 p.m.; that around 10:15 p.m. he had occasion to drive by the store and ask Officer Price what had happened; that later he was asked by Hayes and Caldwell to take them to the hospital because they had been shot.

The State offered rebuttal evidence that defendant made a statement to Detective Price to the effect, "[w]hat if I did give them the gun. I can't tell him what to do with it".

The jury returned verdicts finding defendant guilty of conspiracy to commit armed robbery, guilty of accessory before the fact of armed robbery, and guilty of an assault with a deadly weapon inflicting serious injury. The court consolidated the conspiracy and accessory before the fact charges for purpose of judgment and imposed a ten-year prison sentence. On the felonious assault charge the court entered judgment imposing a prison sentence of four years to begin at the expiration of the ten-year sentence, execution of the four-year sentence to be suspended on certain conditions. Defendant appealed.

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

Fisher, Fisher & McAllister, by Kenneth W. McAllister, for defendant appellant.

BRITT, Judge.

By his first assignment of error, defendant contends the court erred in denying his motion to prohibit the district attorney from questioning him with respect to two murders for which defendant had been charged but never tried, and in allowing the district attorney to question him about those murders. This assignment has no merit.

[1] Defendant testified as a witness in his own behalf. On cross-examination the district attorney questioned him about killing Ollie Ingram and Mackland Little but did not question him about being indicted for the murder of those persons. Defendant concedes that the rule now prevailing in this jurisdiction is that while a defendant may not be cross-examined for purposes of impeachment as to whether he has been indicted or is under indictment for a criminal offense other than that for which he is then on trial, he may be questioned about specific acts of criminal conduct and such cross-examination for purposes of impeachment is not limited to questions concerning convictions of crimes. *See State v. Foster*, 284 N.C. 259, 200 S.E. 2d 782 (1973); *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971); and *State v. Splawn*, 23 N.C. App. 14, 208 S.E. 2d 242, *cert. denied*, 286 N.C. 214, 209 S.E. 2d 318 (1974).

At the same time, defendant argues that the rule should be changed and that the cross-examination of a defendant regarding criminal conduct should be limited to offenses for which he has been indicted and convicted. Argument identical to defendant's has been rejected by our Supreme Court in *State v. Foster, supra*, and *State v. McKenna*, 289 N.C. 668, 224 S.E. 2d 537 (1976). The assignment of error is overruled.

[2] By his second assignment of error, defendant contends the trial court erred in allowing the district attorney, over his objection, to extensively cross-examine him about a prior conviction. This assignment has no merit.

During the course of his cross-examination, defendant was asked if he was not convicted of breaking into and entering Colbert Textiles in High Point in January of 1973. He stated that while he

pled guilty to the offense he was in fact not guilty. The court allowed the prosecutor to ask defendant several additional questions about the case and in this we perceive no impropriety. The scope of the cross-examination of a witness rests largely in the discretion of the trial judge, *State v. Daye*, 281 N.C. 592, 189 S.E. 2d 481 (1972), and the rule that answers given by a witness to questions on cross-examination relating to collateral matters are conclusive does not preclude the examiner from "pressing or sifting the witness" by further cross-examination. 4 Strong's N.C. Index 3d, Criminal Law § 88.3.

[3] We find no merit in defendant's fourth assignment of error. This assignment relates to an alleged inaccuracy by the trial court in reviewing the evidence in the charge to the jury. Suffice it to note that there is no indication in the record that the alleged inaccuracy was called to the attention of the court before the jury retired. The law requires that this be done in order to give the trial judge an opportunity to correct any alleged inaccuracy in his review of the evidence. *State v. Virgil*, 276 N.C. 217, 172 S.E. 2d 28 (1970). The assignment is overruled.

[4] Defendant assigns as errors the failure of the trial court to grant his motions (1) for nonsuit as to all charges and (2) for arrest of judgment in all cases. With respect to the felonious assault charge, and judgment rendered therein, we think the assignments have merit. As to the other charges and judgments, we find no merit in the assignments.

Defendant argues that in order to be guilty of a felonious assault the offender must be present at the scene of the assault either actually or constructively; and to be guilty of accessory before the fact, the offender must be absent from the scene. Therefore, he argues, under the indictments and evidence in these cases, he could not be guilty of a felonious assault on West and also be guilty of accessory before the fact to armed robbery or attempted armed robbery. We find this argument persuasive.

"A principal in the first degree in an assault and battery is he who actually commits the assault and battery with his own hand. A principal in the second degree in an assault and battery is one who is actually or constructively present when an assault and battery is committed by another, and who aids or abets such other in its commission." 1 Strong's N.C. Index 3d, Assault and Battery § 10.

"An accessory before the fact is one who was absent from the scene when the crime was committed but who procured, counseled,

commanded or encouraged the principal to commit it." *State v. Benton*, 276 N.C. 641, 653, 174 S.E. 2d 793, 801 (1970).

In the instant cases, the evidence showed that defendant "procured, counseled, commanded or encouraged" Caldwell and Hayes to commit the attempted armed robbery of West and that he was absent from the scene; and that Caldwell and Hayes committed the felonious assault on West in their attempt to carry out the armed robbery. While the evidence showed that defendant was in his automobile near the store when Caldwell and Hayes entered the store, he was not there when they came out and there was no showing that he remained there after they entered.

We hold that the felonious assault charge against defendant should not have been submitted to the jury and that the trial court should have arrested the judgment on that charge. We also hold that the evidence was sufficient to survive the motions for nonsuit of the conspiracy and accessory before the fact charges and that the judgment in those cases should not have been arrested.

[5] By his sixth assignment of error, defendant contends the court erred in its jury instructions pertaining to accessory before the fact in that the court did not instruct that absence from the scene of the principal crime is an element of the offense. Assuming, *arguendo*, that this assignment has merit, we do not think defendant was prejudiced by the error.

Defendant relies on the following statement from *State v. Bass*, 255 N.C. 42, 51, 120 S.E. 2d 580, 587 (1961), quoted with approval in *State v. Buie*, 26 N.C. App. 151, 153, 215 S.E. 2d 401, 403 (1975):

> "There are several elements that must concur in order to justify the conviction of one as an accessory before the fact: (1) That he advised and agreed, or urged the parties or in some way aided them to commit the offense. (2) That he was not present when the offense was committed. (3) That the principal committed the crime." 22 C.J.S., Criminal Law, § 90, p. 269.

While we do not dispute the quoted statement, the absence of defendant from the scene of the principal offense in the instant case was not an issue at trial. Witnesses for the State testified that he was not present and as a witness for himself defendant testified that he was elsewhere at the time of the attempted armed robbery.

"The chief purposes of the charge are clarification of the issues, elimination of extraneous matters, and declaration and application of the law arising upon the evidence." Chief Justice Stacy in *State v.*

Jackson, 228 N.C. 656, 658, 46 S.E. 2d 858, 859 (1948), citing *State v. Matthews*, 78 N.C. 523 (1878), and *State v. Dunlop*, 65 N.C. 288 (1871). "Mere technical error will not entitle defendant to a new trial; it is necessary that error be material and prejudicial and amount to a denial of some substantial right." 4 Strong's N.C. Index 3d, Criminal Law § 167, p. 851.

While the trial court might have erred in the omission complained of, we find it inconceivable that the omission, under the evidence in this case, was material and prejudicial. The assignment of error is overruled.

In No. 76CRS20479 (felonious assault case), judgment arrested.

In Nos. 76CRS20480 and 76CRS20481 (conspiracy and accessory before the fact cases), no error.

Chief Judge BROCK and Judge MORRIS concur.

BOARD OF TRANSPORTATION, SUBSTITUTED PLAINTIFF v. NEIL E. BROWN AND WIFE, INGRID S. BROWN

No. 7628SC1019

(Filed 19 October 1977)

1. **Eminent Domain § 6.3— land taken for highway—traffic noise—evidence improperly excluded**

In an action to condemn and appropriate a portion of defendant's land for construction of a controlled access highway facility, the trial court erred in excluding evidence of traffic noise which would cause a diminution in the value of defendant's remaining land.

2. **Eminent Domain § 6.3— land taken for highway—no access for remaining land—evidence admissible**

In an action to condemn and appropriate a portion of defendant's land for construction of a controlled access highway facility, the trial court erred in failing to instruct the jury that there would be no direct access from defendant's remaining land to the highway and that this denial of access should be considered in determining the fair market value of the remaining land.

Judge HEDRICK concurring in result.

DEFENDANTS appeal from *Ervin, Judge*. Judgment entered 20 July 1976 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 20 September 1977.

Plaintiff began condemnation action on 14 May 1973 to condemn and appropriate approximately 8 of 52.2 acres of defendant's land for construction of a controlled access highway facility pursuant to N.C. G.S. § 136-89.52. The 8 acres were taken for fee simple right-of-way and perpetual easement for drainage and construction. Access from the new roadway to be constructed on the taken acres was denied defendant's remaining lands.

All of the evidence tended to show that the highway would be a four-lane, high-speed, controlled-access facility; that the construction would involve high cuts; that the highest and best use of the property was for rural, residential homesites or residential subdivision. The defendants' evidence of the difference between the fair market value of the lands before and after the taking ranged from $24,000 to $41,000 while the plaintiff's ranged from $8,375 to $9,088.

The court excluded all evidence as to the effect of traffic noise on defendants' remaining lands and instructed the jury not to consider any such effect. The jury awarded $14,500 to defendants as just compensation for the taking. From the judgment defendants appeal.

Attorney General Edmisten by Senior Deputy Attorney General R. Bruce White, Jr., and Assistant Attorney General Alfred N. Salley for the Board of Transportation.

Lentz & Ball by Ervin L. Ball, Jr., Long, McClure & Dodd by Robert B. Long, Jr., for defendant appellants.

CLARK, Judge.

[1] The defendants assign as error the exclusion by the trial court of evidence of traffic noise from the controlled-access highway to be constructed on part of their land taken by the petitioner, causing a diminution in value of their remaining land.

This issue was properly raised by the defendants. The record on appeal reveals that defendant Neil E. Brown testified, in pertinent part, and the court ruled, as follows:

"[A]nd there's going to be noise, there's going to be damage —

MR. SALLEY: Objection; motion to strike.

THE COURT: Objection sustained. Motion to strike allowed. Don't consider the statement about there's going to be noise, or things of that kind, Ladies and Gentlemen. EXCEPTION NO. 2."

The defendant witness had no opportunity to show noise as an element of damage and to show its relationship to the land taken.

The measure of damages where only a part or a tract of land is appropriated for highway purposes is well established by case law and statute [G.S. 136-112(1)], as follows: the difference between the fair market value of the entire tract immediately before the taking and the fair market value of what is left immediately after the taking, with consideration being given to any general or special benefits resulting from the utilization of the part taken for highway purposes. *Highway Commission v. Black*, 239 N.C. 198, 79 S.E. 2d 778 (1954); *City of Kings Mountain v. Cline*, 19 N.C. App. 9, 198 S.E. 2d 64 (1973).

In determining the fair market value of the remaining land the owner is entitled to damage which is a consequence of the taking of a portion thereof, that is, for the injuries accruing to the residue from the taking, which includes damage resulting from the condemnor's use of the appropriated portion. *Light Co. v. Creasman*, 262 N.C. 390, 137 S.E. 2d 497 (1964); *City of Greensboro v. Sparger*, 23 N.C. App. 81, 208 S.E. 2d 230 (1974).

The value of the land taken should be ascertained as of the date of taking, *Power Co. v. Hayes*, 193 N.C. 104, 136 S.E. 353 (1927). The fair market value of the remainder immediately after the taking contemplates the project in its completed state and any damage to the remainder due to the user to which the part appropriated may, or probably will, be put. *Light Co. v. Creasman, supra.*

The project, for which a part of defendants' land was appropriated, was a controlled-access highway. Clearly the highway was to be used by vehicular traffic. The question is whether the traffic noise on this controlled-access highway is an element of damage to the remainder of defendants' lands. Although at one time noise was considered too speculative to be considered as an element of compensable damage, the Supreme Court of North Carolina has held in two railroad cases that jarring, *noise*, smoke and cinders may be considered in determining the damage done to the remainder land. *See R.R. v. Armfield*, 167 N.C. 464, 83 S.E. 809 (1914), and *R.R. v. Manufacturing Co.*, 169 N.C. 156, 85 S.E. 390 (1915).

The plaintiff relies on *Light Co. v. Creasman, supra*, contending that this case overrules the two railroad cases. In *Creasman*, the petitioner took .012 acre of defendants' 0.425-acre tract in connection with the construction and operation of a new steam plant. The

trial court admitted evidence, over objections by petitioner, relating to general changes in the community and depreciation in value of residential property caused by the steam plant, together with the dam, the lake, and the railroad to the plant. It was held that the admission of this incompetent evidence was prejudicial error, and the court stated: "Such damages, if any, as may be caused *thereby* to respondents' remaining property occur without reference to whether any portion of respondents' property is condemned. In short, they do not result from the taking of a portion of respondents' property." 262 N.C. at 402, 137 S.E. 2d at 506.

We do not construe *Creasman* to overrule the two railroad cases; rather, we find that the court ruled that evidence of various elements of damage which reduced the value of the remainder land were common to all neighborhood property and not property related to the use of the land taken from respondents. Part of the respondents' tract was taken for the power plant, and if their evidence had been restricted to such damage to the remaining property which resulted from the taking of a part for use as a power plant site, such evidence would have been admissible, even though others in the community suffered damage to their property from the use of the site as a power plant.

Noise or any other element of damages to the remaining lands is compensable only if it is demonstrably resultant from the use of the particular lands taken. "If only a portion of a single tract is taken the owner's compensation for that taking includes any element of value *arising out of the relation of the part taken to the entire tract.*" (Emphasis added.) *United States v. Miller*, 317 U.S. 369, 376, 63 S.Ct. 276, 281, 87 L.Ed. 336, 344 (1943). "The rule supported by better reason and the weight of authority is that the just compensation assured by the Fifth Amendment to an owner, a part of whose land is taken for public use, *does not* include the diminution in value of the remainder, caused by the acquisition and use of adjoining lands of others for the same undertaking." (Emphasis added.) *Campbell v. United States*, 266 U.S. 368, 372, 45 S.Ct. 115, 117, 69 L.Ed. 328, 330 (1924).

The landowner who has a part of his tract taken has the burden of proving by competent evidence this relationship, that is, how the use of the land taken results in damage to the remainder. And if noise or other elements of damage are common to others in the neighborhood, some jurisdictions place the burden on the landowner of apportioning the damage to the particular land taken. Others may permit compensation where separate ascertainment or apportion-

ment of damages is impossible. Annot. 59 A.L.R. 3d 488, § 3(b) (1974). The two railroad cases, *R.R. v. Armfield, supra,* and *R.R. v. Manufacturing Co., supra,* did permit consideration of noise without demanding apportionment. In *sub judice,* we find the exclusion of defendants' evidence of noise was prejudicial error.

[2] Defendants also assign as error the failure to instruct the jury that the controlled-access highway, with no direct access thereto, should be considered in assessing damages. G.S. 136-89.52 in pertinent part provides:

> ". . . Where part of a tract of land is taken or acquired for the construction of a controlled-access facility on a new location, the nature of the facility constructed on the part taken, including the fact that there shall be no direct access thereto, *shall be considered* in determining the fair market value of the remaining property immediately after the taking." [Emphasis added.]

In *Highway Comm. v. Gasperson,* 268 N.C. 453, 150 S.E. 2d 860 (1966), it was held that it was reversible error for the trial court to instruct the jury that denial of access should not be considered in view of the provision in G.S. 136-89.52 that the denial of such rights of access is a factor to be considered. Though the statute was amended after this decision, the present statute as quoted, by implication, requires the trial court to instruct the jury on the nature of the controlled-access facility, and that this denial of access should be considered in determining the fair market value of the remaining land. The failure to do so is error.

The judgment is reversed, and we order a

New trial.

Judge VAUGHN concurs.

Judge HEDRICK concurs in result.

Judge HEDRICK, concurring in the result.

I agree with the majority that the trial judge erred to the defendants' prejudice by failing to instruct the jury in this case that the fact that the defendants have no direct access to the highway constructed on the property shall be considered in determining the fair market value of the remaining property immediately after the

taking. In my opinion, however, defendants have failed to show prejudicial error in the trial judge's rulings described in the majority opinion.

STATE OF NORTH CAROLINA v. JIMMY FRANKLIN WALKER

No. 7727SC390

(Filed 19 October 1977)

1. **Assault and Battery § 11.1; Weapons and Firearms— discharging firearm into occupied dwelling—indictment—knowledge of occupancy**

An indictment for discharging a firearm into an occupied dwelling in violation of G.S. 14-34.1 was not fatally defective in failing to allege that defendant knew or should have known that the dwelling was occupied by one or more persons but was sufficient where it charged the offense substantially in the words of the statute.

2. **Criminal Law § 89.3— corroboration of witness—prior consistent statement**

Where a witness testified at the trial that he observed defendant discharge a rifle or shotgun at a trailer from an automobile, testimony by a deputy sheriff that the witness told him that he recognized defendant shooting into the trailer from an automobile was competent to corroborate the testimony of the witness, although the witness did not testify that he had made any such statement to the deputy, since it is competent to corroborate the testimony of a witness by showing that he previously made a statement regarding the subject transaction consistent with such testimony.

3. **Searches and Seizures § 2— search of automobile—consent of passenger—trial of passenger—absence of consent by owner or operator**

A cartridge shell found by officers during a warrantless search of an automobile in which defendant was a passenger was properly admitted in a trial against defendant where defendant voluntarily consented to the search, notwithstanding the officers failed to obtain permission for the search from either the owner or the operator of the automobile.

APPEAL by defendant from *Ferrell, Judge.* Judgment entered 11 January 1977 in Superior Court, LINCOLN County. Heard in the Court of Appeals 28 September 1977.

Defendant was charged with the felony of discharging a firearm into an occupied dwelling.

State's evidence tended to show that on 21 August 1976 Tony Adams lived in a trailer owned by Stacey Keever and rented to him. At about 10:00 p.m. on that date Adams and some six other persons were in the trailer watching television and listening to music. At about 10:00 p.m. while he was standing on the back porch of the

trailer, Tony Adams heard several shots and observed defendant hanging out of the window of a red vehicle owned by Charles Lail; defendant was holding a rifle or a shotgun. After a second burst of shots was fired, the vehicle pulled away. Adams subsequently observed a number of bullet holes in the trailer. The persons who had been in the trailer had run into a middle bedroom and had lain down on the floor. Adams later showed law enforcement officers the location from which the bullets had been fired, and the officers found several empty shells. In a search of the Lail vehicle in which defendant was riding, the law enforcement officers found another empty shell. Frank Satterfield, an SBI ballistics expert, examined the shell found in the Lail vehicle and the shells found in the area of the shooting and expressed the opinion that they were all fired by the same weapon. At about 3:00 or 4:00 p.m. on 21 August Charles Lail had loaned his red 1964 Dodge to defendant. Previous to the incident defendant had communicated a threat to Tony Adams that he was going to "put 90 rounds" into Adams' trailer.

Defendant offered evidence in which he denied shooting into the trailer.

Defendant was convicted by a jury and from a judgment imposing a prison sentence defendant appealed.

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

Robert C. Powell, for the defendant.

MARTIN, Judge.

[1] Defendant contends that the court erred in denying the defendant's motion to dismiss for failure of the indictment to charge a crime under G.S. 14-34.1 in that the indictment failed to state that the defendant knew or should have known that the trailer was occupied by one or more persons. He cites *State v. Williams*, 284 N.C. 67, 199 S.E. 2d 409 (1973) as authority for this contention. We must disagree.

We note at the outset that, regarding the sufficiency of indictments, our Supreme Court held in *State v. Greer*, 238 N.C. 325, 328, 77 S.E. 2d 917, 920 (1953) that

> "The general rule in this State . . . is that an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words. [Citations omitted.] This rule does not apply

> where the words of the statute do not, without uncertainty or ambiguity, set forth all the essential elements necessary to constitute the offense sought to be charged in the indictment, so as to inform the defendant of the exact charge of which he is accused to enable him to prepare his defense, to plead his conviction or acquittal as a bar to further prosecution for the same offense, and upon conviction to enable the court to pronounce sentence. In such a situation the statutory words must be supplemented in the indictment by other allegations which explicitly and accurately set forth every essential element of the offense with such exactitude as to leave no doubt in the minds of the accused and the court as to the specific offense intended to be charged. However, it is neither necessary to state particulars of the crime in the meticulous manner prescribed by common law, nor to allege matters in the nature of evidence." [Citations omitted.]

And to the same effect, Justice Moore in *State v. Russell*, 282 N.C. 240, 243, 192 S.E. 2d 294, 296 (1972) stated:

> "The purpose of an indictment 'is (1) to give the defendant notice of the charge against him to the end that he may prepare his defense and to be in a position to plead former acquittal or former conviction in the event he is again brought to trial for the same offense; (2) to enable the court to know what judgment to pronounce in case of conviction.' " [Citations omitted.]

In the *Williams* case cited by defendant, the Court held that

> ". . . [A] person is guilty of the felony created by G.S. 14-34.1 if he intentionally, without legal justification or excuse, discharges a firearm into *an occupied building* with knowledge that the building is then occupied by one or more persons or when he has reasonable grounds to believe that the building might be occupied by one or more persons." (Emphasis in original.)

Thus, apparently relying on the rule stated above in *Greer*—without citing any authority—defendant now contends that the construction placed on G.S. 14-34.1 by the Court in *Williams* requiring the accused to possess actual or constructive knowledge of the occupancy of the structure into which the firearm was discharged is an "essential element" which must be alleged in the indictment to constitute the offense sought to be charged.

After carefully reviewing the sound principles enunciated in the *Greer* and *Russell* cases, we find no merit in defendant's interpretation of the effect of *Williams* on the case at bar. We think the holding in *Williams* pertaining to the accused's knowledge of occupancy relates to evidence required at trial and not to allegations required in the bill of indictment. *See State v. Greer, supra.* Consequently, we hold that an indictment under G.S. 14-34.1 which, as in the instant case, charges the offense substantially in the words of the statute, contains allegations sufficient to apprise an accused of the offense with which he is charged and to enable the court to proceed to judgment.

[2] Defendant's next contention relates to the admission of certain testimony by a State's witness tending to connect defendant with the commission of the crime. Over defendant's objection, and for the purpose of corroborating the testimony of Tony Adams, the court permitted Deputy Robert George Wise to testify that Adams told him that defendant Jimmy Walker did the shooting into the trailer. Defendant assigns as error the admission of this testimony for the reason that the witness Adams had not, in fact, testified that he had made any such statement to Deputy Wise. This assignment of error is overruled upon the authority of *State v. McLawhorn*, 270 N.C. 622, 155 S.E. 2d 198 (1967), and *State v. Brown*, 249 N.C. 271, 106 S.E. 2d 232 (1958), cases which hold, pertinent to the case at bar, that it is competent to corroborate the testimony of a witness by showing that he previously made a statement regarding the subject transaction consistent with such testimony.

In the instant case, Tony Adams testified that he observed the defendant discharging some kind of a rifle or shotgun at the trailer from the passenger side window of an automobile. Deputy Wise later testified that Tony Adams told him that he recognized the defendant shooting into the trailer from the automobile. The statement made by Adams to Wise and testified to by the witness Wise was consistent with the testimony of the witness Adams at trial and therefore, competent.

[3] Defendant finally contends that the court committed error in failing to suppress evidence of a cartridge shell found on the floorboard of an automobile operated by defendant's wife and in which the defendant was a passenger. Defendant argues that not having obtained permission to search the automobile from the owner or operator made the search unreasonable and unconstitutional.

On *voir dire* the court found that the search of the automobile was with the voluntary consent of defendant and was in no way coerced. Findings of fact of the trial court on *voir dire* are conclusive when supported by competent evidence. *State v. Little*, 270 N.C. 234, 154 S.E. 2d 61 (1967). The defendant alone was involved here, not the owner of the automobile or the operator. "The immunity to unreasonable searches and seizures is a privilege personal to those whose rights thereunder have been infringed. They alone may invoke it against illegal searches and seizures." *State v. Craddock*, 272 N.C. 160, 169, 158 S.E. 2d 25, 32 (1967). A person may waive his right to be free from unreasonable searches and seizures. *State v. Little*, *supra*. Accordingly, this assignment of error is overruled.

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

In the trial we find no prejudicial error.

No error.

Judges BRITT and HEDRICK concur.

FIVE STAR ENTERPRISES, INC., D/B/A LIGHTHOUSE MARINA, BY WESLEY B. GRANT, TRUSTEE IN BANKRUPTCY v. JOEL W. RUSSELL, MALCOLM G. KELLY, ALFRED H. RUSSELL, ODELL CASTEEN, DON SWISHER, AND JOHN GLENN

No. 7719SC3

(Filed 19 October 1977)

Corporations § 30— bankrupt corporation—funds allegedly wrongfully diverted—summary judgment proper

In an action by a trustee in bankruptcy to recover funds allegedly wrongfully diverted from the bankrupt corporation, the trial court properly granted summary judgment for defendant where the pleadings and affidavits tended to show that defendant did not know of the existence of the corporation but dealt personally with one of its officers; defendant purchased a boat from the officer and subsequently paid the balance owed on the boat by writing a check to the officer individually; and the officer took the check and used the funds to repay a personal loan which he had taken out in order to pay debts owed by the corporation.

APPEAL by plaintiff from *Wood, Judge*. Judgment entered 27 October 1976 in Superior Court, CABARRUS County. Heard in the Court of Appeals 27 September 1977.

Plaintiff, trustee in bankruptcy for Five Star Enterprises, Inc., d/b/a Lighthouse Marina ("Five Star"), filed a complaint alleging that defendant John Glenn, by paying to Joel Russell personally $2,000 which defendant owed to Five Star, knowingly participated with Five Star officers Joel Russell and Malcolm Kelly in their scheme to divert funds from Five Star to their own personal use. Plaintiff contends in his complaint that defendant made said payment to Russell with full knowledge of Russell's scheme of wrongdoing. Plaintiff seeks recovery of the $2,000 allegedly diverted from Five Star.

Defendant answered and admitted paying to Joel Russell personally the $2,000 balance owing on a boat purchased from Russell at Five Star but denied any knowledge of Russell's scheme to divert the funds from Five Star and also denied that Russell did in fact divert the funds from Five Star. It is defendant's contention that Russell used the funds to repay a personal loan which he had taken out in order to pay debts owing by Five Star. Both plaintiff and defendant filed motions for summary judgment. The court granted summary judgment in favor of defendant and plaintiff appealed.

Wesley B. Grant, P.A., for the plaintiff.

George C. Mountcastle, for the defendant.

MARTIN, Judge.

Plaintiff contends that the court erred in granting summary judgment in defendant's favor. He argues that a genuine issue of material fact exists as to whether, at the time defendant made the $2,000 payment to Russell, he had knowledge of Five Star and its financial condition and of Russell's intention to apply the check to his own personal obligation.

Defendant's affidavit, in support of his motion for summary judgment, sets forth the following facts: that he had known Russell and Kelly since 1972 when he purchased a home from them; that during the construction of the home, all bills came from Russell and all checks were made out to Russell or Russell Builders; that defendant understood Russell and Kelly to be 50-50 partners in the business; that in 1974 Russell informed defendant that he and Kelly had opened a marina and recommended a boat that defendant might like to purchase; that defendant did purchase the boat by trading in his old boat leaving a balance owing of $2,000; that defendant asked Russell how to make the check out for the balance and was told to make it out to Russell personally because Russell intended to take it to the bank to pay on a note due for boats, defendant's boat being

one of them; that defendant therefore wrote the check on 16 September 1974 and made it payable to Russell, noting on the check that it was in payment for the boat purchased plus all gas to date; that defendant had no reason to inquire into Russell's request that the check be made to him personally since in his prior dealings with Russell, all checks had been so written and since defendant assumed that Russell and Kelly were partners in the marina business; that defendant had never heard of Five Star at the time because the marina was doing business as the "Lighthouse Marina"; and that had Russell asked defendant to make the check payable to Five Star, defendant would have been suspicious and inquired as to the reasons for doing so. Defendant also filed an affidavit by the president of First National Bank of Albemarle stating that in September 1974 Russell attempted to take out a loan on behalf of Five Star to pay off a debt owing by Five Star to Westinghouse Credit Corporation, but the bank refused to make the loan because of Five Star's financial problems; that Russell then asked for a personal loan in an amount sufficient to pay the debt, and the bank agreed; that the loan funds were used by Russell to issue a cashier's check to Westinghouse; that on 17 September 1974 Russell deposited a check from defendant in the amount of $2,019.18 in his own account and immediately applied the full amount to the personal loan which he had taken out a few days before; and that in the bank's opinion, Russell did not divert the funds from Five Star but used them to pay on the note which was given in order to pay Five Star's debt to Westinghouse.

In response to defendant's motion for summary judgment, the plaintiff trustee filed an affidavit quoting from an examination of Russell in March 1976 during which Russell stated that

> "[W]hat happened Mac Kelly borrowed money from First Citizens Bank and he used boats and motors and trailers as collateral. Every three months a percentage of it had to be paid off. . . . Four thousand four hundred dollars came due. The company didn't have the money . . . so I went to the bank at First National Bank and borrowed the money to pay off First Citizens Bank . . . I told Kelly when I got some money I was going to pay that note off. So Mr. John Glenn he and I are real good friends. I built him a home. I told him the situation. I said, 'Make the check out to me; I'll take it to the bank and apply it to the note.' So he did so."

We must now determine whether, in view of the supporting and opposing affidavits, the trial judge's entry of summary judgment in favor of defendant was proper.

We note at the outset that the burden is upon the moving party to establish the lack of a triable issue of fact. *Brevard v. Barkley*, 12 N.C. App. 665, 184 S.E. 2d 370 (1971). Defendant's answer and affidavits disclose in detail the extent of defendant's dealings with Joel Russell and Malcolm Kelly. The facts therein convincingly show that defendant did not knowingly participate in a scheme to divert funds from Five Star. Defendant had dealt with Russell and Kelly in prior transactions under the assumption that they were partners and in fact had never heard of Five Star; and having purchased a boat from Russell, defendant had every reason to believe that his check to Russell personally for the balance owed would in fact be used therefor. These facts would require a directed verdict in defendant's favor if offered at trial. Thus, defendant successfully carried his burden and was entitled to summary judgment unless plaintiff's opposing affidavit demonstrates that there is a genuine issue as to these facts.

When a motion for summary judgment is made and properly supported, as in the instant case, the adverse party may not rest upon the mere allegations or denials of his pleading, but must, by affidavit or otherwise, set forth *specific facts* showing that there is a genuine issue for trial. G.S. 1A-1, Rule 56(e); *see Patterson v. Reid*, 10 N.C. App. 22, 178 S.E. 2d 1 (1970). The plaintiff contends that the material fact about which there is a genuine issue is the notice or knowledge which defendant Glenn had as to the existence of Five Star and the intended application by Russell of Glenn's money to pay his (Russell's) personal obligation. He argues that this issue is created by the conflicting statments in defendant's answer and affidavit—the answer alleging that Russell informed defendant of Five Star's existence and of his intent to pay off a personal loan with defendant's check, and the affidavit stating that defendant had no knowledge of Five Star prior to this lawsuit—and plaintiff's affidavit revealing Russell's statement that he had told defendant the situation about the company's financial condition prior to accepting defendant's check.

Considering the facts stated in plaintiff's affidavit in the light most favorable to plaintiff, we are unable to find that they create a genuine issue for trial. Russell's statement (in plaintiff's affidavit) that "I told him the situation . . ." does not in any way indicate that Russell informed defendant Glenn of Five Star's existence, its finan-

cial condition or the personal nature of the note to which Russell intended to apply the $2,000. Moreover, defendant's answer contains no acknowledgment by defendant that he was informed by Russell of Five Star's existence. In short, plaintiff has failed to produce specific facts sufficient to rebut defendant's showing and create a genuine issue for trial.

Viewing the record before us, we find that defendant was informed, not of an intent to divert funds from Five Star, but of an intent to apply defendant's check to the benefit of the marina, which Russell apparently did. Not only did plaintiff fail to create an issue as to defendant's knowledge of the alleged scheme, but he also failed to create an issue as to actual diversion of the $2,000 check.

Accordingly, we hold that the trial judge's order allowing defendant's motion for summary judgment was proper.

Affirmed.

Judges BRITT and HEDRICK concur.

HICKORY WHITE TRUCKS, INC. v. ROBERT LEE GREENE AND JOYCE J. GREENE

No. 7625DC1033

(Filed 19 October 1977)

1. **Execution § 3— issuance in county of judgment**

Under G.S. 1-307 only the clerk of superior court in the county where a judgment is rendered may issue execution even though the judgment is docketed in other counties.

2. **Accounts § 1; Judgments § 25.2— action on account—setting aside default judgment—wife's reliance on husband—meritorious defense**

The feme defendant's failure to file answer in an action on an open account against her and her husband resulted from excusable neglect where she relied on the verbal assurances of her husband that he would take care of the matter; furthermore, feme defendant showed that she had a meritorious defense to the action where she presented evidence that the account ledger was in the name of her husband only and her name did not appear on the open account, and that she has never received a demand for payment from plaintiff.

3. **Chattel Mortgages § 19— purchase money security agreement—deficiency—liability of feme defendant**

The trial court erred in finding that the feme defendant had a meritorious defense to an action against her and her husband to recover a deficiency remaining after the sale of a truck-tractor under a purchase money security agreement

where she admitted that she signed the security agreement as a co-customer, and there was no showing of fraud in the procurement of the agreement.

APPEAL by plaintiff from *Vernon, Judge*. Order entered 9 August 1976 in District Court, BURKE County. Heard in the Court of Appeals 21 September 1977.

Plaintiff brought an action in Catawba County against defendants seeking recovery of a sum certain on three causes of action: (1) for nonpayment of an open account for services rendered by plaintiff for defendants; (2) for a deficiency remaining after sale of a truck-tractor under a purchase money security agreement, signed by both defendants; and (3) for default in payment on a promissory note. Defendants failed to plead, and the Clerk of Superior Court of Catawba County entered a default judgment against them. A transcript of the judgment was docketed in Burke County and pursuant to an execution issued by the Clerk of the Superior Court of Burke County, defendants' home was sold and plaintiff was the highest bidder.

The feme defendant obtained a temporary restraining order and preliminary injunction to prevent confirmation of the execution sale. She also filed a motion in the cause to have the default judgment set aside as to her on causes of action (1) and (2) because of excusable neglect and a meritorious defense. She did not dispute her liability on the third cause of action, the promissory note. She also asserted that the execution sale was null and void because the execution was issued by the Clerk of Superior Court in Burke County in violation of G.S. 1-307.

Feme defendant's evidence of excusable neglect tended to show that when the complaint was served upon her she turned the papers over to her husband who assured her that he would take care of the matter; that she consulted an attorney who informed her that she need not respond to the complaint since she would not be liable on causes of action (1) and (2); and that she failed to respond to cause of action (3) because she knew that she was liable on the promissory note. On the meritorious defense issue, the feme defendant contended that she was not liable in the first cause of action because her name did not appear on the open account; that she was not liable in the second cause of action even though she had signed the installment sales contract as a co-customer; that she had never been in the plaintiff's office; and that plaintiff had never made any demands on her for money.

At the hearing on the feme defendant's motion, the court held that she had shown excusable neglect and a meritorious defense and ordered that the judgment be set aside as to causes of action (1) and (2). The court also held that the execution sale was null and void because under G.S. 1-307 the Clerk of Superior Court in Burke County had no authority to issue an execution based upon a judgment rendered in Catawba County. Plaintiff appeals.

West, Groome, Baumberger, Tuttle and Thomas, by Carroll N. Tuttle, for plaintiff appellant.

Byrd, Byrd, Ervin and Blanton, by Robert B. Byrd and Scott Whisnant, for defendant appellee.

BRITT, Judge.

[1] Plaintiff contends that the trial court erred in setting aside the default judgment on the first and second causes of action because the feme defendant failed to show excusable neglect and a meritorious defense. We conclude that the trial court was correct in setting aside the default judgment as to the first cause of action, but incorrect as to the second cause of action since the feme defendant failed to show a meriotorious defense. We also conclude that under G.S. 1-307 only the Clerk of Superior Court in the county where a judgment is rendered may issue execution even though the judgment is docketed in other counties.

G.S. 1A-1, Rule 55(d) provides that "[f]or good cause shown the court may set aside an entry on default, and, if a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b)." G.S. 1A-1, Rule 60(b)(1) provides that a final judgment may be set aside if "[m]istake, inadvertence, surprise, or excusable neglect" is shown.

G.S. 1A-1, Rule 60(b)(1) replaces former G.S. 1-220, but is still governed by case law developed under G.S. 1-220. *Gregg v. Steele*, 24 N.C. App. 310, 210 S.E. 2d 434 (1974); *Kirby v. Asheville Contracting Co.*, 11 N.C. App. 128, 180 S.E. 2d 407, *cert. denied*, 278 N.C. 701, 181 S.E. 2d 602 (1971). Case law under former G.S. 1-220 required that a party moving to set aside a judgment on ground of excusable neglect also show that he had a meritorious defense to the plaintiff's cause of action. *Hanford v. McSwain*, 230 N.C. 229, 53 S.E. 2d 84 (1949); *Haiduven v. Cooper*, 23 N.C. App. 67, 208 S.E. 2d 223 (1974).

[2] On the open account action, the feme defendant showed excusable neglect and a meritorious defense. Excusable neglect was

shown by the fact that she relied upon her husband's assurances that he would take care of the matter. In *Gregg v. Steele*, 24 N.C. App. 310, 311, 210 S.E. 2d 434, 435 (1974), the court stated:

> "[A] wife's failure or neglect to file answer in a suit against her and her husband, upon assurances by her husband that he will be responsible for and assume the defense of the action, is excusable neglect." *Abernathy v. Nichols*, 249 N.C. 70, 105 S.E. 2d 211 (1958).

The feme defendant also showed a meritorious defense as to her liability on the open account by the following facts: the account ledger was in the name of Bob Greene only; her name did not appear on the open account at all; and she had never received a demand for payment from plaintiff. Since she showed both excusable neglect and a meritorious defense on the open account action, the trial court's order setting aside the judgment against the feme defendant on the first cause of action is affirmed.

[3] As to the second cause of action, the deficiency judgment on the consumer installment contract, the feme defendant showed excusable neglect by her reliance on her husband's verbal assurances that he would take care of the matter, but she failed to show a meritorious defense. By admitting that she signed the consumer installment contract as a co-customer, she acknowledged that she became bound by the contract. Absent a showing of fraud in the procurement of the contract, she could not be released. *Colt v. Kimball*, 190 N.C. 169, 129 S.E. 406 (1925). Since the finding of a meritorious defense was not supported by any competent evidence or by sufficient findings of material facts, the trial court was incorrect in setting aside the judgment against the feme defendant on the second cause of action. *Mason v. Mason*, 22 N.C. App. 494, 206 S.E. 2d 764 (1974).

In *Weil v. Woodard*, 104 N.C. 94, 97, 10 S.E. 129, 130 (1889), the court set forth the standard of review for an appellate court when a judgment is set aside in a trial court pursuant to former G.S. 1-220 (now G.S. 1A-1, Rule 60(b)(1)):

> [I]f the facts so found in any such case, in any reasonable view of them, constitute such "mistake, inadvertence, surprise or excusable neglect," and if the judge grants the motion, in the exercise of his sound discretion, this Court has no authority to reverse or disturb his action, because the statute makes the discretion his. *It is however, the duty of this Court, on appeal, to determine whether or not the facts as found by the judge*

below, in any reasonable view of them, constitute such "mistake, inadvertence, surprise or excusable neglect," and if they do not, then the order of the court allowing the motion will be reversed; or, if the Court below denies the motion, upon the ground that the facts do not present a case for exercise of his discretion in allowing or disallowing it, then this Court may review his decision, and if it decides that there is error, then the judge below must exercise his discretion and allow or disallow the motion. (Emphasis added.)

For the reasons stated above we conclude:

(1) The execution sale is null and void since the Clerk of the Burke County Superior Court had no authority to issue execution on a judgment rendered in Catawba County. G.S. 1-307.

(2) The order setting aside the default judgment on the first cause of action, the open account, is affirmed.

(3) The order setting aside the default judgment on the second cause of action, the deficiency due on the consumer installment contract, is reversed.

Affirmed in part. Reversed in part.

Chief Judge BROCK and Judge MORRIS concur.

LEIGH CHRISTIAN JARVIS, BY AND THROUGH HIS GUARDIAN AD LITEM, HENRY C. FRENCK, AND BERNICE M. JARVIS v. GREGORY LEONARD SANDERS (LEONARD GREGORY SANDERS), BY AND THROUGH HIS GUARDIAN AD LITEM, WALTER W. PITT, JR., JANE MOOREFIELD KOTELES, AND THEODORE ALOYS KOTELES

No. 7621SC1036

(Filed 19 October 1977)

Automobiles § 91.3— motorcycle collision—failure to submit issue of gross negligence—no error

In an action to recover for injuries sustained in a motorcycle collision, the trial court did not err in its instructions to the jury and in its failure to submit an issue of gross negligence where plaintiff's evidence did not show a reckless, wanton, needless act or omission on the part of defendant in the operation of his motorcycle but at best disclosed only a breach of defendant's duty to exercise ordinary care.

APPEAL by plaintiff from *Kivett, Judge.* Judgment entered 23 July 1976 in Superior Court, FORSYTH County. Heard in the Court of Appeals on 21 September 1977.

This is a civil action wherein plaintiff seeks to recover damages for personal injuries incurred in a collision between motorcycles operated by plaintiff, Chris Jarvis, and defendant, Greg Sanders.

The court allowed the motions of defendants, Jane and Theodore Koteles, the mother and stepfather respectively of defendant, Greg Sanders, for directed verdicts.

The following issues were submitted to and answered by the jury as follows:

"1. Was the plaintiff Leigh Christian Jarvis injured by the negligence of the defendant Gregory Leonard Sanders, as alleged in the Complaint?

ANSWER: Yes.

"2. Did the plaintiff Leigh Christian Jarvis contribute to his own injuries, as alleged in the Answer?

ANSWER: Yes."

From a judgment directing verdicts as to defendants, Jane and Theodore Koteles, and a judgment entered on the verdict as to defendant, Greg Sanders, plaintiff appealed.

H. Glenn Pettyjohn by Theodore M. Molitoris for plaintiff appellants.

Deal, Hutchins and Minor by William Kearns Davis for defendant appellees.

HEDRICK, Judge.

Plaintiff's assignments of error with respect to his claim against defendant, Greg Sanders, raise the single question of whether the court erred in failing to submit an issue to the jury as to the gross negligence and wanton, willful and intentional conduct of the defendant, Greg Sanders.

The evidence, when considered in the light most favorable to the plaintiff, tends to show the following:

Plaintiff, who was 15 years of age, and defendant, who was 16 years of age, were among a group of teenagers who frequently raced motorcycles on a private farm located in Winston-Salem, North

Carolina. Plaintiff owned a Suzuki TS 125 motorcycle and defendant owned a Suzuki TS 185 motorcycle.

There are a number of trails on the farm which compose basically two separate tracks. There is an outer track which is approximately one-half mile in diameter and a smaller shorter track called the "flat track." The terrain of the outer track is rougher with hills and ruts while the flat track is located in an open area. It was customary to travel in a counter-clockwise direction on the flat track and in a clockwise direction on the larger track.

The collision which gave rise to the suit herein occurred on the afternoon of 15 November 1973. Plaintiff was riding his motorcycle on the back stretch of the larger track proceeding at a speed of 35 to 40 m.p.h. in a clockwise direction. Defendant who had been riding in a clockwise direction stopped, turned around, and resumed travelling in the opposite direction accelerating to a speed of 35 to 40 m.p.h. When plaintiff observed the defendant headed toward him, he drove his motorcycle onto the grass shoulder on the right side of the trail, maintaining his speed. Though the trail was narrow there was sufficient room for the two motorcycles to clear each other. However, when they were within approximately 3 to 5 yards of each other, plaintiff saw defendant looking directly at him and "saw Greg's arm turn and he turned right towards me." The front wheel of defendant's motorcycle then collided with the front fender of plaintiff's motorcycle at a 45 degree angle causing serious injuries to plaintiff.

In view of the jury's finding of contributory negligence, the issue herein presented is critical to plaintiff's case. While this finding was fatal to plaintiff's recovery for ordinary negligence, contributory negligence will not bar a recovery on the basis of willful or wanton conduct or intentional conduct. *Brewer v. Harris*, 279 N.C. 288, 182 S.E. 2d 345 (1971); *Pearce v. Barham*, 271 N.C. 285, 156 S.E. 2d 290 (1967).

Willful, wanton or intentional conduct, or gross negligence which would allow plaintiff to recover damages for personal injuries even if the jury should find that plaintiff was guilty of contributory negligence has been defined as follows:

> " 'The term "wanton negligence" . . . always implies something more than a negligent act. This Court has said that the word "wanton" implies turpitude, and that the act is committed or omitted of willful, wicked purpose; that the term "willfully" implies that the act is done knowingly and of stub-

born purpose, but not of malice . . . Judge Thompson says: "The true conception of willful negligence involves a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another, which duty the person owing it has assumed by contract or which is imposed on the person by operation of law. Willful or intentional negligence is something distinct from mere carelessness and inattention, however gross. We still have two kinds of negligence, the one consisting of carelessness and inattention whereby another is injured in his person or property, and the other consisting of a willful and intentional failure or neglect to perform a duty assumed by contract or imposed by operation of law for the promotion of the safety of the person or property of another." Thompson on Neg. (2d Ed.), Sec. 20, *et seq.*' *Bailey v. R.R.*, 149 N.C. 169, 62 S.E. 912.

"To constitute willful injury there must be actual knowledge, or that which the law deems to be the equivalent of actual knowledge, of the peril to be apprehended, coupled with a design, purpose, and intent to do wrong and inflict injury. A wanton act is one which is performed intentionally with a reckless indifference to injurious consequences probable to result therefrom. Ordinary negligence has as its basis that a person charged with negligent conduct should have known the probable consequences of his act. Wanton and willful negligence rests on the assumption that he knew the probable consequences, but was recklessly, wantonly or intentionally indifferent to the results." (Citations omitted.) *Wagoner v. R.R.*, 238 N.C. 162, 167-8, 77 S.E. 2d 701, 705-6 (1953); *see also Hughes v. Lundstrum*, 5 N.C. App. 345, 168 S.E. 2d 686 (1969).

While the evidence here is sufficient to support the jury's finding of negligence on the part of the minor defendant and contributory negligence on the part of the plaintiff, we are of the opinion that it is not sufficient to raise an inference of willful, wanton or intentional conduct, or gross negligence on the part of the minor defendant. When the evidence is considered in the light most favorable to plaintiff, and tested by the definition of gross negligence and intentional conduct recognized in this state, it falls short of manifesting a reckless, wanton, needless act or omission on the part of the defendant in the operation of the motorcycle. The evidence at best discloses a breach of defendant's duty to exercise ordinary care. It raises no inference of an intentional or reckless disregard upon the part of the minor defendant of any duty imposed by contract or law for the safety of others operating motorcycles

upon private property. The court did not err in its instructions to the jury, and in its failure to submit an issue of gross negligence.

In view of our decision set out above, it is not necessary that we discuss plaintiff's additional assignments of error. All of plaintiff's assignments of error are overruled.

No error.

Judges VAUGHN and CLARK concur.

STEVEN DUNHAM SMITH PETITIONER v. LEO F. WALSH, JR., DIRECTOR, DRIVER LICENSE SECTION, DIVISION OF MOTOR VEHICLES, DEPARTMENT OF TRANSPORTATION, STATE OF NORTH CAROLINA RESPONDENT

No. 7720SC40

(Filed 19 October 1977)

Automobiles § 2.1— speeding in excess of 75 mph—suspension of license by DMV—revocation of suspension by superior court

The Division of Motor Vehicles was authorized by G.S. 20-16(a) and G.S. 20-19(b) to suspend petitioner's driver's license for a period of 12 months because of his conviction of driving in excess of 75 mph in a 45 mph speed zone, and the superior court on appeal had no discretionary power to revoke the suspension of petitioner's license which had been ordered by the Division of Motor Vehicles.

APPEAL by respondent, North Carolina Division of Motor Vehicles, from *Graham, Judge*. Judgment entered 12 November 1976. Heard in the Court of Appeals 29 September 1977.

On 19 March 1976 the North Carolina Division of Motor Vehicles, respondent herein, acting pursuant to G.S. 20-16(a)(10) and G.S. 20-19(b), ordered petitioner's driving privilege suspended for a period of twelve months because of his conviction of operating a motor vehicle at a speed in excess of 75 miles per hour in a 45 mile per hour speed zone. After exhausting administrative remedies without obtaining relief, petitioner commenced this action in the Superior Court seeking a reversal of the respondent's order. After hearing evidence, the trial court entered judgment making findings of fact, based upon which the court concluded "in its discretion that the suspension of the petitioner's license for speeding should be revoked and his license reinstated on the speeding offense." From judgment in accord with this conclusion ordering respondent "to reinstate petitioner's driver's license on said offense," respondent appealed.

Seawell, Pollock, Fullenwider, Robbins & May, P.A., by P. Wayne Robbins, for petitioner appellee.

Attorney General Edmisten by Assistant Attorney General William B. Ray and Deputy Attorney General William W. Melvin for respondent appellant.

PARKER, Judge.

In his verified petition filed in the Superior Court, petitioner alleged:

> 3. That on or about the 18th day of February, 1976, the Petitioner was convicted of driving while under the influence of intoxicating liquors and speeding 100 in a 45 MPH zone in the District Court of Moore County, Carthage, North Carolina.

At the hearing in the Superior Court the petitioner testified that he had been convicted on 18 February 1976 of operating a motor vehicle on a public highway while under the influence of intoxicating liquor and speeding a hundred miles per hour in a 45 mile per hour zone. He testified that the reason he was speeding was that he "was trying to get away from a police officer."

In the judgment appealed from, the court made the following finding of fact:

> 3. That on or about the 18th day of February 1976, the petitioner was convicted of driving while under the influence of intoxicating liquors and speeding in excess of 45 m.p.h. in the District Court of Moore County, Carthage, North Carolina.

Respondent excepts to this finding, pointing out that petitioner's own allegation and evidence show that petitioner was convicted of speeding in excess of 75 miles per hour in a 45 mile per hour speed zone, a much graver speeding offense than as stated in the court's finding of fact. Petitioner concedes this to be true, his brief containing the following:

> Obviously from the evidence the proper finding was speeding in excess of 75 miles per hour. Equally obvious is that this was a typographical error on the part of the appellee in preparing judgment. No one at the hearing considered the conviction otherwise than speeding in excess of 75.

Accordingly, for purposes of this appeal we shall consider the judgment of the Superior Court as though it contained a proper finding that petitioner had been convicted of operating a motor vehicle at a

speed in excess of 75 miles per hour in a 45 mile per hour speed zone. The question presented by this appeal is whether, in view of such a finding, the court had the discretionary power to revoke the suspension of petitioner's driving privilege which had been ordered by the Division of Motor Vehicles. We hold that it did not.

G.S. 20-16(a) contains the following:

> The Division shall have authority to suspend the license of any operator or chauffeur with or without preliminary hearing upon a showing by its records or other satisfactory evidence that the licensee:
>
> * * *
>
> (10) Has been convicted of operating a motor vehicle at a speed in excess of 75 miles per hour on a public road or highway where the maximum speed is less than 70 miles per hour.

G.S. 20-19(b) provides that "[w]hen a license is suspended under subdivision (10) of G.S. 20-16(a), *the period of suspension shall be in the discretion of the Division and for such time as it deems best for public safety but shall not exceed a period of 12 months.*" (Emphasis added.) Under these statutes, the discretionary authority to suspend petitioner's license for a period not exceeding 12 months was vested exclusively in the respondent, the Division of Motor Vehicles. No discretionary power was conferred upon the court. As stated by Sharp, J. (now C.J.), speaking for the Supreme Court in *Joyner v. Garrett, Comm'r of Motor Vehicles*, 279 N.C. 226, 232, 182 S.E. 2d 553, 558 (1971), "[t]he power to issue, suspend, or revoke a driver's license is vested exclusively in the Department [now the Division] of Motor Vehicles, subject to review by the Superior Court and, upon appeal, by the appellate division." Judicial review is provided for by G.S. 20-25, and in a case such as is now before us "[i]t is established that the petitioner has the right to a full *de novo* review of respondent's action in the superior court." *In re Grubbs*, 25 N.C. App. 232, 233, 212 S.E. 2d 414, 415 (1975). However, "[o]n appeal and hearing *de novo* in superior court, that court is not vested with discretionary authority. It makes judicial review of the facts, and if it finds that the license of petitioner is in fact and in law subject to suspension or revocation the order of the Department must be affirmed . . . ." *In re Donnelly*, 260 N.C. 375, 381, 132 S.E. 2d 904, 908 (1963).

The undisputed facts of the present case bring it squarely within the provisions of G.S. 20-16(a)(10), and the order of the respondent suspending petitioner's license for a period of 12 months

because of his conviction of driving in excess of 75 miles per hour in a 45 mile per hour speed zone was fully authorized by G.S. 20-19(b). The court had no authority to substitute its discretion for that of the respondent. Accordingly, the judgment appealed from must be reversed. *In re Grubbs, supra.*

We note that the record and briefs indicate that the Division of Motor Vehicles also revoked petitioner's driver's license for one year because of his conviction for driving while under the influence of intoxicating liquor and that the District Court Judge may have granted petitioner a limited driving permit in connection with that case after entry in the Superior Court of the judgment in the case presently before us. Since no question has been presented on this appeal concerning the revocation of petitioner's driving privilege which resulted from his conviction for driving under the influence nor concerning any limited driving privilege which may have been granted by the District Court in connection with that case, we express no opinion concerning such matters.

The judgment appealed from is

Reversed.

Chief Judge BROCK and Judge ARNOLD concur.

ROBERT TAYLOR v. R. L. BAILEY

No. 7629SC1031

(Filed 19 October 1977)

1. **Vendor and Purchaser § 3— contract to convey land—reference to deed of trust—description of land sufficient**

In an action for the specific performance of a contract to convey land, the description contained in the contract, though not a metes and bounds description, was sufficient to meet the requirements of the statute of frauds, since the description gave the acreage and referred to a deed of trust, naming the parties and the date thereof, in which the land was described with particularity.

2. **Vendor and Purchaser § 3— contract to convey land—latent ambiguity in description**

In an action for the specific performance of a contract to convey land where the description of the land was given only by reference to a deed of trust, plaintiff's evidence effectively removed the latent ambiguity of the contract where the deed of trust referred to in the contract was admitted into evidence without objection; defendant, called as an adverse witness, testified that the property described in the deed of trust was the property which was the subject of the con-

tract; and defendant testified that he knew the reference to Buncombe County in the contract was in error, that the property was in Henderson County, and that plaintiff knew that also.

3. Vendor and Purchaser § 2— contract to convey land— time of settlement— time not of the essence

In an action for the specific performance of a contract to convey land, defendant's contention that plaintiff could not prevail because time was of the essence of their agreement is without merit where the evidence tended to show that settlement under the contract, which was dated October 3, should take place on or before October 15; plaintiff, upon execution of the contract to convey, immediately employed a surveyor to survey the property as provided in the agreement; there was a problem which resulted in the surveyor not finishing his work until late in the afternoon of October 15; plaintiff informed defendant of the problem on the morning of the fifteenth; when the surveyor completed his work and plaintiff attempted to reach defendant, defendant was unavailable; and plaintiff was ready, willing and able to complete the terms of the contract on that day.

APPEAL by defendant from *Griffin, Judge*. Judgment entered 26 August 1976 in Superior Court, HENDERSON County. Heard in the Court of Appeals 21 September 1977.

Plaintiff, by this action, seeks to have defendant specifically perform a contract for the sale of land entered into by the parties on 3 October 1975. Defendant, by answer, admits the execution by him of the contract, but takes the position that the instrument is void because the description is totally inadequate and that, if not void, the plaintiff's failure to perform by 15 October 1975 would operate to nullify the agreement since time was of the essence.

The matter was heard by the court sitting without a jury, and judgment was entered requiring that defendant specifically perform his obligation under the contract to convey upon plaintiff's payment of the purchase price in accordance with the terms and conditions applicable to the purchase price.

Other facts are set out in the opinion.

Long, McClure and Dodd, by Jeff P. Hunt, for plaintiff appellee.

S. Thomas Walton for defendant appellant.

MORRIS, Judge.

[1] Defendant first contends that the court erred in denying his motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, made in his answer and at trial. This contention is the subject of his assignments of error Nos. 1 and 2. He argued at

trial and argues on appeal that the complaint fails to state a claim upon which relief can be granted for the reason that the description contained in the contract to convey is fatally defective thus rendering the contract insufficient to meet the requirements of the statute of frauds and therefore void.

The description in the contract is as follows:

> "All of that certain tract or parcel of land, situate, lying and being in the Township of Hoopers Creek, County of Buncombe, State of North Carolina, and being described as follows:
>
> Containing 24.75 acres and being tracts 1, 2, and 3 described in deed of trust dated March, 1974—mortgagor, George W. Moore, Mortgagee, Fred L. Hyatt, Jr., and wife, Jumelia M. Hyatt, with all the rights and easements appertaining thereto, but subject to restrictions, reservations and conditions of record."

In *Kidd v. Early*, 289 N.C. 343, 353, 222 S.E. 2d 392 (1976), Chief Justice Sharp, speaking to the question of whether the description contained in an option to purchase lands was sufficient to meet the requirements of the statute of frauds, said:

> "When a description leaves the land 'in a state of absolute uncertainty, and refers to nothing extrinsic by which it might be identified with certainty,' it is patently ambiguous and parol evidence is not admissible to aid the description. The deed or contract is void, *Lane v. Coe, supra* [262 N.C.], at 13, 136 S.E. 2d at 273. Whether a description is patently ambiguous is a question of law. *Carlton v. Anderson*, 276 N.C. 564, 173 S.E. 2d 783 (1970). 'A description is . . . latently ambiguous if it is insufficient in itself to identify the property but refers to something extrinsic by which identification might possibly be made.' *Lane v. Coe, supra*, at 13, 136 S.E. 2d at 273."

See also Prentice v. Roberts, 32 N.C. App. 379, 232 S.E. 2d 286 (1977).

Defendant argues that the description before us for construction is clearly patently ambiguous. We cannot agree. True, there is no metes and bounds description. However, the description gives the acreage and refers to a deed of trust, naming the parties and the date thereof, in which the land is described with particularity. This is adequate to satisfy the "something extrinsic by which identification might possibly be made." Further, the complaint locates the property in Henderson County. Attached to the complaint is a copy of the contract which set out the terms and conditions, the purchase

price, method of payment, date of closing, etc. The complaint is clearly sufficient to satisfy the "notice" concept of pleading adopted by the North Carolilna Rules of Civil Procedure. *See Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970).

Defendant also argues, as a basis for his Rule 12(b)(6) motion, that "the complaint does not give the defendant the legal protection for the application for (sic) the doctrine of *res judicata* should the plaintiff attempt to pursue another cause of action against the defendant for a specific performance to property located in Henderson County, described in Deed Book 519 on page 299 in the Henderson County Registry." This argument is clearly feckless. Paragraph 3 of the complaint alleges that the contract sought to be enforced was entered into on 3 October 1975, between plaintiff and defendant, whereby defendant agreed to convey real estate in Henderson County more fully described in Book 519, at page 299, Henderson County Registry. On the same date the complaint was filed, plaintiff filed notice of lis pendens in which the property which is the subject of the litigation was described by metes and bounds.

[2] Defendant next urges that the court erred in denying his motion for involuntary dismissal at the close of plaintiff's evidence and incorporates his argument with respect to assignments of error Nos. 1 and 2, and he designates this assignment as No. 1A. The deed of trust referred to in the contract was admitted into evidence without objection. Defendant, called as an adverse witness, testified that he gave the plaintiff the deed of trust so that plaintiff could prepare the contract, that the property described in the deed of trust is the property which was the subject of the contract, that he knew the reference to Buncombe County was in error and that the property is in Henderson County, and plaintiff knew that also. Plaintiff's evidence effectively removed the latent ambiguity of the contract and was sufficient to support the court's findings of fact. This assignment of error is also overruled.

[3] Defendant further contends that plaintiff cannot prevail because time was of the essence of the agreement upon which plaintiff sues. The only reference to time in the contract was this sentence: "It is agreed that settlement under this contract shall be completed on or before October 15, A.D., 1975." Immediately following that sentence appears the following:

"CONDITIONS OF CONTRACT

1. Subject to facts revealed by Attorneys Title Opinion and survey of property."

In *Cadillac-Pontiac Co. v. Norburn*, 230 N.C. 23, 24, 51 S.E. 2d 916 (1949), the language with respect to time of performance was: "It is agreed that settlement under this contract shall be completed on or before November 20, A.D. 1945." In speaking to defendant's claim that time was of the essence and plaintiff had not performed within the time allotted, the Court said that it did "not appear that time was the essence of the agreement as it often is in a mere option.... The agreement itself is not worded to avoid the contract altogether or expressly vitiate it, if settlement is not made at that time." *Cadillac-Pontiac Co. v. Norburn, supra* at 28, 29.

Additionally, here the parties expressly contemplated a title check and a survey of the property. It is obvious to us as it must have been to the parties, that the period from 3 October to 15 October included two weekends. The court found as a fact that "the plaintiff, upon execution of said contract to convey, immediately employed a registered and certified surveyor to survey the property which is the subject of the contract to convey, to wit: Surveyor, J. Glenn Haynes." Defendant does not except to this finding and the evidence supports it. Plaintiff's title attorney testified that he was employed to examine the title and that several days before the 15th he advised plaintiff that there was a problem which would require the result of the survey in order for him to be able to certify the title. Plaintiff testified that he communicated this problem to defendant on the morning of the 15th; that he told defendant the surveyor was on the property and would finish in the afternoon; that the surveyor completed his work at 4:45; that he talked to defendant's secretary at 6:00 and told her what had happened and she said she would try to reach defendant at home; that plaintiff made 5 or 6 attempts to reach defendant on the 15th but could not up to 10:00 that night.

The court found

"That the defendant himself testified that he is in the real estate business in Buncombe County, North Carolina; and, that he has been dealing in real property for a period of at least fifteen (15) years; and, as such, said defendant knew or should have known that a survey of said property involved could, within the realm of common experience in said matters, take longer than the period of time between October 3, 1975, and October 15, 1975, to complete." and

"That there is no evidence that the plaintiff tarried or delayed; but, on the contrary, he withdrew his money on October 15,

1975, from the Wachovia Bank and Trust Company, and he stood ready, willing and able to complete the terms and conditions of said contract as said terms and conditions applied to him on that date; and, he is, in fact, now ready, willing and able to complete said terms and conditions of said contract as they apply to him."

The evidence is sufficient to support these findings.

Finally defendant contends the court erred in signing the judgment directing defendant "to deliver to the plaintiff a warranty deed conveying the property in question, in fee simple, and that said defendant specifically perform" all the terms and conditions of the contract upon plaintiff's performance of all the conditions required of him. Defendant bases this contention upon the statement in his brief that defendant's wife was not a party to the contract and "not subject to the jurisdiction of this court." It is perfectly obvious that defendant's wife is not a party to the contract and is not a party defendant in the lawsuit. It is just as obvious that the court has not attempted to order her to do anything. Defendant, by his contract, agreed to "execute and deliver to the Purchaser, or assignee, a good and sufficient deed, in fee simple, conveying said lands and premises, free from all liens and encumbrances, except as herein provided. . .". This is what the court has required him to do. If he cannot, or does not, the question of damages is the subject of another lawsuit.

Affirmed.

Chief Judge BROCK and Judge BRITT concur.

CITIES SERVICE OIL COMPANY v. HOWELL OIL COMPANY, INC., HUBERT M. HOWELL, HERBERT H. HOWELL AND MORRIS JESTER

No. 768SC1004

(Filed 19 October 1977)

Guaranty § 2— continuing guaranty—statute of limitations no bar—no novation—summary judgment proper

Where plaintiff sought to hold the corporate defendant liable as principal on a promissory note executed in 1971, one defendant liable as endorser and a guarantor under a separate agreement executed in 1966, and two other defendants liable as guarantors under the 1966 agreement, the trial court properly granted plaintiff's motion for summary judgment against the two defendants as

guarantors, since: (1) the statute of limitations had not run on plaintiff's cause of action, the 1966 guaranty agreement to plaintiff being, by its own terms, a continuing guaranty which could only be revoked in writing and an absolute guaranty of "payment when due of any and all present or future indebtedness owed by the corporate defendant," and (2) the 1971 promissory note which replaced the open account dealings between plaintiff and the corporate defendant was not a novation which released the two individual defendants from liability on the 1966 guaranty agreement.

APPEAL by defendants Herbert H. Howell and Morris Jester from *Cowper, Judge.* Judgments entered 20 September 1976 in Superior Court, WAYNE County. Heard in the Court of Appeals 31 August 1977.

In this action plaintiff filed a single complaint against the four defendants seeking to recover $35,722.08 plus interest, the balance allegedly due on a note payable to it and executed on 14 July 1971 by the corporate defendant and endorsed personally by defendant Hubert M. Howell. Plaintiff sought to hold the corporate defendant liable as principal, defendant Hubert M. Howell liable as endorser and a guarantor under a separate agreement dated 9 May 1966, and defendants Hubert H. Howell and Jester liable as guarantors under the 1966 agreement.

The corporate defendant and defendant Hubert M. Howell filed a joint answer. Defendants Herbert H. Howell and Jester filed a separate answer in which they admitted signing the guaranty agreement, but denied liability under it on the grounds that the three-year statute of limitations had run on the agreement and that the execution of the promissory note in 1971 constituted a novation of the agreement. The corporate defendant and defendant Hubert M. Howell admitted their liability on the note and requested that a referee be appointed to determine the balance due on the note.

Plaintiff filed a motion for summary judgment against defendants Herbert H. Howell and Jester. Judge Cowper granted the motion, holding defendants Herbert H. Howell and Jester jointly and severally liable on the 1971 promissory note on the grounds that they were guarantors under the 1966 guaranty agreement. They appealed.

Cecil P. Merritt for plaintiff appellee.

Smith, Everett and Womble, by James M. Smith, for defendant appellants.

BRITT, Judge.

Appellants contend the trial court erred in allowing plaintiff's motion for summary judgment because there were genuine questions of material fact as to whether the statute of limitations had run on the 1966 guaranty agreement and as to whether the 1971 promissory note was a new contract constituting a novation releasing them from liability under the 1966 guaranty agreement. We find no merit in the contention.

We hold that this was an appropriate case for summary judgment, that the statute of limitations had not run on plaintiff's cause of action, and that the requirements for a novation were not met when the promissory note was executed in 1971.

Summary judgment is appropriate under G.S. 1A-1, Rule 56(c) ". . . if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *See Zimmerman v. Hogg and Allen, Professional Association*, 286 N.C. 24, 209 S.E. 2d 795 (1974); *Kessing v. National Mortgage Corporation*, 278 N.C. 523, 180 S.E. 2d 823 (1971). Rule 56(e) further provides: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." *See Brevard v. Barkley*, 12 N.C. App. 665, 184 S.E. 2d 370 (1971); *Coakley v. Ford Motor Co.*, 11 N.C. App. 636, 182 S.E. 2d 260, *cert. denied*, 279 N.C. 393, 183 S.E. 2d 244 (1971); *Haithcock v. Chimney Rock Co.*, 10 N.C. App. 696, 179 S.E. 2d 865 (1971); *Patterson v. Reid*, 10 N.C. App. 22, 178 S.E. 2d 1 (1970). A verified pleading which meets all the requirements under G.S. 1A-1, Rule 56(e), may also be used to show there is a genuine issue for trial. *Schoolfield v. Collins*, 281 N.C. 604, 189 S.E. 2d 208 (1972).

Applying these general principles to the present case, plaintiff's verified complaint, interrogatories and depositions, together with appellants' admissions, reveal that there was no genuine issue of material fact. Appellants admitted the execution of the 1966 guaranty agreement and the existence of the 1971 promissory note from the corporate defendant to plaintiff. They did not file a verified response or any affidavits in opposition to plaintiff's motion for sum-

mary judgment. The only two points of contention are matters of law: (1) whether the statute of limitations has run on plaintiff's cause of action, and (2) whether the execution of the 1971 promissory note was a novation releasing appellants from liability under the guaranty agreement. The trial court correctly concluded that the statute of limitations did not run against the plaintiff and that the execution of the 1971 promissory note was not a novation.

The 1966 guaranty agreement to plaintiff was, by its own terms, a continuing guaranty which could only be revoked in writing. It stated that Morris Jester, Herbert Howell and Hubert Howell

> " . . . jointly, severally and unconditionally guarantee(s) payment when due of any and all present or future indebtedness owed by Howell Oil Company, Inc. . . . (hereinafter referred to as the Debtor) . . . and hereby waive(s): notice of acceptance of this guaranty by you . . . ; notice of any and all defaults in payment, and any and all other notice to which the undersigned might otherwise be entitled in connection with this guaranty, the indebtedness and obligations guaranteed hereby and any other security therefor; diligence, suit or any other act by you . . . which might otherwise be a condition precedent to enforcing this guaranty; and any defenses because of debtor's legal disability or incapacity.
>
> . . . .
>
> "This is a continuing guaranty applying to all present and future indebtedness and obligations now or hereafter owing by the above named Debtor you and/or your successors and assigns, arising out of any and all transactions had with you and/or your successors and assigns, or guaranties delivered to you, by the Debtor or based upon any indebtedness or obligation assigned or transferred to you, shall extend to and cover all renewals of any claims, demand or performances guaranteed under this instrument or extensions of time in respect thereto, shall not be affected by any surrender or release by you . . . or of any other party liable or of any security held by you . . . for any obligations hereby guaranteed nor by any other act or omission by you . . . ; and shall continue in force until five days after notice of the undersigned's withdrawal of this guaranty is received by you at your above address which notice shall be effective only as to your subsequent dealings with Debtor.

> "The undersigned further agree(s) that you and/or your successors and assigns may enter into any agreement whatsoever with the said Debtor concerning payments, defaults, extensions of time, renewals, securities, and allowances of any and all obligations hereby guaranteed, without in any way impairing or changing the liability of the undersigned hereunder."

Under North Carolina law, "[t]he rights of the plaintiff as against the guarantors, defendants herein, arise out of the guaranty contract and must be based on that contract." *EAC Credit Corporation v. Wilson*, 281 N.C. 140, 145, 187 S.E. 2d 752, 755 (1972). By the express provisions of the 1966 guaranty agreement and according to the definition of a continuing guaranty in *Hickory Novelty Company v. Andrews*, 188 N.C. 59, 123 S.E. 314 (1924), the 1966 agreement was a continuing guaranty. The agreement itself states "this is a continuing guarantee applying to all present and future indebtedness and obligations." In *Hickory Novelty Company v. Andrews*, 188 N.C. at 65, 123 S.E. at 317, the court defined a continuing guaranty as follows:

> "If the object of the guaranty is to enable the principal to have credit over an extended time, and to cover successive transactions, it is a continuing one; but if the intention of the guarantor, as indicated by language used, is that but one transaction is to be covered by the guaranty, it is a limited one." Childs on Suretyship and Guaranty § 23, p. 20.

Appellant guarantors were liable under a continuing guaranty which could only be revoked in writing and the time for bringing the action was not limited by the three-year statute of limitations.

In addition, the 1966 agreement was an absolute guaranty of "payment when due of any and all present or future indebtedness owed by Howell Oil Company, Inc." A similar situation appeared in *Aracady Farms Milling Company v. Wallace*, 242 N.C. 686, 89 S.E. 2d 413, 53 A.L.R. 2d 517 (1955). In *Aracady*, the court defined the time of the accural of a cause of action under a continuing guaranty of absolute payment as follows: (p. 689, p. 415)

> The guaranty in this case is a continuing guaranty, *Novelty Co. v. Andrews*, 188 N.C. 59, 123 S.E. 314; 24 Am. Jur., Guaranty, Sec. 18, but is also an absolute guaranty of "the due and punctual payment when due of such sum or sums of money as at any time and from time to time shall be owed you (plaintiff) by said co-partners for merchandise so supplied by you." The right to sue upon this absolute guaranty of payment arises

immediately upon the failure of the principal debtors, the male defendants, to pay their trade acceptances at maturity. *Trust Co. v. Clifton, supra; Chemical Co. v. Griffin, supra; Jones v. Ashford*, 79 N.C. 172.

Applying these rules to the present case, the plaintiff's cause of action arose against the defendant guarantors when the principal, the corporate defendant, refused to make further payments on the 1971 promissory note. The record indicates that the payments were made through February 1973. Plaintiff's complaint against the defendant guarantors was filed 10 July 1974. This was well within the three-year period envisioned by G.S. 1-52, consequently, plaintiff's action was not barred by the statute of limitations.

Appellants' argument that the 1971 promissory note which replaced the open account dealings between plaintiff and the corporate defendant was a novation which released them from liability on the 1966 guaranty agreement is not persuasive.

In *Tomberlin v. Long*, 250 N.C. 640, 644, 109 S.E. 2d 365, 367-368 (1959), the court defined novation as follows:

> "Novation may be defined as a substitution of a new contract or obligation for an old one which is thereby extinguished * * * The essential requisites of a novation are a previous valid obligation, the agreement of all the parties to the new contract, the extinguishment of the old contract, and the validity of the new contract * * * ." 66 C.J.S. Novation Secs. 1 and 3.

The court further pointed out that " '[w]here the question of whether a second contract dealing with the same subject matter rescinds or abrogates a prior contract between the parties depends solely upon the legal effect of the latter instrument, the question is one of law for the courts' . . . . "

In the present situation, appellants failed to show all the essential elements of a novation. The only question is the legal effect of the 1971 promissory note. Appellants did not sign the promissory note as parties and could not be held liable as parties under the note. In addition, the promissory note did not extinguish their liability under the 1966 guaranty agreement, either expressly or impliedly. Its only legal effect was to consolidate the amounts owed to plaintiff by the principal, the corporate defendant.

The 1971 promissory note did not in any way release the defendant guarantors even though it might have been considered a modification of their liability on the principal's open account. The

1966 guaranty contract specifically provides that plaintiff "may enter into any agreement with the said Debtor concerning payments, defaults, extensions of time, renewals, securities, and allowances of any and all obligations hereby guaranteed . . . " without changing the defendant guarantors' liability under the guaranty agreement. In *Vannoy v. Stafford*, 209 N.C. 748, 184 S.E. 482 (1936), the court held that an extension of time to an endorser on a note would not discharge him when he had expressly waived the extension of time defense.

The 1966 continuing guaranty agreement was in effect when the 1971 promissory note was executed because the agreement had not been revoked in writing as required by its own terms. Defendant guarantors were liable after February 1973, when the principal failed to pay the amounts due under the promissory note. The 1971 note was not a novation releasing the defendant guarantors, and the action against the guarantors on the basis of the guaranty agreement for the principal's default on the promissory note was commenced in July of 1973, well within the three-year statute of limitation time period. G.S. 1-52.

For the reasons stated above, the trial court's grant of plaintiff's motion for summary judgment was proper.

Affirmed.

Chief Judge BROCK and Judge MORRIS concur.

VIOLET FREEMAN, GENERAL GUARDIAN OF HERSHELL ROBERT FREEMAN, JR., AND VIOLET FREEMAN, INDIVIDUALLY v. IVA DEAN TRIVETTE FREEMAN

No. 7725DC14

(Filed 19 October 1977)

Divorce and Alimony § 13; Insane Persons § 8— divorce action by guardian

The general guardian of an insane or incompetent person may not maintain on behalf of such person an action for divorce based on a year's separation. G.S. 33-20.

APPEAL by defendant from *Tate, Judge*. Judgment entered 15 October 1976, in District Court, BURKE County. Heard in the Court of Appeals 28 September 1977.

Plaintiff Violet Freeman, general guardian of her son, Hershell Robert Freeman, Jr., instituted an action for divorce based on one year's separation, against Freeman, Jr.'s wife. Defendant made a motion to dismiss alleging that plaintiff as general guardian did not have the authority to bring an action for divorce. The trial court denied the motion and subsequently granted the absolute divorce.

Defendant appeals.

Mitchell, Teele & Blackwell, by Hugh A. Blackwell, for plaintiff appellee.

West, Groome, Baumberger, Tuttle & Thomas, by Carroll D. Tuttle, for defendant appellant.

ARNOLD, Judge.

The question presented by this appeal, whether a general guardian of an insane or incompetent person may maintain an action for divorce based on a year's separation, has not been previously decided by the courts of this State. *See*, 1 Lee, North Carolina Family Law § 59 (n. 188) (1963 and 1976 Cum. Supp.). We conclude that such an action cannot be maintained.

The powers granted a general guardian by statute are found in G.S. 33-20.

> "§ 33-20. Guardian to take charge of estate. — Every guardian shall take possession, for the use of the ward, of all his estate, and may bring all necessary actions therefor."

An action for divorce based upon one year's separation is not a necessary action within G.S. 33-20. The statutory provisions following G.S. 33-20, which may be viewed as a clarification of the powers granted by G.S. 33-20, cover such things as rentals (G.S. 33-21), cultivation of lands of wards (G.S. 33-23, -24), and collection of claims (G.S. 33-28). Nowhere in Chapter 33 (Guardian and Ward) or Chapter 35 (Persons with Mental Diseases and Incompetents) is there express statutory authority for the general guardian of an incompetent to bring an action for divorce.

The majority of states hold that a divorce cannot be maintained on behalf of a mentally incompetent spouse by a guardian, committee, or next friend. *See* Annot., 6 A.L.R. 3d 681 (1966). The annotation states:

> "The basis for this rule appears to be the belief that there are no marital offenses which of themselves work a dissolution of

the marital relation, and the right of the injured party to regard the bond of marriage as indissoluble because of religious affiliation or for other reasons is considered so strictly personal that such relation should not be dissolved except with the personal consent of the injured spouse, which cannot be given where he or she is insane."

Id. at 683.

We find only two jurisdictions which follow the minority view that a guardian, committee, or next friend may bring a divorce action on behalf of an incompetent spouse. Of those two, Massachusetts' holdings are based upon an express statute, and Alabama's holdings are based upon judicial construction of a general statute relating to actions by insane persons. *Id.* at 683-84.

Plaintiff cites *Smith v. Smith*, 226 N.C. 544, 39 S.E. 2d 458 (1946), for the proposition that the provisions of Chapter 33 are not an exclusive itemization of the powers of a guardian. In *Smith* the guardian *ad litem* was permitted to defend the action brought against his ward for divorce. In that case, the defendant guardian argued that the marital relation is such that the spouse alone may elect to prosecute or defend an action for divorce. Responding to that argument, the court stated:

"The intriguing contention that the right to prosecute or defend an action for divorce is strictly personal to the spouse and the election cannot be made by a legal representative is based on the holding in *Worthy v. Worthy*, 36 Ga., 45. There the plaintiff was insane. The action was instituted in her name by a next friend. It was held that the right to sue for a divorce must be regarded 'as *strictly personal* to the party aggrieved,' and that it was for the plaintiff alone to determine how long and to what extent she would condone the infidelities of a faithless husband and 'whether . . . the wife will continue to regard him as her husband, and live with him as his wife *is for her decision only.*'

"Even if we concede its force in respect to the plaintiff in a divorce action, this ratiocination may not be applied to the facts appearing on this record. Plaintiff has made the election to seek a dissolution of the marital contract. Defendant, if sane, could not assent to the decree. She could only elect either to defend or abstain from answering. Being insane, she must appear through her duly appointed representative, G.S., 1-64, and he must answer, G.S., 1-67."

Id. at 545-46, 39 S.E. 2d at 460.

While we do not disagree with plaintiff's argument that the provisions of Chapter 33 are not an exclusive itemization of a guardian's powers, we find no authority in *Smith* which will permit a guardian to maintain an action for divorce.

There has been no case in North Carolina which has allowed a general guardian to maintain a divorce action in the sense that we refer to such an action. *Sims v. Sims*, 121 N.C. 297, 28 S.E. 407 (1897), allowed a general guardian of a lunatic to annul a marriage that she had entered into while still adjudged a lunatic. The court stated, 121 N.C. at 299, 28 S.E. at 408, that "[s]uch marriage is absolutely void *ab initio* and can be at any time so declared by the courts." As plaintiff points out, the court went on to say that "[s]uch action is for divorce (*Lea v. Lea* . . . , [104 N.C. 603, 10 S.E. 488 (1889)]), and all actions for a lunatic can be brought either in the name of the guardian or in the name of the lunatic by the guardian." *Id.* In the *Lea* case the Supreme Court held that the action to have a marriage declared void due to a pre-existing marriage is an action for "divorce" and that alimony *pendente lite* may be awarded. The court noted that there were three kinds of divorces but it addressed only one—divorce on the nullity of the marriage contract. Assuming that we accept the idea that annulment is a type of divorce even today, we construe the *Sims* case to apply only to those divorces which are in essence annulments based upon the incompetency of a person at the time of his or her marriage.

The majority rule that a suit for divorce is so personal and volitional that it cannot be maintained by a guardian on behalf of an incompetent is sound. In the absence of statutory authority to bring such an action we hold that an action for divorce based upon one year's separation cannot be maintained by a general guardian on behalf of an incompetent. The judgment granting divorce is

Reversed.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. BROADIE SAMPSON, JR.

No. 778SC347

(Filed 19 October 1977)

1. **Kidnapping § 1.2— sufficiency of evidence**

Evidence in a prosecution for kidnapping was sufficient for the jury where it tended to show that defendant, acting in concert with another person, unlawfully restrained and removed the victim from one place to another for the purpose of committing the crime of armed robbery, in violation of G.S. 14-39(a)(2).

2. **Kidnapping § 1.1— victim's testimony—admissibility to show acting in concert**

Testimony by a kidnapping victim as to what defendant's accomplice said during perpetration of the crime was admissible to show that defendant and his accomplice were acting in concert in the commission of the kidnapping.

3. **Criminal Law § 134.2— sentencing—judge other than trial judge—no error**

Defendant was not prejudiced where sentencing was delayed for the purpose of a diagnostic evaluation of defendant, and a different judge other than the trial judge subsequently imposed judgment.

APPEAL by defendant from *Smith, Judge.* Judgment entered 21 January 1977, in Superior Court, WAYNE County. Heard in the Court of Appeals 22 September 1977.

Defendant pled not guilty to the charge of kidnapping (for the purpose of armed robbery) of Riley B. Coker, Jr. on 19 June 1976.

The State's evidence tended to show that on the evening of the date charged Coker, age 18, in the parking lot of an arcade and pool hall known as Byrd's, was requested by defendant to get in his car so that defendant could buy marijuana from him. There were three other passengers in the car. Coker got in the back seat beside Charles Bryant. Defendant started the car, saying they were going off to smoke a joint. Coker requested that defendant let him out of the car, but defendant drove away. Bryant pulled out a pistol, pointed it at Coker and took his wallet containing $25.00 and a bag of marijuana. Bryant told defendant to let Coker out. Defendant stopped the car, and Coker got out, hitched a ride back to Byrd's, and reported the crime to the police. Defendant was arrested soon thereafter, and a bag of marijuana, but no money, was found in his car.

Defendant offered no evidence.

After a verdict of guilty as charged, the trial court (Tillery, Judge) ordered a pre-sentence diagnostic evaluation and delayed sentencing. Defendant was sentenced to imprisonment 78 days later after completion of the evaluation.

Attorney General Edmisten by Associate Attorney Richard L. Griffin for the State.

Barnes, Braswell & Haithcock, P.A. by Michael A. Ellis for defendant appellant.

CLARK, Judge.

[1] The evidence, considered in the light most favorable to the State, was sufficient to show that defendant, acting in concert with Charles Bryant, unlawfully restrained and removed Coker from one place to another for the purpose of committing the crime of armed robbery, in violation of the new kidnapping statute, G.S. 14-39(a)(2). The trial court properly denied defendant's motions for judgment as of nonsuit and to set aside the verdict.

[2] Defendant assigns as error the admission of Coker's testimony that while riding in the car he heard Charles Bryant tell defendant "that Royal Avenue would be okeah." The witness further testified that defendant drove his car to and on Royal Avenue. The evidence was relevant for the purpose of showing that defendant, operator of his car, followed the advice of Bryant, from which it could be inferred that they were acting in concert in the commission of the kidnapping. Defendant contends that the evidence was inadmissible because it was hearsay. The statement was not objectionable as hearsay because it was offered for a purpose other than that of proving the truth of the matter stated. 1 Stansbury's N.C. Evidence, (Brandis Rev. 1973) § 141.

[3] Defendant contends it was error for a judge other than the trial judge to impose judgment because "the sentencing Judge cannot possibly be as knowledgeable as the trial judge as to the age, character, education, environment, habits, mentality, propensities, and the record of the defendant." The sentencing was delayed for the purpose of a diagnostic evaluation of the defendant. G.S. 148-12 requires that a copy of the diagnostic study

report be transmitted to the trial court. With the benefit of the report the sentencing judge would likely be more knowledgeable as to the factors enumerated than the trial judge who did not have the report. In any event, we find no statutory or case law prohibition against a judge other than the judge who presided at trial imposing judgment. Where the trial judge orders a diagnostic study of a defendant, under our system of rotation and assignment of judges, in most cases the trial judge would not be the sentencing judge because of a substantial delay between verdict and sentencing. Where the sentencing judge is not the judge who presided at trial, he would not have firsthand knowledge of the evidence in the case; but a transcript of the trial, or the testimony of the major witnesses in the trial, or even a summary of the evidence by the prosecuting attorney and defense counsel, would appear to be sufficient to enable the sentencing judge to exercise his sentencing authority with intelligence.

The judgment is not void merely because the trial or plea was before one judge and the sentence was imposed by another. 24 C.J.S. Criminal Law, § 1561. And the defendant in the record on appeal has not in any way supported his contention that the sentencing judge did not have available sufficient information to impose intelligently the judgment appealed from.

No error.

Judges VAUGHN and HEDRICK concur.

STATE OF NORTH CAROLINA v. GEORGE BALDWIN, JR.

No. 7715SC406

(Filed 19 October 1977)

Weapons and Firearms— possession of shotgun by felon—operability of gun—sufficiency of evidence

In a prosecution for possession of a firearm by a convicted felon where the State offered evidence that defendant had been convicted of a felony within five years and that he was in possession of a shotgun, but there was no evidence as to whether the gun was operable, evidence was sufficient to require submission of the case to the jury and to support the verdict.

State v. Baldwin

APPEAL by defendant from *Lee, Judge.* Judgment entered 7 December 1976 in Superior Court, ORANGE County. Heard in the Court of Appeals 30 September 1977.

Defendant was charged in a proper bill of indictment with possession of a firearm by a convicted felon. G.S. 14-415.1.

The evidence presented by the State tends to show the following: Early on the morning of 10 July 1976 a vehicle operated by defendant, George Baldwin, was stopped by a police officer in the town of Chapel Hill. An examination of the interior of the vehicle revealed a cartridge belt and a 12 gauge sawed-off shotgun. Shotgun shells were found in the pocket of the defendant. A criminal record introduced at trial by the State disclosed that on 2 March 1972 defendant had entered a plea of guilty to a charge of felonious assault.

Defendant offered no evidence.

The jury rendered a verdict of guilty as charged. From a judgment imposing a prison term of five years, defendant appealed.

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

Levine and Stewart by John T. Stewart for the defendant.

HEDRICK, Judge.

Defendant's assignments of error all relate to the single question of whether the State in a prosecution for violation of G.S. 14-415.1 is required to submit evidence that the gun of which defendant was charged with possessing was in operable condition. North Carolina General Statutes, § 14-415.1(a) reads as follows:

> "It shall be unlawful for any person who has been convicted in any court of this State, of any other state of the United States . . . of feloniously violating any provision of Article . . . 8 . . . of Chapter 14 of the General Statutes to purchase, own, possess, or have in his custody, care, or control any handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches within five years from the date of such conviction . . . ."

In the present case the State produced evidence tending to prove the defendant's constructive possession of a shotgun "with a barrel length of less than 18 inches or an overall length of less than 26 inches within five years from the date of . . . [a] conviction" for felonious assault. There was also testimony that the shotgun had been examined by Alcohol, Tobacco, and Firearms agents to determine if it was operable. However, the State failed to introduce the results of this examination. Thus, the record is wholly devoid of any evidence that the shotgun found in defendant's possession was capable of being fired.

Since the issue raised is of first impression in this State, defendant requests that we look to other jurisdictions for guidance. In the cases cited by defendant from Pennsylvania, California and New York the courts have held that similar statutes in those states were "obviously intended to cover only objects which could cause violence by firing a shot," and therefore, that guns incapable of being fired were not "firearms" within the meaning of the statutes. *Commonwealth v. Layton*, 452 Pa. 495, ---, 307 A. 2d 843, 844 (1973). *See also People v. Jackson*, 266 Cal. App. 2d 341, 72 Cal. Rptr. 162 (1968); *People v. Boitano*, 18 N.Y.S. 2d 644 (1940). *But see State v. Middleton*, 143 N.J. Super. 18, 362 A. 2d 602 (1976). However, each of the cited cases can be distinguished from the present case by the fact that there was uncontroverted evidence in each case that the gun possessed by the defendant was inoperable. These same courts have pointed out in other cases that the State "need not show the weapon to have been operable until evidence of its inoperability has been introduced . . . ." *Commonwealth v. Horshaw*, 237 Pa. Super. 76, ---, 346 A. 2d 340, 342 (1975). *See also People v. Halcomb*, 172 Cal. App. 2d 177, 342 P. 2d 2 (1959).

In the present case there is no evidence as to whether the gun found in the defendant's possession was operable. We hold that the evidence offered by the State is sufficient to require the submission of the case to the jury and to support the verdict.

No error.

Judges BRITT and MARTIN concur.

AMICARE NURSING INNS, INC. v. CHC CORPORATION

No. 7726SC2

(Filed 19 October 1977)

Corporations § 28— revocation of charter—power to sue

A Delaware corporation whose charter has been revoked for nonpayment of its franchise taxes had authority under Delaware law to sue in its own name for a period of three years after such revocation.

APPEAL by defendant from *Hasty, Judge.* Judgment entered 1 November 1976 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 27 September 1977.

Civil action wherein plaintiff, a Delaware corporation, seeks to recover damages for an alleged breach of contract by the defendant, a Maryland corporation. Defendant alleged in its amended answer that plaintiff's charter had been revoked by the Secretary of State of Delaware for nonpayment of franchise taxes and that, consequently, under the applicable Delaware statutes, plaintiff lacked the capacity to sue. The trial court by order dated 17 May 1976 severed the issue of capacity to sue for preliminary determination.

On 26 May 1976 plaintiff moved for summary judgment on the severed issue. On 1 November 1976 the trial court found as a fact that

> "8. The Charter of Amicare Nursing Inns, Inc. was deemed 'inoperative and void' the 15th day of April, 1971, for nonpayment of franchise taxes by the Secretary of State of Delaware; the Charter of Amicare Nursing Inns, Inc. was 'proclaimed' inoperative and void by the State of Delaware on the 25th day of January, 1972, seven days before the plaintiff Amicare's complaint in this matter was filed."

The court then concluded as a matter of law that

> "1. Section 278 of the General Corporation Law of Delaware is controlling, and a corporation whose charter has been declared 'inoperative and void' for nonpayment of franchise taxes is nevertheless continued thereafter for a period of three years of body corporate for the purpose of prosecuting and defending suits by or against it."

On this basis the court granted plaintiff's motion for summary judgment on the severed issue and defendant appealed.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston by Gaston H. Gage and William P. Farthing, Jr., for plaintiff appellee.

Smith, Anderson, Blount & Mitchell by Henry A. Mitchell, Jr., and Michael E. Weddington for defendant appellant.

HEDRICK, Judge.

In its six assignments of error defendant contends that the pertinent Delaware statutes read in harmony with one another compel the conclusion that a corporation whose charter has been revoked for nonpayment of franchise taxes lacks the capacity to bring suit. Plaintiff argues that § 278 of the General Corporation Law of Delaware authorizes all dissolved corporations, including those with revoked charters, the power to sue in its own name for a period of three years. Section 278 reads in pertinent part:

> "All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of three years from such expiration or dissolution . . . bodies corporate for the purpose of prosecuting and defending suits, whether civil, criminal or administrative, by or against them . . . but not for the purpose of continuing the business for which the corporation was organized . . . ."

Defendant, citing *Indian Protective Association v. Gordon*, 34 App. D.C. 553, *affirmed without opinion*, 225 U.S. 698, 32 S.Ct. 839, 56 L.Ed. 1262 (1910), responds that a corporation whose charter has been revoked for nonpayment of taxes is not "dissolved" within the meaning of § 278 and that therefore plaintiff has no statutory authority upon which to sue until it has paid its taxes.

After an examination of the few cases on point, we find that Indian Protective Association, *supra*, is no longer controlling. Subsequent cases decided by the Delaware court and the federal courts have rendered its authority obsolete. In *Townsend v. Delaware Glue Co.*, 12 Del. Ch. 25, 103 A. 576 (Del. 1918), the Delaware Court of Chancery held that a corporation whose

charter had been revoked for nonpayment of taxes could be sued in its own name as a party defendant under the predecessor of § 278. *See also Harned v. Beacon Hill Real Estate Co.*, 9 Del. Ch. 411, 84 A. 229 (Del. 1912). There is no significance as regards the applicability of § 278 in the distinction relied upon by the defendant that *Townsend* involved a party defendant instead of a party plaintiff as in the present case. The terms of § 278 are equally applicable to both situations. Furthermore, defendant's sole authority, *Indian Protective Association*, has been rejected by a more recent federal court decision which is substantially similar in its factual situation to ours. *See Tradesmen's National Bank & Trust Co. v. Johnson*, 54 F. 2d 367 (D. Md. 1931). It is clear that the Delaware court has interpreted § 278 as applying to the case at hand. Accordingly, we hold that summary judgment for plaintiff on the issue of plaintiff's capacity to sue is affirmed.

Affirmed.

Judges BRITT and MARTIN concur.

BETTY CROTTS FAGAN v. ARTHUR S. HAZZARD

No. 7718SC4

(Filed 19 October 1977)

1. **Trover and Conversion § 2— actual damages for conversion—failure of proof**

The trial court properly found that plaintiff failed to carry her burden of proving that she suffered actual damages because of defendant's conversion of the self-player portion of plaintiff's piano and that plaintiff was entitled only to nominal damages of one dollar.

2. **Trover and Conversion § 2— punitive damages—new trial**

Plaintiff is entitled to a new trial on the issue of punitive damages for defendant's conversion of the self-player portion of her piano where plaintiff's allegation that defendant's conduct was willful, wanton and malicious was established when defendant's answer was stricken because it was not timely filed, and the court's denial of punitive damages was based upon the improper premise that plaintiff had failed to carry her burden of proving that defendant's conduct was willful, wanton and malicious.

APPEAL by plaintiff from *Rousseau, Judge*. Judgment entered 1 September 1976 in Superior Court, GUILFORD County. Heard in the Court of Appeals 27 September 1977.

In this action plaintiff seeks to recover actual and punitive damages for defendant's alleged conversion of certain parts from her Gulbransen player piano.

The case was tried initially in October 1975 at which time plaintiff was awarded $950 actual damages and $1,900 punitive damages. Defendant appealed and in an opinion reported in 29 N.C. App. 618, 225 S.E. 2d 640 (1976), this court remanded the case to the superior court for a new trial on the issues of actual and punitive damages. A summary of the allegations of the complaint, proceedings and evidence presented at the first trial is set forth in the opinion in the former appeal and will not be restated here.

Defendant failed to answer timely and the striking of his pleading was upheld on the former appeal. The second trial was without a jury and the parties presented evidence substantially as presented at the first trial. The trial court found facts and made the following conclusions of law and determination:

> [1. That the plaintiff has failed to satisfy the Court by the greater weight of the evidence as to the value of the player portion but that on the pleadings filed in this case there was a conversion of the plaintiff's property and the plaintiff is entitled to nominal damages in the sum of one dollar.]
>
> PLAINTIFF'S EXCEPTION NO. 1.
>
> [2. That the plaintiff has failed to satisfy the Court by the greater weight of the evidence that the defendant's conversion of said player portion was willful or with actual malice, or that it was done in a wanton manner.]
>
> PLAINTIFF'S EXCEPTION NO. 2.
>
> THEREFORE, [IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover from the defendant the sum of one dollar together with the cost that may be taxed by the Clerk.]
>
> PLAINTIFF'S EXCEPTION NO. 3.

Plaintiff appealed.

Schoch, Schoch and Schoch, by Arch Schoch, Jr., for plaintiff appellant.

Stephen E. Lawing for defendant appellee.

BRITT, Judge.

Plaintiff's assignments of error are based upon the three exceptions above noted. We think the court did not err in its first conclusion but that it did err in its second conclusion.

It will be noted that plaintiff excepted only to the conclusions of law and the judgment, and she has not raised in her brief the question whether the judgment is supported by the findings of fact and conclusions of law. That being true, the scope of our review is confined to the three exceptions noted. Rule 10, Rules of Appellate Procedure, 287 N.C. 671, 698-699 (1975).

[1] With respect to plaintiff's first exception and the question of actual damages, clearly plaintiff had the burden of proving actual damages. 6 Strong's N.C. Index 3d, Evidence § 5. The evidence showed that plaintiff purchased the used piano in 1973 for $150. She attempted to show that while the piano would play manually without the self-player, that she had been damaged to the extent of approximately $1,000 by defendant's wrongful conversion of the self-player parts. Defendant's evidence tended to show that the self-player was not repairable and that the piano was just as valuable, if not more valuable, without the self-player unit as it was with it.

In its first "conclusion", the court, in effect, said that plaintiff had failed to carry her burden of proving actual damages, therefore, it determined that she had sustained no actual damage. Plaintiff's assignment as to the first conclusion of law is overruled.

[2] We think plaintiff's assignment of error relating to the second conclusion of law has merit. In her complaint, she alleged that defendant's conversion of the self-player parts was willful, wanton and malicious. "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." G.S. 1A-1, Rule 8(d). When defendant's answer was stricken, plaintiff's contention that defendant's conduct was

willful, wanton and malicious was established and the trial court erred in finding or concluding otherwise.

Even so, whether punitive damages should be awarded rests in the discretion of the jury, or in the discretion of the court if jury trial is waived. 5 Strong's N.C. Index 3d, Damages § 17.7. While the awarding of punitive damages in the instant case was solely in the discretion of the trial judge, he based his denial upon an improper premise.

Inasmuch as the court's second conclusion of law is erroneous, plaintiff is entitled to a new trial on the issue of punitive damages only. With respect to the question of actual damages, the judgment appealed from is affirmed, but with respect to the question of punitive damages, the judgment is vacated.

Affirmed in part, reversed in part and cause remanded.

Judges HEDRICK and MARTIN concur.

STATE OF NORTH CAROLINA v. BOBBY LEE BARKER

No. 7527SC827

(Filed 19 October 1977)

Homicide § 24.2— reduction of crime from murder to manslaughter—burden of proof—erroneous instruction

Upon remand from the U.S. Supreme Court, a defendant convicted of voluntary manslaughter in March 1975 is granted a new trial because of the court's instructions which placed the burden on defendant to rebut the presumptions of malice and unlawfulness.

ON order from the United States Supreme Court entered 27 June 1977 granting defendant's petition for a writ of certiorari to review our decision reported in 28 N.C. App. 729, 222 S.E. 2d 490 (1976), vacating said decision and remanding the cause to this court for further consideration in light of *Patterson v. New York*, 432 U.S. ----, 53 L.Ed. 2d 281, 97 S.Ct. 2319 (1977), and *Hankerson v. North Carolina*, 432 U.S. ----, 53 L.Ed. 2d 306, 97 S.Ct. 2339 (1977).

Defendant was charged in a bill of indictment with the felony of murder of D. L. Barker on 16 August 1974. When the case was

called for trial, the district attorney announced that the State would not try defendant for first degree murder but would try him for second degree murder. From a verdict of guilty of voluntary manslaughter and judgment of imprisonment, defendant appealed.

Our decision finding no error in defendant's trial having been vacated by the United States Supreme Court, and the cause remanded to us for further consideration as above stated, we now proceed to reconsider our former decision.

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

Harris and Bumgardner, by Tim L. Harris, for the defendant.

BROCK, Chief Judge.

Defendant contends he is entitled to a new trial for the reason that certain instructions given by the trial court to the jury violated the rule established by the United States Supreme Court in *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508 (1975), and followed by the North Carolina Supreme Court in *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975).

Clearly, the instructions in this case which placed the burden on defendant to show circumstances that would reduce the offense from second-degree murder to manslaughter were erroneous in view of *Mullaney* and *Hankerson*. We hasten to add, however, that the trial of the instant case took place in March of 1975, previous to the *Mullaney* and *Hankerson* decisions, and the able trial judge gave the substance of instructions that had been approved by the appellate courts of this jurisdiction for more than 100 years.

In *Hankerson* our State Supreme Court declared no longer valid instructions similar to those challenged in the instant case. We quote from the Hankerson opinion (page 643): "We hold that by reason of the decision in *Mullaney* the Due Process Clause of the Fourteenth Amendment prohibits the use of our long-standing rules in homicide cases that a defendant in order to rebut the presumption of malice must prove to the satisfaction of the jury that he killed in the heat of a sudden passion and to rebut the presumption of unlawfulness, that he killed in self-defense . . . ."

Although our Supreme Court in *Hankerson* declared no longer valid instructions similar to those challenged in this case, said court held that *Mullaney* would be given retroactive effect in North Carolina only to trials conducted on or after 9 June 1975. Thereafter, the U.S. Supreme Court allowed certiorari in *Hankerson* and, in an opinion filed 17 June 1977 and reported in 432 U.S. ----, 53 L.Ed. 2d 306, 97 S.Ct. ----, held that our State Supreme Court erred in declining to hold the Mullaney rule retroactive.

Of course, we are bound by the opinion of the United States Supreme Court. Consequently, we hold that defendant in this case at hand is entitled to a new trial and it is so ordered.

New trial.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. CHARLES IRA BURKE

No. 7512SC615

(Filed 19 October 1977)

Homicide § 24.2— reduction of crime from murder to manslaughter—burden of proof—erroneous instruction

Upon remand from the U.S. Supreme Court, a defendant convicted of second degree murder in November 1974 is granted a new trial because of the court's instructions which placed the burden upon defendant to show circumstances that would reduce the crime from second degree murder to manslaughter.

ON order from the United States Supreme Court, *Burke v. North Carolina*, --- U.S. ---, 53 L.Ed. 2d 1087, 97 S.Ct. 2965 (1977), entered 27 June 1977 granting defendant's petition for writ of certiorari to review our decision reported in 28 N.C. App. 469, 221 S.E. 2d 713 (1976), vacating said decision and remanding the cause to this Court for further consideration.

Attorney General Edmisten, by Senior Deputy Attorney General R. Bruce White, Jr. and Assistant Attorney General Zoro J. Guice, Jr., for the State.

H. Gerald Beaver, Assistant Public Defender, Twelfth Judicial District, for defendant appellant.

ARNOLD, Judge.

The decision of this Court finding no error in defendant's trial, reported in 28 N.C. App. 469, 221 S.E. 2d 713 (1976) was vacated by order of the U.S. Supreme Court entered 27 June 1977, and the cause remanded to this Court for further consideration in light of *Patterson v. New York*, 432 U.S. ---, 53 L.Ed. 2d 281, 97 S.Ct. 2319 (1977), and *Hankerson v. North Carolina*, 432 U.S. ---, 53 L.Ed. 2d 306, 97 S.Ct. 2339 (1977).

Being bound by the decisions of the United States Supreme Court in *Patterson v. New York, supra,* and for the further reasons stated by this Court in *State v. Barbour* (filed 13 October 1977, No. 7515SC479), we order that defendant be given a new trial.

New trial.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. JERRY DALE HUNTER

No. 7524SC642

(Filed 19 October 1977)

Homicide § 24.2— reduction of crime from murder to manslaughter—burden of proof—erroneous instruction

Upon remand from the U.S. Supreme Court, a defendant convicted of voluntary manslaughter in February 1975 is granted a new trial because of the court's instructions which placed the burden on defendant to rebut the presumptions of malice and unlawfulness.

DEFENDANT was charged in a bill of indictment with first degree murder. He was tried for second degree murder, having pleaded not guilty to the charge. The jury found the defendant guilty of the offense of voluntary manslaughter and from judgment entered 28 February 1975 imposing a prison sentence he appealed to this Court. Evidence presented at the trial is summarized in our former opinion reported in 28 N.C. App. 465, 221 S.E. 2d 837 (1976). On 2 March 1976 the Supreme Court of North Carolina denied defendant's petition for discretionary review and

dismissed his appeal for lack of substantial constitutional question. 289 N.C. 453, 223 S.E. 2d 162 (1976).

On 27 June 1977 the Supreme Court of the United States vacated the decision of this Court and remanded the cause to us for further consideration in light of *Patterson v. New York*, 432 U.S. ---, 53 L.Ed. 2d 281, 97 S.Ct. 2319 (1977) and *Hankerson v. North Carolina*, 432 U.S. ---, 53 L.Ed. 2d 306, 97 S.Ct. 2339 (1977).

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

Swain and Leake, by A. E. Leake, and Chambers, Stein, Ferguson and Becton, by Louis L. Lesesne, Jr., for the defendant.

MARTIN, Judge.

In our decision filed 4 February 1976, we recognized that the instructions given by the trial court, in placing the burden of proof on the defendant to rebut the presumption of malice and unlawfulness, violate the concept of due process announced for the first time in *Mullaney* and followed by the North Carolina Supreme Court in *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975). However, we declined to give *Mullaney* retroactive effect on the authority of *Hankerson* and found no error in defendant's trial.

The Supreme Court of the United States having allowed certiorari in *Hankerson* and, in an opinion filed 17 June 1977 and reported in 432 U.S. ---, 53 L.Ed. 2d 306, 97 S.Ct. 2339 (1977), held that the Supreme Court of North Carolina erred in declining to hold the *Mullaney* rule retroactive. Because a decision of the Supreme Court of the United States interpreting the Constitution of the United States is binding upon this Court, we hold that defendant in the case under consideration is entitled to a new trial and it is so ordered.

New trial.

Judges MORRIS and PARKER concur.

IN THE MATTER OF: AINSLEE EUGENE KOYI RESPONDENT

No. 7718DC368

(Filed 19 October 1977)

1. **Appeal and Error § 9— commitment to mental health facility—appeal—mootness**

Appeal of a person involuntarily committed to a mental health care facility was not moot although the commitment period had expired.

2. **Insane Persons § 1.2— commitment order—failure to record facts**

Order committing respondent to a mental health care facility must be reversed where the court failed to record sufficient facts to support its findings that respondent was mentally ill and imminently dangerous to himself or others as required by G.S. 122-58.7(i).

APPEAL by respondent from *Allen, Judge*. Order entered 16 March 1977 in District Court, GRANVILLE County. Heard in the Court of Appeals 27 September 1977.

This proceeding for the involuntary commitment of respondent, Ainslee Eugene Koyi, was initiated by Officer Scott of the Greensboro Police Department pursuant to the provisions of G.S. 122-58.1, et seq. Respondent was taken into custody and examined by a qualified physician at the Mental Health Center in Guilford County. As a result of this examination, the physician determined that respondent was mentally ill and dangerous to himself and others. Respondent was then taken to John Umstead Hospital where he was examined by Dr. Lev, who also found respondent to be mentally ill and dangerous to himself and others, because "In his present state he is totally unable to provide for his own welfare."

On 16 March 1977, a hearing on the petition pursuant to G.S. 122-58.7, was had. Dr. Lev's report was considered by the court, and respondent, who was represented by court-appointed counsel, testified in his own behalf. The court entered the following order:

> "After hearing the testimony of Dr. Lev, Psychiatrist, who treats the above-named patient, _____ and _____ the Court finds by clear, cogent, and convincing evidence as follows:
>
> X The patient is mentally ill or inebriate suffering with a mental disorder, diagnosed as manic depressive vs paranoid schizophenia (sic).

X The patient is imminently dangerous to himself or others in that _____.

X It is, therefore, ordered that the respondent be committed to John Umstead Hospital for a period of 90 days or until such time as he is discharged according to law.

This the 16 day of March, 1977.

s/BEN U. ALLEN
District Court Judge."

Respondent appealed pursuant to G.S. 122-58.9.

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

Sam B. Currin III for respondent appellant.

MORRIS, Judge.

[1, 2] Although the record discloses that the 90-day commitment period has expired, this appeal is not moot. *See In Re Carter*, 25 N.C. App. 442, 213 S.E. 2d 409 (1975).

G.S. 122-58.7(i) provides:

"To support a commitment order, the court is required to find, by clear, cogent, and convincing evidence, that the respondent is mentally ill or inebriate, and imminently dangerous to himself or others. The court shall record the facts which support its findings."

The direction to the court to record the facts which support its findings is mandatory. *See Matter of Crouch*, 28 N.C. App. 354, 221 S.E. 2d 74 (1976). The trial judge in the case *sub judice* did not record sufficient facts to support his findings that the respondent was mentally ill and imminently dangerous to himself or others. *See Matter of Neatherly, Jr.*, 28 N.C. App. 659, 222 S.E. 2d 486 (1976).

The order appealed from is

Reversed.

Judges VAUGHN and CLARK concur.

BETTY WRIGHT BRUMFIELD v. CARL ALVIN BRUMFIELD, SR.

No. 7721DC42

(Filed 19 October 1977)

Divorce and Alimony § 24— children in wife's custody—support properly required from husband

Evidence was sufficient to support findings by the trial court and the findings supported his conclusion that defendant should pay past and future child support for his two children in plaintiff's custody.

APPEAL by defendant from *Sherk, Judge.* Order entered 21 October 1976 in District Court, FORSYTH County. Heard in the Court of Appeals 30 September 1977.

This proceeding was originally instituted in 1973 and resulted in an order on 12 October 1973 granting plaintiff custody of five children born of the marriage between the parties and requiring that defendant pay $60 per week child support to be increased by the sum of $78 per month in one year after a mortgage payoff. On 5 August 1976 plaintiff filed a motion alleging changed circumstances and asking the court to order payment of child support arrearages plus future child support payments. Defendant answered, asking that plaintiff's motion be dismissed.

Plaintiff testified that five children were born of the marriage: Pat, 18, Drema, 15, Lendy, 13, Carl, 7 and William, 5. After the October 1973 court order she had custody of the children, but in August of 1974 the children went to live with defendant. In January 1975 Lendy came back to live with her, and at that time she asked defendant to resume paying a proportionate share of child support. In June 1975 Drema came back to live with her, and at that time she asked defendant to pay a proportionate share of child support. The defendant has paid her no support for Lendy or Drema since they returned to live with her. Plaintiff remarried in 1975. Her net pay averages $70 per week. Her present family consists of herself, her husband and the two children.

Defendant testified that his present living expenses total about $700 per month. Defendant is a partner in a mobile home service and is paid a salary of $125 per week. He has custody of the two younger children born of the marriage to plaintiff. He is now remarried and has one child of the present marriage, and his

present wife has four children of her previous marriage, all of whom reside with him.

The court made findings of fact and ordered defendant to pay to plaintiff $750 in arrearages, and to pay $25 per week per child for the support of the minor children in the custody of plaintiff. Defendant appealed.

Wilson and Morrow by John F. Morrow for plaintiff appellee.

H. Glenn Pettyjohn for defendant appellant.

HEDRICK, Judge.

Defendant contends the court erred in ordering him to pay past and future child support for the two children in plaintiff's custody. He argues that the court did not properly consider his ability to pay, his living expenses, his other support obligations and the needs of the children in his custody. He contends that the court grossly abused its discretion by considering only the needs of the two children in plaintiff's custody and ignoring the other children born of the marriage as well as the other dependents of defendant.

We have carefully examined all the findings of fact made by the trial judge, and the conclusions of law drawn therefrom. The critical findings are supported by the evidence, and these findings support the order entered. We find no abuse of discretion by the trial judge. The order appealed from is affirmed.

Affirmed.

Judges BRITT and MARTIN concur.

PARKER OIL COMPANY, INC., PLAINTIFF v. HENRY SMITH, THIRD PARTY PLAINTIFF v. PARKER GRAIN COMPANY, INC., THIRD PARTY DEFENDANT

No. 763DC1024

(Filed 19 October 1977)

Appeal and Error § 6.5; Rules of Civil Procedure § 56— denial of summary judgment—no appeal

Denial of a motion for summary judgment ordinarily does not affect a substantial right so that an appeal may be taken from such an interlocutory order. Dictum in *Motyka v. Nappier*, 9 N.C. App. 579, that the moving party is free to preserve his exception to the denial of a motion for summary judgment for consideration on appeal from a final judgment should be disregarded.

APPEAL by third party defendant from *Whedbee, Judge.* Judgment entered 16 July 1976, in District Court, PITT County. Heard in the Court of Appeals 20 September 1977.

Parker Oil Company instituted this action to recover from Smith, defendant and third party plaintiff appellee, the sum of one thousand seven hundred thirty-five dollars for petroleum products sold and delivered. Smith crossclaimed against third party defendant appellant for the sum of one thousand seven hundred thirty-five dollars for corn sold and delivered. The parties having stipulated that the defendant and third party plaintiff was indebted to the plaintiff, the sole issue presented to the jury was the number of bushels of corn that the third party defendant had received from third party plaintiff. The jury answered in favor of defendant and third party plaintiff: 780 bushels. Judgment was entered in favor of defendant.

Third party defendant appeals.

Williamson, Shoffner & Herrin, by Mickey A. Herrin, for defendant and third party plaintiff appellee.

J. Michael Weeks for third party defendant appellant.

ARNOLD, Judge.

Appellant contends that the trial court erred in denying its motion for summary judgment against defendant Smith. However, that question is not before us. A motion for summary judgment is simply a pretrial motion. Denial of a motion for summary judg-

ment does not determine the merits of the case. It merely means that the case proceeds to trial. Annot. 15 A.L.R. 3d 899 (1967).

Denial of a motion for summary judgment ordinarily does not affect a substantial right so that appeal may be taken from the interlocutory order. *See, e.g. Stonestreet v. Motors, Inc.*, 18 N.C. App. 527, 197 S.E. 2d 579 (1973). In *Motyka v. Nappier*, 9 N.C. App. 579, 176 S.E. 2d 858 (1970), this Court properly dismissed an attempted appeal from the denial of a motion for summary judgment. However, dictum at p. 582 of *Motyka* (176 S.E. 2d at 859), that the moving party is free to preserve his exception to the denial of a motion for summary judgment for consideration on appeal from final judgment, should be disregarded.

In this case, no error is assigned to any part of the trial which resulted in a jury verdict and judgment against the appellant. Judgment is therefore

Affirmed.

Judges PARKER and MARTIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 5 OCTOBER 1977

IN RE WHITLEY No. 772SC358	Martin (76CRS4992)	Appeal Dismissed
STATE v. BAIN No. 7716SC340	Robeson (76CR12291)	No Error
STATE v. JOHNSON No. 7711SC364	Lee (76CRS4275)	No Error
STATE v. MIMS No. 7717SC82	Rockingham (75CR13694) (75CR13697) (75CR13698)	No Error
STATE v. OLDHAM No. 7715SC319	Chatham (74CR5849) (74CR5877)	Reversed
STATE v. SAMPSON No. 7716SC352	Robeson (76CR16618)	No Error
STATE v. TETTERTON No. 772SC350	Martin (76CR4269)	No Error
STATE v. TOWNSEND No. 7710SC367	Wake (76CR21521)	No Error

FILED 19 OCTOBER 1977

BARKSDALE v. BARKSDALE No. 7615DC1044	Orange (75CVD558)	Affirmed
BRITTAIN v. BRITTAIN No. 7623DC1035	Wilkes (75CVD0656)	Affirmed
JOHNSON v. JOHNSON No. 7718DC44	Guilford (76CVD1556)	Affirmed
MOHA CO. v. INGRAM No. 7728DC37	Buncombe (76CVM2163)	Affirmed
STATE v. CAPPS No. 7729SC163	McDowell (76CR3045) (76CR3046)	No Error
STATE v. CHRISTMAS No. 7710SC305	Wake (76CR41644)	No Error
STATE v. EDMISTEN No. 7725SC402	Catawba (76CR7265) (76CR7267)	No Error
STATE v. HUFFMAN No. 7729SC391	McDowell (76CR4419)	No Error

STATE v. LITCHFIELD No. 771SC327	Pasquotank (76CR2194)	No Error
STATE v. McLEAN No. 7711SC334	Lee (76CR4135)	No Error
STATE v. MOORE No. 7718SC341	Guilford (76CRS1153)	No Error
STATE v. PEARTREE No. 772SC410	Beaufort (75CR7237)	New Trial
STATE v. WALLACE No. 7721SC382	Forsyth (76CR34199)	No Error

STATE OF NORTH CAROLINA v. PAUL WILFRED JOHNSON

No. 7730SC409

(Filed 2 November 1977)

1. **Criminal Law § 163— objection to recapitulation of evidence**

Assignments of error to the court's recapitulation of the evidence will not be considered on appeal where defendant made no objection thereto at the trial.

2. **Criminal Law §§ 101.4, 130— comments by jury officer—motion for new trial**

A motion for a new trial based on a comment by the jury officer in the presence of one or more jurors that he was proud that the District Attorney in his argument to the jury stood up for the law enforcement officers involved in the case alleged an irregularity as contemplated by G.S. 1A-1, Rule 59(a)(1) which could have prevented defendant from receiving a fair trial, and the motion was filed within the time allowed by G.S. 1A-1, Rule 59(b) where it was filed four days after judgment was entered. Therefore, defendant is entitled to a proper hearing on the motion, after which the superior court judge should make findings of fact and determine whether there was an irregularity and, if so, whether it prevented defendant from having a fair trial. G.S. 15-174.

APPEAL by defendant from *Hasty, Judge.* Judgment entered 10 March 1977, and order entered 14 April 1977 in Superior Court, SWAIN County. Heard in the Court of Appeals 30 September 1977.

Upon a plea of not guilty defendant was placed on trial for the first-degree murder of Clyde Junior Tabor on 15 January 1977. Evidence presented by the State is summarized in pertinent part as follows:

At approximately 4:00 p.m. on said date the dead body of Tabor was found lying in the snow in the Euchella Cemetery about 25 feet from his car, the engine of which was running. There were footsteps all around the body and leading up a bank into a wooded area. There was blood under the body, on Tabor's face and between the body and the car.

The sheriff was called and as he was driving to the cemetery, he saw defendant come out of the woods with a gun strapped to his belt. The sheriff knew defendant and stopped to ask him why he was carrying a gun. Defendant told him he was hunting after which defendant accepted the sheriff's invitation to get into the car. The sheriff stated that he did not know what was going on at

the cemetery; defendant then stated that he was going to call the sheriff and turn himself in; that "[h]e (Tabor) made a phone call and was going to meet my daughter out here . . . and I told him what I'd do to him if he didn't leave us alone, and I shot him".

Upon arriving at the cemetery the sheriff learned that Tabor had been shot dead; he then took defendant to the station where he was arrested.

On the day of the shooting Tabor had visited the home of Larry Nance where he made a phone call but Nance did not hear the conversation or know whom Tabor had called. Defendant had threatened to kill Tabor on at least two prior occasions.

The sheriff traced the footsteps leading from the cemetery into the woods and found that they led to the place where he picked up defendant. While tracing the footsteps he found a rifle hidden in some bushes. An autopsy revealed that Tabor died from a rifle wound and had a blood alcohol content of .15 percent at the time of death. No weapon was found on Tabor.

Lab reports disclosed that the bullet taken from Tabor's body had been fired by the rifle recovered from the bushes; that powder burns on Tabor's tee shirt indicated that he had been shot at a distance of two to four feet from the rifle.

Defendant presented evidence which is summarized in pertinent part as follows:

He was acquainted with Tabor but had not seen him for several months prior to the date in question. On that date, defendant decided to go hunting at the cemetery and got his wife to drop him off there. He had a revolver in his belt and a rifle in his hand. He had recently undergone a cataract operation, could not see well and had been advised by his doctor not to engage in strenuous activity.

As he walked toward the woods he heard a car drive up behind him; he did not recognize the car or driver until he saw Tabor get out. He had no idea Tabor was coming to the cemetery that day and received no telephone call from him or information from his daughter regarding a telephone call from Tabor.

Upon getting out of the car, Tabor told defendant that he was going to kill him; although defendant told Tabor that he

wanted no trouble, Tabor "lunged for him". A scuffle ensued and Tabor was getting the better of defendant until defendant struck Tabor on his head with the rifle butt. Tabor stated again that he was going to kill defendant and when he made a further "dive" for defendant, defendant shot him in self-defense.

The jury returned a verdict of guilty of voluntary manslaughter. From judgment imposing a prison sentence of 12 to 15 years, defendant appealed.

Further facts pertinent to a decision of this case are set forth in the opinion.

Attorney General Edmisten, by Associate Attorney Thomas H. Davis, Jr., for the State.

Van Winkle, Buck, Wall, Starnes, Hyde and Davis, by Herbert L. Hyde, and G. Edison Hill, for defendant appellant.

BRITT, Judge.

By his assignments of error 1 through 5, defendant contends the trial court erred in rulings on evidence. Suffice it to say, we have carefully considered these assignments but finding no merit in any of them, they are all overruled.

By his assignments of error Nos. 6, 24 and 25, defendant contends the court erred in failing to direct a verdict of not guilty and in failing to set the verdict aside for the reason that the evidence was not sufficient to survive the motion for nonsuit and to support the verdict. We find no merit in these assignments and hold that the evidence was sufficient to take the case to the jury and to support the verdict returned.

By his assignments of error Nos. 7, 8, 11 and 12, defendant contends the trial court erred in its instructions to the jury by misstating evidence and expressing opinions on the evidence. We find no merit in any of these assignments.

[1] Under these assignments defendant argues that His Honor failed to reiterate certain testimony favorable to defendant and gave over-emphasis to certain testimony favorable to the State. We do not find this argument persuasive. "The general rule is that objections to the charge in stating the contentions of the parties or recapitulating the evidence must be called to the court's

attention in apt time to afford opportunity for correction, in order that an exception thereto will be considered on appeal." 4 Strong's N.C. Index 3d, Criminal Law § 163, p. 837. The record does not disclose that defendant made objections to the recapitulation of the evidence at trial, therefore, we will not consider them here. After a careful review of the instructions complained of, we conclude that the trial judge did not express an opinion on the evidence in violation of G.S. 1-180.

Under these assignments defendant argues that the trial judge gave erroneous instructions on the law. It suffices to say that we have carefully reviewed the instructions challenged here and conclude that they are free from prejudicial error.

Defendant challenges the correctness of other portions of the jury charge and also argues that the trial judge failed to give adequate instructions on certain points vital to his defense. We have given due consideration to all of these contentions but conclude that they have no merit. All assignments of error to the jury charge are overruled.

[2] By his assignment of error No. 27, defendant contends the misconduct of the jury officer entitles him to a new trial. On this aspect of the case, the record reveals:

After the jury and alternates were selected and impaneled, the trial judge entered an order that the jury and alternates be sequestered during court session hours. He appointed Windell A. Crisp jury officer with instructions that he keep all jurors together, separate and apart from all other persons, during court session hours throughout the trial; that he not permit any person, directly or indirectly, to approach or contact any of the jurors; and that he arrange and provide for meals, refreshments and such other accommodations as might in his judgment be reasonably necessary for the comfort and convenience of the jurors while so sequestered. The court specifically ordered that during the trial jurors should not talk to anyone about the case or let it be discussed in their presence until the case was given to them for consideration and verdict under the charge of the court.

The trial of the case began on Monday, 7 March 1977, and continued until Thursday, 10 March 1977, when a verdict was returned and judgment was entered. Defendant gave notice of appeal and appeal entries were entered on 10 March 1977.

On 14 March 1977 defendant filed a motion asking the court to vacate the judgment entered, and verdict returned by the jury, on 10 March 1977 and grant defendant a new trial. The motion was based on alleged misconduct on the part of Crisp, the jury officer, which took place around 11:20 a.m. on 10 March 1977 immediately after the court had completed its instructions to the jury and they had retired to their room to consider the verdict. The motion was supported by affidavits which tended to show:

For some period of time prior to the trial, Crisp had served as a part-time or special deputy sheriff of Swain County. During the course of the trial Crisp wore the uniform and insignia of a deputy sheriff and carried a badge, gun and ammunition similar to that worn and carried by the sheriff of Swain County and his deputies. Swain County Sheriff Wiggins was a principal witness for the State in the trial of the case and a substantial issue during the trial was the credibility of the sheriff as opposed to that of defendant. During arguments to the jury, defense counsel strenuously criticized, and the district attorney strenuously defended, the quality of the investigation of the case conducted by the sheriff and other law enforcement officers.

Immediately after the court concluded its instructions to the jury, discharged the remaining alternate juror, and sent the jury to their room to deliberate on their verdict, Crisp went into the room with the jury, and in the presence of the entire jury made comments about the case that were inflammatory and prejudicial to defendant. The remarks made by Crisp were calculated to deny defendant a fair trial by an impartial jury as guaranteed by the Federal and State Constitutions.

In an affidavit, Bruce Medford, one of the jurors, stated that Crisp "came into the jury room and said I was glad of one thing that the State took up for the law enforcement officers instead of tearing them down like the defense did; that may not be the exact words but they are the substance of what he said". By affidavit another juror stated that Crisp "came into the jury room and said that he was glad or appreciated or was proud that the attorney had commented on upholding the actions of the officers in the investigation of the case . . . . "

In his answer to the motion for a new trial, the district attorney admitted that on one occasion during the trial Crisp "made

a comment in the presence of one or more members of the jury in substance that he was proud or glad that the District Attorney for the State in his argument to the jury stood up for the law enforcement officers of Swain County". In his affidavit Crisp admitted that at one time during the trial, in the presence of one or more jurors, he stated that "I am glad Marcellus (the district attorney) stood up for law enforcement".

Defendant set forth in his motion that the alleged misconduct of the jury officer did not come to the attention of defendant's attorneys until Friday evening, 11 March 1977, after court had adjourned for the session.

Defendant served notice that he would ask for a hearing on his motion for a new trial before the judge presiding over a session of superior court being held in Graham County on 14 March 1977. On 14 April 1977 Judge Hasty filed an order reciting that the motion was heard by him in Cherokee County (Swain, Graham and Cherokee Counties all being in the Thirtieth District) during the 28 March 1977 Session of the Court; that immediately following the entry of judgment against defendant in Swain County on 10 March 1977, defendant gave notice of appeal and appeal entries were entered; and that immediately thereafter the session of court at which defendant was tried and sentenced was adjourned. Judge Hasty concluded that he did not have jurisdiction to entertain and pass upon defendant's motion, therefore, the motion was dismissed. Defendant appealed from that order.

We think Judge Hasty correctly concluded that he did not have jurisdiction to "entertain and pass upon" defendant's motion for a new trial, but we think he erred in dismissing the motion.

> "As a general rule, an appeal takes a case out of the jurisdiction of the trial court. Thereafter, pending the appeal, the judge is *functus officio*. '. . . (A) motion in the cause can only be entertained by the court where the cause is.' Exceptions to the general rule are: (1) notwithstanding notice of appeal a cause remains *in fieri* during the term in which the judgment was rendered, (2) the trial judge, after notice and on proper showing, may adjudge the appeal has been abandoned, (3) the settlement of the case on appeal." *Wiggins v. Bunch*, 280 N.C. 106, 108, 184 S.E. 2d 879, 880 (1971), *pet. for rehearing denied*, 281 N.C. 317 (1972), quoting from *Machine Co. v. Dixon*, 260 N.C. 732, 133 S.E. 2d 659 (1963).

It is clear that defendant's motion did not come within any of the exceptions set forth in *Wiggins*. We are advertent to the amendments to G.S. Chapter 15A enacted by Chapter 711 of the 1977 Session Laws, and particularly the new G.S. 15A-1414 (c) which appears to modify the rule in *Wiggins*; however, those amendments are not effective until 1 July 1978.

G.S. 15-174 provides that "[t]he courts may grant new trials in criminal cases when the defendant is found guilty, under the same rules and regulations as in civil cases". G.S. 1A-1, Rule 59(a), provides in pertinent part:

> "A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:
>
> (1) Any irregularity by which any party was prevented from having a fair trial; . . . . "

Rule 59(b) provides: "*Time for motion.*—A motion for a new trial shall be served not later than 10 days after entry of the judgment."

While defendant has not cited, and our research has not revealed, a case directly on point with the case at hand, we think decisions of our Supreme Court emphasizing the sanctity of the jury room are instructive.

In *State v. Bindyke*, 288 N.C. 608, 220 S.E. 2d 521 (1975), the court awarded a new trial for the reason that an alternate juror was permitted in the jury room after deliberations had begun. We quote from the opinion (page 623, 531):

> ". . . [T]here can be no doubt that the jury contemplated by our Constitution is a body of twelve persons who reach their decision in the privacy and confidentiality of the jury room. There can be no question that the presence of an alternate juror in the jury room after a criminal case has been submitted to the regular panel of twelve is always error. The requirements of G.S. 9-18 and N.C. Const. art. 1, § 24, and similar statutes and constitutional provisions in other jurisdictions, are mandatory. . . .
>
> "The rule formulated by the overwhelming majority of the decided cases is that the presence of an alternate, either

during the entire period of deliberation preceding the verdict, *or* his presence at any time during the *deliberations* of the twelve regular jurors, is a fundamental irregularity of constitutional proportions which requires a mistrial or vitiates the verdict, if rendered. . . . "

The court held that the presence of an alternate juror in the jury room during the jury's deliberations constitutes reversible error *per se.*

The decision of the Supreme Court in *Bindyke* was followed by this court in *State v. Rowe*, 30 N.C. App. 115, 226 S.E. 2d 231 (1976).

We think defendant's motion *alleges* an irregularity as contemplated by Rule 59(a)(1) which could have prevented him from receiving a fair trial. However, a hearing should be held on the motion, facts found and a determination made by a judge of the Superior Court as to whether there was an irregularity and, if so, if it prevented defendant from having a fair trial.

We do not presume to pass upon the merits of defendant's motion. We merely hold that, in our opinion, he has filed a proper motion under Rule 59(a)(1), that he filed his motion within the time allowed by Rule 59(b), and that he is entitled to a proper hearing on the motion. *See generally* Wright & Miller, Federal Practice and Procedure: Civil § 2873 (1973). Quoted in *Sink v. Easter*, 288 N.C. 183, 199, 217 S.E. 2d 532 (1975).

Consequently, the order filed 14 April 1977 dismissing defendant's motion for a new trial is vacated and this cause is remanded to the Superior Court of Swain County for a hearing on, and a determination of, defendant's motion for a new trial.

No error in trial.

Order dismissing motion for a new trial vacated and cause remanded.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. CLINTON BABB

No. 7711SC416

(Filed 2 November 1977)

1. **Receiving Stolen Goods § 5— fatal variance between indictment and proof**

Where the indictment sufficiently alleged the felonious receiving of stolen goods knowing them to have been stolen (taken by common-law larceny) in violation of G.S. 14-71, but the State's evidence tended to show that defendant received property which was taken by a tire store employee in violation of the felony statute, G.S. 14-74, there was a fatal variance between the charge and the proof.

2. **Receiving Stolen Goods § 5— purchasing property in public place—factors to be proved by State**

Where a defendant, charged with a violation of G.S. 14-71, purchases property in a public business from one in custody or possession and with the actual or apparent authority to sell it, the State must prove that the property was taken by the seller in violation of a felony statute and that at the time of the transaction the defendant had knowledge, or reasonable grounds to believe, that the seller had so taken the property *and* had no authority to transact the sale.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 27 January 1977, in Superior Court, LEE County. Heard in the Court of Appeals 17 October 1977.

Defendant pled not guilty to the charge of receiving eight tires and eight tubes stolen from Budd's Master Tire Service, Inc., knowing them to have been feloniously stolen.

Richard Cummings, for the State, testified that on 30 January 1976 he was and had been for several years the foreman of the truck tire department of Master Tire Service, Inc. On that date defendant came to the shop to pay for eight tires he had purchased in 1975 for about $1400. While there defendant asked Cummings if he could get for defendant eight truck tires and tubes at "a good price." Cummings told defendant he could get him eight tires and tubes for $800, the same brand (Michelin) defendant had bought from Master Tire Service for $1200 four or five years ago. In the early morning of 2 February 1976 Cummings telephoned defendant that he had the tires. Defendant's wife, on her way to school, stopped by the shop and gave $800 to Cummings. Cummings took four tires and tubes from the Tire Service, put them on rims, ordered four other tires and tubes from a tire outlet in

Greensboro (billing them to the Tire Service), and had an employee go to Greensboro to get them and deliver them to Hunter's Garage, where they were mounted on defendant's truck. Cummings did not give an invoice and receipt to defendant as he had on the two previous occasions when defendant had bought tires from the Tire Service. Cummings further testified that he entered a plea of guilty to the charge of "larceny by employee" and was then serving a prison sentence.

An officer of the Master Tire Service testified that the retail value of the eight tires and tubes was $2,106.

Defendant testified that when he settled his account on 30 January with Cummings he was charged interest in the sum of $212.00, and Cummings told him he would get credit for the interest paid when he next bought tires there. He told Cummings he needed eight radial tires then. It was generally known blemished steel radials could be bought for $100 each if paid in cash. Cummings called him at 6:00 a.m. on 2 February and told him he had the tires he wanted for $800, so he sent his wife by the shop with the money. On the following day Cummings had the tires mounted on rims by an employee. Defendant presumed that the tires were blemished in view of the price.

The jury found defendant guilty as charged, and from judgment imposing a suspended sentence, defendant appeals.

Attorney General Edmisten by Assistant Attorney General James Peeler Smith for the State.

Pittman, Staton & Betts by Stanley W. West and William W. Staton for defendant appellant.

CLARK, Judge.

Did the trial court err in denying defendant's motion for judgment as of nonsuit on the ground that there was no evidence that the tires and tubes were stolen property?

The indictment charges that defendant did feloniously receive property knowing the same to have been "feloniously stolen, taken, and carried away, . . ." The quoted words are a short-hand definition of common-law larceny. But the evidence fails to establish common-law larceny of the tires and tubes. One element of common-law larceny is that the property must be

taken under such circumstances as to amount technically to a trespass, a wrongful taking and carrying away. *State v. Griffin*, 239 N.C. 41, 79 S.E. 2d 230 (1953); *State v. Delk*, 212 N.C. 631, 194 S.E. 94 (1937); *State v. Watts*, 25 N.C. App. 194, 212 S.E. 2d 557 (1975).

All of the evidence tends to show that Richard Cummings was, and for several years had been, the foreman of the truck tire department of Budd's Master Tire Service, Inc. He had apparent and actual authority to sell the truck tires and accessories in his department. As a witness for the State, Cummings testified that he had pled guilty to the charge of "larceny by employee." We must assume that he was charged with and pled guilty to the violation of G.S. 14-74, which provides in substance that if any servant or other employee to whom property shall be delivered for safekeeping by the master converts the same to his own use with the intent to steal and defraud contrary to the trust; or if any servant shall embezzle such property, or otherwise convert the same to his own use, with intent to steal or defraud the master, he "shall be fined or imprisoned . . . not less than four months nor more than ten years, at the discretion of the court: . . ."

In *State v. Higgins*, 1 N.C. 36 (1792), it was pointed out that G.S. 14-74 was a substantial prototype of an old English statute, 21 Henry VIII, c. 7, ss. 1, 2. The court held that defendant was not a "servant" within the meaning of the statute, then determined that under the indictment charging a violation of the statute defendant could not be convicted of common-law larceny. We quote pertinent excerpts from the decision:

> ". . . In the preamble it is said, after stating such a fact as the one in the indictment, which misbehavior so done, was *doubtful* at the common law, whether it was felony or not.
>
> * * * *
>
> "Towards the year 1470, under the reign of Ed. IV, it was held that where a person entrusted goods to the care of a servant, the servant could not take them feloniously, because they were in his possession. 10 Ed. IV, 14.
>
> * * * *

"In the time of Henry VIII, says Mr. Reeves, a breach of trust and embezzlement of effects confined to the custody of a person, were thought not to be a *felonious taking and carrying away*. This kind of fraud had of late grown common, from the impunity it enjoyed; and many now thought that, as it carried in it much of the mischief, it deserved the punishment annexed to felony." 1 N.C. at 41, 42, and 44.

It is clear from *Higgins* that the purpose of the statute was to make the conduct described therein a crime because it did not constitute the crime of common-law larceny. In *State v. Wilson*, 101 N.C. 730, 7 S.E. 872 (1888), it was held that a defendant could not be convicted for a violation of G.S. 14-74 under an indictment charging common-law larceny; that it was necessary to allege that the property was received and held by defendant in trust, or for the use of the owner, and being so held, it was feloniously converted or made away with by the servant or agent.

G.S. 14-71 provides that if any person shall receive property "the stealing or taking whereof amounts to larceny *or a felony*, either at common law *or by virtue of any statute made or hereafter to be made*, . . ." [Emphasis added.] It appears that under the statute the property knowingly received or concealed could include not only stolen property but trust property converted in violation of G.S. 14-74 or property taken in violation of any other felony statute. But if the property knowingly received was not stolen but was taken in violation of some felony statute, the indictment should so allege.

As a general rule the indictment must sufficiently define the crime or set forth all its essential elements for the purpose of informing the accused of the specific offense of which he is accused so as to enable him to prepare his defense or plead his conviction or acquittal as a bar to further prosecution for the same offense. *State v. Wells*, 259 N.C. 173, 130 S.E. 2d 299 (1963). "An indictment for an offense created by statute must be framed upon the statute, and this fact must distinctly appear upon the face of the indictment itself; and in order that it shall so appear, the bill must either charge the offense in the language of the act, or specifically set forth the facts constituting the same. . . ." *State v. Jackson*, 218 N.C. 373, 375, 11 S.E. 2d 149, 151 (1940).

[1] The indictment in the case *sub judice* sufficiently alleges feloniously receiving stolen goods knowing them to have been

stolen (taken by common-law larceny) in violation of G.S. 14-71. But the State's evidence tends to show that defendant received property which was taken by Cummings, the shop foreman, in violation of the felony statute, G.S. 14-74. Cummings pled guilty to a violation of *this* felony statute. There is a variance in the charge and the proof, a failure by the State to show that the goods were stolen. A defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment. A fatal variance between the indictment and proof is properly raised by a motion for judgment as of nonsuit, since in such instance the evidence is not sufficient to support the charge as laid in the indictment. 4 Strong, N.C. Index 3d, Criminal Law, § 107.

By analogy, embezzlement, like G.S. 14-74, is a statutory offense. G.S. 14-90 *et seq.* And G.S. 14-71 makes it an offense knowingly to receive embezzled property in violation of a felony embezzlement statute, but such offense is distinct from that of receiving stolen goods, and a charge of receiving stolen goods is not sustained by proof that the goods were merely embezzled. 76 C.J.S., Receiving Stolen Goods, §§ 2, 16.

Admittedly, the distinction between common-law larceny and a taking of property in violation of G.S. 14-74 is minuscule, and in that sense the indictment defect is technical. However, the distinction is significant in its effect on determining the issues at trial. The case for the State and the instructions of the trial court to jury were based on the assumption that Cummings had *stolen* property. Consequently, the jury did not have the opportunity to consider, under proper instructions, the actual and apparent authority of Cummings to possess and sell the property as it affected the issues of unlawful taking by Cummings and guilty knowledge by defendant. See *State v. Shoaf*, 68 N.C. 375 (1873) where defendant, charged with receiving stolen goods, bought a horse from the son of the owner, and the court found reversible error in the failure of the trial court to instruct the jury, as requested, that the receiver was not guilty of larceny if he believed the son could sell the horse and, if so, the defendant would not be guilty of the receiving charge.

[2] Where a defendant, charged with a violation of G.S. 14-71, purchases property in a public business from one in custody or possession and with the actual or apparent authority to sell it, the State must prove that the property was taken by the seller in

violation of a felony statute, in this case G.S. 14-74, and that at the time of the transaction the defendant had knowledge, or reasonable grounds to believe, that the seller had so taken the property *and* had no authority to transact the sale.

The motion for judgment as of nonsuit should have been allowed. The judgment is vacated and the charge dismissed. The District Attorney may seek a bill of indictment charging receiving property taken in violation of G.S. 14-74, if so advised.

Vacated and dismissed.

Judges MORRIS and VAUGHN concur.

FRANK H. CONNER COMPANY v. SPANISH INNS CHARLOTTE, LIMITED, A NORTH CAROLINA LIMITED PARTNERSHIP, EMIL BALL, JERRY M. WHIPPERFURTH, RICHARD R. HOLCHEK, AND R. C. BENSON, INDIVIDUALLY AND AS GENERAL PARTNERS; ARCHIE C. WALKER, AS TRUSTEE AND WACHOVIA REALTY INVESTMENTS, AN UNINCORPORATED BUSINESS TRUST, AND UNITED LEASING CORPORATION AND WACHOVIA MORTGAGE COMPANY

No. 7726SC17

(Filed 2 November 1977)

1. Laborers' and Materialmen's Liens § 1— lien for surveying work—improvement of realty

Work performed by a surveying subcontractor in clearing a portion of a building site and placing corner stakes for a building to be constructed by plaintiff on the site constituted labor performed pursuant to and in furtherance of plaintiff's contract to improve real property within the purview of former G.S. 44A-8 and was subject to a lien under that statute; therefore, plaintiff's lien under G.S. 44A-8 relates back to the date such services were performed and has priority over a construction loan deed of trust recorded seven days after such services were performed.

2. Arbitration and Award § 9— waiver of right to challenge award

Appellant construction lender waived its right to challenge an arbitration award which fixed the amount of plaintiff contractor's laborers' and materialmen's lien on defendant owner's property by failing to participate in either the arbitration award hearing or the hearing in superior court which affirmed the award when it had notice of such hearings.

3. Estoppel § 4.6— action by party to be estopped—reliance by other party

Plaintiff was not estopped to assert that its laborers' and materialmen's lien had priority over defendants' construction loan deed of trust because of a

noncommencement affidavit executed by its surveying subcontractor some 14 days after the execution of the deed of trust, since the affidavit was not executed by the party to be estopped and did not induce defendant to act in reliance thereon.

Judge MARTIN dissents.

APPEAL by defendants Wachovia Realty Investments, Wachovia Mortgage Company, and Archie C. Walker, Trustee, from *Snepp, Judge*. Judgment entered 12 November 1976 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 28 September 1977.

In its complaint filed 26 June 1975 plaintiff, Frank H. Conner Co., alleged three claims for relief against defendants Spanish Inns Charlotte, Ltd., Emil Ball, Jerry M. Whipperfurth, Richard R. Holchek and R. C. Benson, Individually and as General Partners; Archie C. Walker as Trustee; Wachovia Realty Investments; William W. Tennent III, Trustee; United Leasing Corporation; and Wachovia Mortgage Company. In its first claim for relief, which is the only claim involved in this appeal, plaintiff seeks to have an arbitration award declared to be a specific lien on real property pursuant to the provisions of G.S. 44A-8. In its first claim plaintiff alleged that on 4 October 1973 it entered into a contract with defendant Spanish Inns to construct a motel building on the latter's lot for a total price of $1,664,465.00, and that on 27 June 1973 it began to furnish labor and materials pursuant to an earlier agreement which agreement was merged into said contract. The plaintiff further alleged that the defendant, Wachovia Realty Investments, made a construction loan to defendant Spanish Inns and that said loan was secured by a deed of trust to defendant Archie C. Walker, trustee, which was recorded on 29 October 1973. Plaintiff further alleged that the general contract between plaintiff and defendant Spanish Inns "provides that any dispute arising between the plaintiff and the defendant, Spanish Inns Charlotte, Ltd., shall be resolved by arbitration and with respect to the determination of any sum due the plaintiff by the defendant, Spanish Inns Charlotte, Ltd. . . . the same is now subject to an arbitration proceeding having been ordered in the Superior Court Division of the General Court of Justice of Mecklenburg County on February 6, 1975 . . . ."

The defendant Spanish Inns, in its answer filed 8 September 1975, with respect to plaintiff's first cause of action, alleged:

"1. That when this matter was heard on motion for stay of arbitration by these defendants the plaintiff stipulated in open court that the only issue involving these defendants was the plaintiff's right to a statutory lien on the defendants property. These defendants deny that the plaintiff has any right to statutory lien on its property."

The defendants Archie C. Walker, trustee; Wachovia Realty Investments; and Wachovia Mortgage Company in their answer filed 29 August 1975 admitted that the plaintiff and defendant Spanish Inns had entered into a contract on 4 October 1973 and that the dispute between those parties had been submitted to arbitration pursuant to the terms of the contract and order of Superior Court. Wachovia Realty Investments admitted making a construction loan and admitted that it was beneficiary of the deed of trust executed by Spanish Inns to secure the loan recorded 29 October 1973. These defendants denied that plaintiff had furnished any labor or material pursuant to the general contract prior to the recording of the deed of trust securing the construction loan.

The plaintiff and defendants Wachovia Realty Investments; Archie C. Walker, trustee; and Wachovia Mortgage Company, filed motions for summary judgment, and the evidence offered in support of and in opposition to these motions established the following additional facts: Plaintiff is a construction company with its principal place of business in Charlotte, North Carolina. Defendant Spanish Inns Charlotte, Ltd., was the owner of certain property located in Charlotte, North Carolina. On 4 October 1973 plaintiff and defendant Spanish Inns entered into a contract wherein plaintiff as general contractor agreed to construct a six story motel on the property owned by Spanish Inns.

On 17 October 1973 General Surveyors, Inc., a subcontractor for plaintiff, sent employees to the building site "for the purpose of staking the building to be constructed by the plaintiff." On 17, 18 and 22 October 1973 the employees of General Surveyors, Inc., "in performing the work cleared a portion of the building site and partially rough-staked the building site which consisted of locating and installing building corner stakes at the west end of the building plus building line stakes on the south side of the building." General Surveyors, Inc., completed their work on 21 November 1973 and were compensated therefor by plaintiff.

On 29 October 1973 defendants Spanish Inns and Wachovia Realty Investments entered into a construction loan agreement wherein Wachovia Realty Investments agreed to finance the construction of the motel and to advance proceeds at regular intervals for work completed and Spanish Inns executed a deed of trust on the property designating defendant Archie C. Walker as trustee and Wachovia Realty Investments as beneficiary. The deed of trust was duly recorded on the same day.

On 6 May 1975 plaintiff filed a notice and claim of lien on the property in the amount of $543,919.58, the balance allegedly due under the general contract, alleging that the lien should relate back to the date the first services were rendered by General Surveyors, Inc. Pursuant to the terms of the contract the dispute between plaintiff and Spanish Inns as to the amount due on the contract was submitted to an arbitration panel by order of Superior Court dated 6 February 1975. On 12 September 1975 an award of $195,936.00 was rendered by the panel in favor of plaintiff and this award was confirmed by order of the Superior Court dated 23 February 1976.

On 8 November 1976 Judge Snepp denied defendant's motion for summary judgment, and entered summary judgment for plaintiff against Spanish Inns in the amount of $195,936.00 and decreed that the said judgment was a specific lien against the property described in the complaint, and that said lien had priority over the construction loan deed of trust executed by Spanish Inns to Archie C. Walker, trustee, recorded in Book 3629, page 0933, on 29 October 1973. Defendants Wachovia Realty Investments; Archie C. Walker, trustee; and Wachovia Mortgage Company appealed.

Connor, Lee, Connor, Reece & Bunn by David M. Connor and Cyrus F. Lee; and Wade and Carmichael by J. J. Wade, Jr., for plaintiff appellee.

Berry, Bledsoe & Hogewood by Louis A. Bledsoe, Jr. and Dean Gibson; and Womble, Carlyle, Sandridge & Rice by Donald A. Donadio and Kenneth A. Moser for defendant appellants.

HEDRICK, Judge.

[1] The primary question raised by this appeal is whether the uncontroverted facts established by this record support the judgment declaring that plaintiff's lien dates from 17 October 1973

and has priority over the defendants' deed of trust recorded on 29 October 1973. The record clearly establishes that some labor and material was provided by plaintiff's subcontractor on 17, 18 and 22 October 1973, prior to the recording date of defendants' deed of trust. If, under the circumstances of this case, the services performed by plaintiff's subcontractor on 17, 18 and 22 October 1973 are lienable pursuant to G.S. 44A-8 (prior to its amendment in 1975), the trial judge was correct in declaring that plaintiff's lien on the subject property had priority over the defendants' deed of trust.

> "§ *44A-7. Definitions.* . . . :
>
> . . .
>
> "(2) 'Improvement' means all or any part of any building, structure, erection, alteration, demolition, excavation, clearing, grading, filling, or landscaping, including trees and shrubbery, driveways, and private roadways, on real property.
>
> . . .
>
> "§ *44A-8. Mechanics', laborers' and materialmen's lien: persons entitled to lien.*—Any person who performs or furnishes labor or furnishes materials *pursuant to a contract*, either express or implied, with the owner of real property, *for the making of an improvement* thereon shall, upon complying with the provisions of this article, have a lien on such real property to secure payment of all debts owing for labor done or material furnished pursuant to such contract." (Emphasis added.)

In *Smith v. South Mountain Properties, Inc.*, 29 N.C. App. 447, 224 S.E. 2d 692, *cert. denied*, 290 N.C. 552 (1976), and *Bryan v. Projects, Inc.*, 29 N.C. App. 453, 224 S.E. 2d 689, *cert. denied*, 290 N.C. 550 (1976), this Court analyzed these statutes and held that labor furnished by land surveyors, landscape architects, planners, consultants, and other professionals pursuant to a contract with the owner to provide such services was not lienable under G.S. 44A-8. Labor performed in providing such professional services does not fall within the statutory definition of "improvement," G.S. 44A-7(2). *Smith v. South Mountain Properties, Inc., supra*; *Bryan v. Projects, Inc., supra.*

In the present case plaintiff was under contract to construct on Spanish Inns' property a large motel. Obviously, the construc-

tion of the motel falls within the statutory definition of an "improvement" to real property. It is debatable whether the labor done by plaintiff's subcontractor on 17, 18 and 22 October 1973 was "land surveying" as described in *South Mountain* and *Bryan*, or labor improving real property within the meaning of the statutory definition of "improvements." It is not necessary, however, that we make such a fine distinction in this or any similar case. Assuming *arguendo* that the labor performed by plaintiff's subcontractor on 17, 18 and 22 October 1973 was "land surveying," it was nevertheless labor performed pursuant to and in furtherance of plaintiff's indivisible contract with Spanish Inns to improve the real property. Any other reading of this statute would impose an impermissible burden on the parties involved to determine whether any particular service would trigger a lien under G.S. 44A.

[2] Defendants' second assignment of error reads as follows:

> "The appellants were not parties to the arbitration proceedings between the plaintiff and the defendant Spanish Inns Charlotte, Ltd., wherein the amount of the plaintiff's recovery upon its construction contract was established, and the amount of the arbitration award cannot be binding upon the appellants in this action of the plaintiff to perfect its lien."

This assignment of error purports to be based on an exception to the judgment from which the appeal is taken; yet, the assignment of error seems to challenge the amount of the arbitration award which was established in a separate proceeding. Assuming *arguendo* that these defendants had standing to challenge the arbitration award, the record affirmatively discloses that they waived such right by not participating in either the arbitration award hearing or the hearing in the Superior Court confirming the award when they had notice of such hearings. Moreover, no exception was noted to either the award, or the order of the Superior Court confirming the award. This assignment of error has no merit.

[3] Defendants' final assignment of error reads as follows:

> "The plaintiff is estopped to assert a lien prior to said deed of trust because of a noncommencement affidavit executed by its surveying subcontractor."

Equitable estoppel arises upon a misrepresentation or concealment of material facts by the party sought to be estopped calculated to induce a reasonably prudent person to act in reliance thereon and which does so induce him to act in reliance thereon. *Boddie v. Bond*, 154 N.C. 359, 70 S.E. 824 (1911). The affidavit referred to in this assignment of error was not given by plaintiff, the party sought to be estopped, but was given by plaintiff's subcontractor on 12 November 1973, 14 days after the making of the construction loan and the recording of the deed of trust securing the loan. Manifestly, this assignment of error has no merit.

Affirmed.

Judge BRITT concurs.

Judge MARTIN dissents.

STATE OF NORTH CAROLINA v. RUBEL GRAY HILL

No. 7710SC388

(Filed 2 November 1977)

1. **Criminal Law § 66.16— in-court identification of defendant—evidence of independent origin sufficient**

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court did not err in allowing testimony by the prosecuting witness identifying defendant as one of his assailants even if a photographic identification procedure was improper where the evidence tended to show that, though the witness did not know defendant's name, he and defendant had been inmates at the same prison camp for at least two months prior to the knifing incident during which period he had seen defendant from time to time; the incident occurred in the open courtyard of the prison camp in broad daylight; and the witness had seen defendant and his companion approaching immediately prior to the incident and saw defendant standing with a knife-like instrument immediately after the incident.

2. **Criminal Law § 116— jury instructions—defendant's failure to testify—instructions not requested**

Defendant's contention that any instruction on his failure to testify is improper in the absence of a request by defendant is without merit.

3. Assault and Battery § 15.3— additional instructions—intent to kill defined—reasonable doubt and burden of proof instructions not repeated

Defendant was not prejudiced where, in response to a request from the jury after it had begun its deliberations, the trial judge gave a definition of "intent to kill" as it related to the bill of indictment, but the judge did not repeat his instructions on reasonable doubt and burden of proof.

APPEAL by defendant from *Braswell, Judge.* Judgment entered 2 March 1977 in Superior Court, WAKE County. Heard in the Court of Appeals 28 September 1977.

Defendant was charged in a proper bill of indictment with assault with a deadly weapon with intent to kill inflicting serious injury, G.S. 14-32(a).

Upon defendant's plea of not guilty, the State offered evidence tending to show the following:

Jerry Wayne Gaddy, an inmate at the Polk Youth Center located in Raleigh, North Carolina, was headed to a weightlifting class at the center when he was approached by two fellow inmates, a man named Callahan whom he knew by name and defendant Hill whom he did not know by name but had seen on prior occasions. After a brief verbal exchange Gaddy told the two men that he was late to his weightlifting class and could not delay. As he turned away Callahan hit him across the face and he "felt something hit me across the back." Turning around, Gaddy saw defendant "standing there with a knife, a shank made out of some sort—looked like metal in his hand." Gaddy was then escorted to the first aid room and from there to the hospital where he was treated for wounds on his face, wrist and back.

The defendant denied any involvement in the incident and introduced evidence tending to show that he was some distance away when the incident occurred.

Defendant was convicted as charged. From a judgment imposing a sentence of 9 years imprisonment as a youthful offender, defendant appeals.

Attorney General Edmisten by Associate Attorney Christopher P. Brewer for the State.

Bailey, Dixon, Wooten, McDonald & Fountain by Ralph McDonald for defendant appellant.

HEDRICK, Judge.

[1] Defendant contends the trial court erred in admitting the testimony of the prosecuting witness identifying defendant as one of his assailants. In support of this assignment of error defendant argues that the in-court identification was tainted by an impermissibly suggestive photographic identification procedure in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States. *Simmons v. United States*, 390 U.S. 377, 19 L.Ed. 2d 1247, 88 S.Ct. 967 (1968). The photographic identification here involved was not introduced into evidence by the State. We are guided, therefore, by the words of Justice Huskins, speaking for our Supreme Court in *State v. Shore*, 285 N.C. 328, 338, 204 S.E. 2d 682, 688 (1974), a case involving an allegedly unconstitutional showup:

> "The record discloses . . . that the State offered no evidence of this hallway showup in the presence of the jury. Our inquiry therefore is not whether evidence of the showup would be admissible but *whether the in-court identification by these witnesses was tainted* by the confrontation in the hallway." (Emphasis added.)

In the present case the judge's order denying the defendant's motion to suppress included the following:

> "[T]he Court concludes from a total body of the evidence . . . that there was ample opportunity by Mr. Gaddy to see and observe and know beforehand this Defendant and see and observe and know this Defendant at the scene of the crime as one of the perpetrators of the crime;
>
> . . .
>
> "[T]hat the in-court identification is based independently of the witness's own original knowledge of the Defendant and is not tainted by subsequent events . . . ."

It is established law that "findings of fact, . . . made by the trial judge, are conclusive if they are supported by competent evidence in the record." *State v. Gray*, 268 N.C. 69, 78-9, 150 S.E. 2d 1, 8 (1966). *See also State v. Morris*, 279 N.C. 477, 481, 183 S.E. 2d 634, 637 (1971); *State v. Knight*, 282 N.C. 220, 227, 192 S.E. 2d 283, 288 (1972). The evidence in this case reveals that while the prosecuting witness, Gaddy, did not know defendant's name, he and

the defendant had been inmates at the same prison camp for at least two months prior to the knifing incident during which period he had seen defendant from time to time; that the incident occurred in the open courtyard of the prison camp in broad daylight; and that the witness had seen the defendant and co-defendant approaching immediately prior to the incident and saw the defendant standing with a knife-like instrument immediately after the incident. This evidence fully supports the judge's finding that the witness had "ample opportunity" to "observe and know" defendant before the incident and at the scene of the crime. Thus, "since . . . [the judge's] finding is supported by competent evidence, it alone renders the in-court identification competent even if it be conceded *arguendo* that the . . . [photographic identification] was improper" and this finding is "conclusive on appeal and must be upheld." *State v. Shore*, *supra* at 339, 204 S.E. 2d at 689. Accordingly, this assignment of error has no merit.

[2] Next, defendant contends the court erred in instructing the jury regarding defendant's failure to testify. The court's charge to the jury included the following:

> "The defendant in this case has not testified. It is the law that the defendant in a criminal action is, at his own request but not otherwise, a competent witness, and his failure to make such a request shall not create any presumption against him; therefore, his silence is not to influence your decision in any way."

Defendant does not argue that the court's instruction was not adequate to embrace the spirit of G.S. 8-54 which safeguards the right of a criminal defendant not to testify in his own trial. Rather, defendant argues that *any* instruction is improper in the absence of a request by the defendant in that it suggests an inference of defendant's guilt from his failure to testify which would not occur to the jury otherwise.

In *State v. Jordan*, 216 N.C. 356, 366, 5 S.E. 2d 156, 161 (1939), our Supreme Court held that there was no error in omitting an instruction regarding defendant's failure to testify in the absence of a request by the defendant:

> "[I]t is debatable whether the judge does not do the defendant a disfavor by emphasizing the failure of the defendant to go upon the stand and, thereby, deepening an impression

> which is perhaps hardly ever removed by an instruction which requires a sort of mechanical control of thinking in the face of a strong natural inference. [Citations omitted.]
>
> "Upon these considerations, we think the matter had best be left to the sound judgment of the defending attorney whether he shall forego the instruction or specially ask for it."

Since *Jordan* our Supreme Court has admonished against the use of such instructions except upon request by defendant on several occasions. *State v. Bryant*, 283 N.C. 227, 195 S.E. 2d 509 (1973); *State v. Barbour*, 278 N.C. 449, 180 S.E. 2d 115 (1971). However, in none of the cited cases did the Court reverse for the mere inclusion of an instruction without a request. And, in fact, in the most recent case, *State v. Caron*, 288 N.C. 467, 473, 219 S.E. 2d 68, 72 (1975), Justice Moore speaking for the majority of the Court, distinguished the North Carolina rule from that of those jurisdictions which have held "that unless the defendant so requests, such an instruction tends to accentuate the significance of his silence and thus impinges upon defendant's unfettered right to testify or not to testify at his option." Thus, while our Supreme Court has prescribed that the spirit of G.S. 8-54 can best be accomplished by omitting any instruction regarding defendant's failure to testify in the absence of a request by defendant, it has not seen fit to solidify that prescription into a rule of law. We find no error in the trial court's instruction.

[3] Next, defendant contends that the court erred in its additional instructions to the jury defining "intent to kill," an element of the offense charged. The record discloses that in response to a request from the jury, the trial judge gave a definition of "intent to kill" as it related to the bill of indictment. Defendant concedes that the definition challenged by this exception has been approved in prior cases. *See State v. Allen*, 283 N.C. 354, 196 S.E. 2d 256 (1973); *State v. Ferguson*, 261 N.C. 558, 135 S.E. 2d 626 (1964). He argues, however, that since the definition was given to the jury after it had begun its deliberations, and the judge did not repeat his instructions on reasonable doubt and burden of proof, the jury could have been misled as to the State's burden of proving every element of the offense beyond a reasonable doubt.

The defendant's argument is without merit. In his initial charge the trial judge instructed fully and clearly on the burden of proof. Except in the clear likelihood that the jury would misconstrue an instruction given out of context, it is "not necessary that he repeat this as part of the additional instructions given to the jury." *State v. Hammond*, 23 N.C. App. 544, 546, 209 S.E. 2d 381, 382 (1974). We find no such likelihood in the present case. Accordingly, there is no merit in this assignment of error.

Finally defendant contends that the court erred by not striking the testimony of the prosecuting witness that Callahan on a prior occasion when the defendant was not present had said to the witness "that if John Bowers or Edward Spry got shipped down for robbing me, that he would kill me." Assuming *arguendo* that the challenged testimony was not competent under the circumstances of this case for any purpose, and the trial judge erred in denying defendant's motion to strike and in not instructing the jury to disregard the testimony, we do not perceive that the defendant was prejudiced thereby. The record is replete with evidence tending to show defendant's intent when he and Callahan assaulted Gaddy. Any error in admitting the challenged testimony was harmless beyond a reasonable doubt.

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

No error.

Judges BRITT and MARTIN concur.

STATE OF NORTH CAROLINA v. ROGER M. BLACKWELDER

No. 7712SC394

(Filed 2 November 1977)

1. Searches and Seizures § 1— authority to search stopped vehicle—motor vehicle statute

An officer was not authorized by G.S. 20-183(a) to remove the driver of a vehicle which he had stopped and to search the vehicle where the officer did

not find that the driver had violated a motor vehicle statute but stopped and searched the vehicle for the purpose of determining whether the driver possessed contraband drugs.

2. **Searches and Seizures § 1— authority to search stopped vehicle—plain view doctrine**

The "plain view" doctrine did not justify an officer's seizure of a tic tac box containing LSD tablets from under the front seat of an automobile driven by defendant after the officer had stopped the vehicle for the purpose of determining whether it contained contraband drugs.

3. **Searches and Seizures § 1— search of automobile—furtive acts of occupants**

An officer did not have probable cause to search an automobile driven by defendant for narcotics because of "furtive movements" by defendant and other occupants of the automobile where the officer, after turning on his blue light to stop the automobile, saw some commotion inside and saw defendant lean or bend down, the officer could see that neither defendant nor the other occupants were the suspect he was seeking, and the officer had no specific knowledge relating defendant to the trafficking in narcotics which he was investigating.

PLAINTIFF appeals from *Herring, Judge.* Order entered 10 February 1977 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 29 September 1977.

Defendant was charged with felonious possession with intent to sell and deliver lysergic acid diethylamide ("LSD"). Before trial, defendant moved to suppress evidence as seized in an illegal search. A plenary hearing was held on the motion.

State's evidence tended to show that, on 6 January 1976, S.B.I. Agent Mills and two C.I.D. agents attached to Fort Bragg saw a 1963 Plymouth Valiant parked at a motel near Bragg Boulevard, Fayetteville. Agent Mills knew that this vehicle was registered to Ernest Faircloth and that it had been involved in a narcotics transaction two nights before. Mills was seeking the man, Michael Mura, who had been operating the vehicle then. Agent Mills and the C.I.D. agents followed the vehicle for several blocks and saw three men, two in the front, one in the rear. Mills testified that, while he recognized none of the men, he would have recognized Mura if he had seen him. Mills turned on his blue light and stopped the suspect car. While the car was stopping, he saw some commotion inside and saw the driver lean or bend down. Mills walked up to the car and pulled the defendant-driver out. He testified that he knew the defendant and recognized him when he pulled in front of the car, that he knew defendant was not

Mura or Faircloth. After Mills took the defendant out of the car, he went back, reached under the front seat and picked up a tic tac box with some purple tablets in it. Mills testified that he had seen such tablets before; that they were "LSD." He arrested defendant for felonious possession.

Defendant testified on his own behalf that he had borrowed the car from Ernest Faircloth and that when he saw Mills' blue light he pulled over directly without bending down, that he sat straight up in his seat until "Mills and the C.I.D. yanked us out."

The judge made findings of fact and concluded that there had been no probable cause to stop the car and remove the defendant and search. The judge ordered the LSD evidence suppressed. From that order the State appeals.

Attorney General Edmisten by Associate Attorney Richard L. Griffin for the State, appellant.

Public Defender Mary Ann Tally for defendant appellee.

CLARK, Judge.

The State assigns as error the court's order to suppress the evidence on the grounds that seizure of the contraband was a violation of the defendant's constitutional Fourth Amendment protection against illegal searches and seizures.

[1] The State contends first that Agent Mills had a right to stop the car and remove the driver pursuant to G.S. § 20-183(a), which reads in pertinent part:

> "It shall be the duty of the law-enforcement officers of this State . . . to see that the provisions of this Article are enforced within their respective jurisdictions, and *any such officer shall have the power to arrest on sight or upon warrant any person found violating the provisions of this Article.* Such officers within their respective jurisdictions shall have the *power to stop* any motor vehicle upon the highways of the State *for the purpose of determining whether the same is being operated in violation of any of the provisions of this Article. . . .*" [Emphasis added.]

Mills made no claim that he stopped defendant's vehicle to determine whether the Motor Vehicle Act was being violated.

The power to stop is not dependent on probable cause to believe a violation has occurred. *State v. Dark* so held, stating that at least one of the purposes of the power was to permit officers to run license and registration checks. *State v. Dark*, 22 N.C. App. 566, 207 S.E. 2d 290, *cert. den.* 285 N.C. 760, 209 S.E. 2d 284 (1974). But it is not necessary in the instant case to decide whether the stopping was statutorily permissible, since it is clearly the removal of the defendant and the search that is at issue.

The power to stop a vehicle under G.S. 20-183 does not include the power to search. The power to search incident to a warrantless arrest is clearly limited to situations where the officer, after stopping the vehicle, has found a person "violating the provisions of this Article." There is no evidence that Agent Mills stopped the vehicle operated by defendant for the purpose of determining if he had violated a motor vehicle statute. Rather, the obvious purpose in stopping the vehicle was to determine if defendant possessed contraband drugs. The question before us is not the right to stop, but the right to remove defendant from and search the vehicle.

[2] The State contends that the tic tac box was seized legally under the "plain view" doctrine. We find no support for this contention in either the statutory or case law of this State. G.S. 15A-231 incorporates the U.S. Supreme Court "plain view" exception which permits inclusion of the fruit of a legal, warrantless presence, recognizing "[c]onstitutionally permissible searches and seizures which are not regulated by the General Statutes of North Carolina. . . ." Under G.S. 15A-253, the statutory "plain view" doctrine is limited to the inadvertent discovery of items pursuant to a legal search under a valid warrant though these items are not specified in the search warrant. Constitutionally permissible seizures under the "plain view" exception to the Fourth Amendment protection against warrantless searches and seizures have been restricted to those instances where the officer has legal justification to be at the place where he inadvertently sees a piece of evidence in plain view. The doctrine serves to supplement the prior justification. Plain view alone is not enough to justify warrantless seizure of evidence. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1971). Two North Carolina cases, relied on by the State, also support the "right to be there" principle. *State v. Smith*, 289 N.C. 143, 221

S.E. 2d 247 (1976); *State v. Allen*, 282 N.C. 503, 194 S.E. 2d 9 (1973). In both cases law officers stopped the vehicles under the authority of G.S. 20-183(a) and observed the item seized in plain view as they were determining whether the operator had violated a motor vehicle law.

[3] The State further contends that Mills had independent grounds for his warrantless search, that the furtive movements Mills testified he observed after stopping the vehicle gave him enough probable cause to believe that he would find "the instrumentality of a crime or evidence pertaining to a crime. . . ." to justify the automobile search. *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 88 S.Ct. 1472, 20 L.Ed. 2d 538 (1968), and cases cited therein. State relies upon *State v. Ratliff*, 281 N.C. 397, 189 S.E. 2d 179 (1972). In *Ratliff*, a first-degree murder case, the disputed evidence was a shotgun. It was found by the officer under the following circumstances which the court held demanded a finding of probable cause:

> "The officer observed defendant, apparently nude, in a parked car on the parking lot of a business establishment at midnight. Any alert officer under such circumstances would stop and investigate. When this officer stopped, defendant tried to drive away. Then he was seen brushing something out of his lap into the floorboard of the car. Then he appeared to kick something under the seat with his left leg and foot. Such suspicious, furtive conduct would alert any officer to the fact that defendant had something to hide." 281 N.C. at 404, 189 S.E. 2d at 183.

In the instant case the State's evidence shows far less suspicious furtiveness, none in fact that is not explicable by innocent fear and confusion at being pulled over by a police car. The dangers of police abuse of what Ringel calls "[f]ictitious 'furtive gestures' " to justify search after the fact are clear. Ringel, Searches and Seizures, Arrests and Confessions (1976 Supp.), 152.

The removal of defendant and search of the vehicle might also have been justified had Mills had probable cause to believe that defendant or some other person in the car was committing a crime. The search of an automobile or a person incident to a legal although warrantless arrest proceeds on a theory entirely different from that justifying the search on probable cause to

believe the vehicle contains contraband. *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925); *Ratliff, supra.* The U.S. Supreme Court has discussed the sort of "furtive gesture" which may, if added to other suspicious circumstance, generate sufficient probable cause to believe a crime is being committed and to arrest and search:

> "[D]eliberately furtive actions . . . are strong indicia of *mens rea* [initial emphasis] and *when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest.*" [Emphasis added.] *Sibron v. New York*, 392 U.S. 40, 66-67, 88 S.Ct. 1889, 1904, 20 L.Ed. 2d 917, 937 (1968).

The gestures in the instant case were, as discussed earlier, not clearly furtive. Mills testified that, when he turned on his blue light to stop the car he could see that neither the defendant nor the others were the suspects he was looking for. He had no "specific knowledge" relating the defendant to the "evidence of crime," the narcotic trafficking he had been investigating. The situation did not generate sufficient probable cause to justify a legal warrantless arrest or removal and search incident to it.

As the State has failed to show any error in the trial judge's conclusions of law based on his findings of fact we hold that the trial judge was correct in excluding the evidence of contraband because the defendant's Fourth Amendment right had been clearly violated by the State in obtaining the evidence.

Affirmed.

Judges MORRIS and VAUGHN concur.

NANCY M. JERNIGAN v. MARY ELIZABETH BRAY STOKLEY, EFFIE STOKLEY HAWKINS, LILLIAN STOKLEY, AND LENNIE L. HUGHES ADMINISTRATOR D.B.N. OF THE ESTATE OF CHARLES WALTER STOKLEY

No. 771SC415

(Filed 2 November 1977)

1. **Husband and Wife § 17; Judgments § 35.1— divorce decree—res judicata—estate by entireties terminated**

In an action for partition where plaintiff, the sister of decedent, claimed that she and defendant, the former wife of decedent, owned certain lands as tenants in common by virtue of a divorce decree obtained by decedent prior to his death, defendant was bound by an earlier decision reported in 30 N.C. App. 351 upholding the validity of the divorce obtained by her former husband, and she was not entitled to a jury trial on the question of extrinsic fraud by decedent in obtaining the divorce.

2. **Husband and Wife § 7— estate by entireties—divorce—tenancy in common—land passing by intestate succession**

Where deeds recited that defendant and her deceased former husband were tenants by the entirety of described lands, but they became tenants in common because of a divorce obtained by the husband, plaintiff, who was the sister of decedent, and other relatives of the decedent were not estopped from making claims on the lands, since they were relying on legal principles which create a tenancy in common when the grantees are not legally husband and wife and on the laws of intestate succession rather than on the recitals in the deeds themselves.

APPEAL by defendant Mary Elizabeth Bray Stokley from *Tillery, Judge.* Judgment entered 15 March 1977 in Superior Court, CAMDEN County. Heard in the Court of Appeals 30 September 1977.

Following the affirmation by the Court of Appeals of the validity of the 1965 divorce decree between the late Charles Stokley and defendant Mary Stokley in 30 N.C. App. 351, 227 S.E. 2d 131 (1976), the sister of said decedent, Nancy M. Jernigan, filed a petition on 26 August 1976 alleging that she and defendant Mary Stokley, the former wife of her deceased brother, own certain lands as tenants in common and requesting that the land be sold for partition and the proceeds divided. One tract of land had been purchased by Charles and Mary Stokley on 4 February 1965, 13 days before their divorce on 17 February 1965, and a second tract was purchased on 15 March 1965, 26 days after the divorce.

Additional background information concerning the validity of the divorce decree is set out in 30 N.C. App. 351, 227 S.E. 2d 131.

Defendant Mary Stokley answered the petition, alleging that she is the fee simple owner of the land in question, that the divorce decree is void because of extrinsic fraud, and that petitioner is estopped from claiming the lands.

Petitioner then filed a motion for summary judgment with supporting documents. Later, petitioner filed an amendment joining Effie Stokley Hawkins and Lillian Stokley, nieces of the decedent, and Lennie L. Hughes, Administrator d.b.n. of the Estate of the decedent, as defendants. She alleges that the interests of the tenants in common in the lands in question are as follows: defendant Mary Stokley, as surviving tenant in common, four-eighths; petitioner, as surviving sister of decedent, two-eighths; defendant Effie Hawkins, as surviving niece of decedent, one-eighth; and defendant Lillian Stokley, as surviving niece of decedent, one-eighth.

Defendant Mary Stokley filed four motions for summary judgment with supporting affidavits and documents relating to her intrinsic and extrinsic fraud defense and her three separate estoppel defenses. On 15 March 1977 the court entered judgment allowing the petitioner's motion for summary judgment and denying defendant Mary Stokley's four motions for summary judgment. Defendant Mary Stokley appeals.

White, Hall, Mullen & Brumsey, by John H. Hall, Jr., for petitioner appellee.

Frank B. Aycock, Jr., for defendant appellant Mary Elizabeth Bray Stokley, and LeRoy, Wells, Shaw, Hornthal, Riley & Shearin, by Terrance W. Boyle, for defendant appellee Effie Stokley Hawkins.

BRITT, Judge.

[1] By her first assignment of error, defendant Mary Stokley contends that she is entitled to a jury trial on the question of extrinsic fraud by decedent in obtaining the purported divorce in Edgecombe County on 17 February 1965. We find no merit in the assignment.

In *Stokley v. Stokley* and *Stokley v. Hughes*, 30 N.C. App. 351, 227 S.E. 2d 131 (1976), this court held that the 1965 divorce decree, which had been challenged on the basis of intrinsic fraud, was valid because it had not been challenged within one year as required by G.S. 1A-1, Rule 60(b). We think the judgment affirmed by this decision is *res judicata* of the contention raised by appellant's first assignment of error.

"It is a well-settled rule, and one which is supported by a multitude of authorities, that a party cannot, by varying the form of action or adopting a different method of presenting his case escape the operation of the principle that one and the same cause of action shall not be twice litigated between the same parties or their privies." *Mann v. Mann*, 176 N.C. 353, 357, 97 S.E. 175, 177 (1918).

"Under this principle we may cite the familiar rule that one who has been defeated on the merits in an action at law cannot afterwards resort to a bill in equity upon the same facts for the same redress." *Mann v. Mann*, 176 N.C. 353, 358, 97 S.E. 175, 178 (1918). "Ordinarily the operation of estoppel by judgment depends upon the identity of parties, of subject matter and of issues, that is, if the two causes of action are the same judgment final in the former action would bar the prosecution of the second. McIntosh N.C. P & P in Civil Cases, Sec. 659, p. 748; *Randle v. Grady*, 288 N.C. 159, 45 S.E. 2d 35." *Surratt v. Charles E. Lambeth Insurance Agency*, 244 N.C. 121, 130, 93 S.E. 2d 72, 77-78 (1956).

Applying these general principles to the present situation, we think the appellant is bound by the decision reported in 30 N.C. App. 351, 227 S.E. 2d 131 (1976), upholding the validity of the divorce obtained by her former husband, Charles Walter Stokley. The present case involves the same subject matter, the same issues and the same parties as were involved in the former case. The underlying subject matter of the present action is the validity of the divorce decree because it determines the status of the property purportedly bought by Charles and Mary Stokley as tenants by the entirety. If the divorce decree was valid, the property was held by them as tenants in common, J. Webster, *Real Estate Law in North Carolina* § 116 (1971), and the heirs of Charles Stokley would be entitled to one-half of the property by intestate succession. G.S. 29-15, 29-16.

The issues are also the same since they turn on the question of fraud. The court and appellant both acknowledged in the former action that intrinsic fraud was the basis for the challenge of the divorce decree. The court in the prior case concluded that the divorce was valid since the intrinsic fraud challenge was not asserted within one year as required by G.S. 1A-1, Rule 60(b). Appellant has failed to change the underlying basic issue of intrinsic fraud by renaming it extrinsic.

Finally, by the principle of privity, there is also identity of parties. "When used with respect to estoppel by judgment, the term 'privity' denotes mutual or successive relationship to the same rights of property. One is 'privy,' when the term is applied to a judgment or decree, whose interest has been *legally* represented at the trial. A party will not be concluded by a former judgment unless he could have used it as a protection, or as a foundation of a claim, had the judgment been the other way. *Coach Co. v. Burrell, supra.*" *Masters v. Dunstan*, 256 N.C. 520, 526, 124 S.E. 2d 574, 578 (1962). The first action involved the petitioner in the present case and the present defendant Mary Stokley. The addition of the two nieces of decedent and the administrator of his estate as defendants does not require relitigation of the validity of the divorce decree since petitioner represented in the first action the claims of relatives who would be entitled to take by intestate succession.

Since the subject matter, the issues, and the parties in the prior case are identical to those in the present case, *res judicata* prevents relitigation on the issue of the validity of the 1965 divorce decree.

[2] By her second assignment of error, defendant Mary Stokley contends that petitioner and defendants Effie Stokley Hawkins and Lillian Stokley are estopped from making claims on the lands, and also the estate of decedent, on the ground that those who claim under a deed confirm all of its provisions and cannot establish their claim by adopting those provisions which are in their favor, while they repudiate or contradict other provisions that are repugnant thereto. On the basis of the facts in the instant case, we find no merit in this contention.

Under North Carolina law, "[a]n estate by the entirety is a form of co-ownerships held by husband and wife with the right of

survivorship. It arises by virtue of title acquired by husband and wife jointly after their marriage." J. Webster, *Real Estate Law in North Carolina* § 102(a), pp. 108-109 (1971). A couple will hold the property as tenants in common rather than as tenants by the entirety if the following occurs: (1) the parties obtain a divorce *a vinculo*, an absolute divorce which destroys the unity of husband and wife that is essential to the existence of the tenancy; or (2) the grantees are not legally husband and wife at the time the conveyance takes effect even though they are so described in the conveyance. *Ibid*, §§ 116, 102(b) (1971).

In the present case, the two situations which create a tenancy in common occurred with respect to the lands in question. The absolute divorce created a tenancy in common with respect to the first tract of land which was acquired on 4 February 1965, thirteen days before the divorce. The fact that Mary and Charles Stokley were no longer husband and wife when they acquired the second tract on 15 March 1965, twenty-six days after the divorce, created another tenancy in common ownership. Since the divorce decree is recognized as valid in this case under the principle of *res judicata*, petitioner and defendants Effie Stokley Hawkins and Lillian Stokley are actually claiming their one-half as tenants in common under the North Carolina intestate succession laws. G.S. 29-15, 29-16. They are relying on the legal principles which create a tenancy in common when the grantees are not legally husband and wife rather than recitals in the two deeds which transferred the lands in question.

For the reasons stated above, we hold that the judgment of absolute divorce between Charles Walter Stokley and Mary Elizabeth Bray Stokley on 17 February 1965, and upheld in 30 N.C. App. 351, 227 S.E. 2d 131 (1976), is still valid by virtue of the principle of *res judicata*. The property which Charles Walter Stokley and the defendant Mary Elizabeth Bray Stokley purportedly held as tenants by the entirety was actually held at the time of his death as tenants in common. Consequently, the trial court correctly granted summary judgment on the petition to partition in favor of petitioner. There was no genuine issue of material fact presented as contemplated by G.S. 1A-1, Rule 56, concerning the right of the heirs of said decedent to claim his one-half interest in

property which he had held as a tenant in common with his former wife, defendant Mary Stokley.

Affirmed.

Judges HEDRICK and MARTIN concur.

EMILY TAMMERA KRICKHAN v. WILLIAM F. KRICKHAN III

No. 7628DC1048

(Filed 2 November 1977)

Divorce and Alimony § 16.10— home mortgage payment as alimony and child support—sale of home—continuation of alimony obligation

Where a separation agreement required defendant to make a monthly home mortgage payment of $221.55, of which $100.00 was allotted as alimony and $121.55 was allotted as child support, the primary purpose of the payment was not to satisfy the mortgage but was to provide alimony and child support, and defendant's obligation to make the $100.00 monthly alimony payments survived the sale of the home and retirement of the mortgage.

APPEAL by defendant from *Israel, Judge*. Judgment entered 8 October 1976 in District Court, BUNCOMBE County. Heard in the Court of Appeals 22 September 1977.

Plaintiff-wife instituted this action seeking a declaratory judgment establishing defendant-husband's duty to make certain alimony payments pursuant to a separation agreement. She also requested an award of back alimony.

Plaintiff and defendant were married on 19 November 1966 and lived together until their separation in 1974. They executed a separation agreement dated 26 November 1974, and their marriage was dissolved on 5 February 1976 by a decree of absolute divorce. The portions of the separation agreement relevant to this appeal are as follows:

> 3. REAL PROPERTY: It is understood and agreed that the parties hereto own as tenants by the entirety a house and lot located at 12 Gladstone Road in the City of Asheville, North Carolina. The wife shall have the right to reside in the house with the minor children until she remarries or until the

youngest surviving child attains the age of 18, whichever event occurs first. . . .

* * *

7. SUPPORT AND MAINTENANCE OF WIFE: In lieu of alimony payments directly to the wife, the husband shall pay directly to Asheville Federal Savings & Loan Association the monthly payments on the mortgage of $221.55 and of this amount $100 per month shall be considered as alimony paid to the wife.

The wife acknowledges that the provisions herein contained with regard to her alimony payments are reasonable and adequate, and in view of the circumstances of the parties and in view of her own property holdings, and she expressly waives all claims against the husband for alimony, support and maintenance for herself except as expressly provided in this agreement.

* * *

9. SUPPORT OF MINOR CHILDREN: The husband hereby agrees to pay to the wife the sum of $250.00 per month as support for the minor children, in addition to the house payment hereinbefore called for of which amount $121.55 is hereby allocated and designated as child support making the total child support payable by the husband to the wife $371.55 per month. These payments shall be made in bi-monthly payments of $125.00 each to the wife, with the first payment to be due and payable on the 1st day of November, 1974, and the next payment to be due and payable on the 15th day of November, 1974, and a like payment of $125.00 on the 1st and 15th days of each calendar month thereafter, and the remaining $121.55 to be paid directly to Asheville Federal Savings and Loan Association.

The mortgage payments applied to the mortgage on the house referred to in paragraph three, which plaintiff and defendant owned at the time of separation as tenants by the entirety.

Defendant initially made the full payments as provided in the separation agreement. However, plaintiff and defendant sold their house in March 1976, one month after the divorce decree. The mortgage was paid from the proceeds of the sale, and the surplus

which remained after the mortgage was paid was divided equally between the plaintiff and defendant. After the sale, defendant continued to make the monthly child support payments of $250.00 as required by paragraph nine of the separation agreement. He also began making monthly payments directly to his wife in the sum of $121.55, which was the portion of the mortgage payment allotted as child support in paragraph seven. However, he did not pay the monthly sum of $100.00 which was the portion of the mortgage payment allotted as alimony to the plaintiff in paragraph seven.

Plaintiff brought this declaratory judgment action requesting the court to construe the separation agreement. The trial court concluded that the sum of $100.00 was intended as alimony and that defendant's duty to pay that sum survived the sale of the house and payment of the mortgage. The judgment required defendant to make the monthly alimony payments of $100.00 until plaintiff's death or remarriage, whichever occurs first. Defendant appealed.

Morris, Golding, Blue & Phillips by James N. Golding for plaintiff appellee.

Floyd D. Brock by Jerry W. Miller for defendant appellant.

PARKER, Judge.

Paragraph seven of the separation agreement in this case obligated defendant to make monthly payments of $221.55, of which $100.00 was allotted as alimony and $121.55 was allotted as child support. Rather than making payments directly to the wife, the agreement provided that the monthly payments should be applied directly to the mortgage on the house. Obviously, if a person becomes obligated to pay a certain sum periodically, that obligation must end sometime. However, the separation agreement failed to specify a time for termination of this obligation. Questions relating to the construction and effect of a separation agreement are ordinarily determined by the same rules which govern the interpretation of contracts generally. "A contract . . . encompasses not only its express provisions but also all such implied provisions as are necessary to effect the intention of the parties unless express terms prevent such inclusion." *Lane v. Scarborough*, 284 N.C. 407, 410, 200 S.E. 2d 622, 624 (1973). A termina-

tion date for defendant's obligation must therefore be implied by the court, and defendant contends that the trial judge misconstrued the separation agreement when he concluded that the obligation did not terminate until plaintiff's death or remarriage. He contends that the $100.00 payments were described as alimony only for tax purposes and that their primary purpose was actually to satisfy the mortgage.

The focus of the court's inquiry in construing a contract or separation agreement is " 'the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time.' " *Lane v. Scarborough, supra*, 284 N.C. at 410, 200 S.E. 2d at 624, *quoting Electric Co. v. Insurance Co.*, 229 N.C. 518, 520, 50 S.E. 2d 295, 297 (1948). See also *Bowles v. Bowles*, 237 N.C. 462, 75 S.E. 2d 413 (1953). Following these criteria, we conclude that the trial court correctly construed the separation agreement. The parties specified that the $100.00 sum was to be considered alimony, and it is reasonable to conclude that they meant just that, absent a clear indication that the primary purpose of the payments was to retire the mortgage on the house. The fact that the amount of alimony and child support was set with reference to housing costs at the time of the separation does not alter this result.

This conclusion is buttressed by defendant's actions following the sale of the house. He began paying directly to plaintiff the portion of the payment ($121.55) which was designated as child support. This course of action indicates that the defendant himself interpreted the agreement to mean that the sale of the house did not terminate his obligation to continue making the payments which were originally applied on the mortgage. "In contract law, where the language presents a question of doubtful meaning and the parties to a contract have, practically or otherwise, interpreted the contract, the courts will ordinarily adopt the construction the parties have given the contract *ante litem motam*." *Davison v. Duke University*, 282 N.C. 676, 713-14, 194 S.E. 2d 761, 784 (1973). See also *Goodyear v. Goodyear*, 257 N.C. 374, 126 S.E. 2d 113 (1962). Defendant argues that he continued making child support payments only because his duty to support his children could not be terminated by a contractual agreement. However, this argument amounts to an admission that the monthly sum of

$121.55 denominated as child support was actually intended to serve that very purpose, and it logically follows that the remaining portion of the payments, a monthly sum of $100.00 denominated as alimony, was also intended to serve its stated purpose.

Furthermore, the separation agreement was drafted by defendant's attorney, and an ambiguity in a written contract should be construed against the party who prepared the instrument. *Yates v. Brown*, 275 N.C. 634, 170 S.E. 2d 477 (1969); *Windfield Corp. v. McCallum Inspection Co.*, 18 N.C. App. 168, 196 S.E. 2d 607 (1973). The court correctly construed the instrument to require defendant to pay the amount of the mortgage payments directly to plaintiff after the sale of the house, and the judgment is therefore affirmed.

Affirmed.

Judges MARTIN and ARNOLD concur.

NATHANIEL ELLIS v. HENRY SPEARS MULLEN, JR.

No. 7627SC1049

(Filed 2 November 1977)

1. **Cancellation and Rescission of Instruments § 2.1— illiterate person—failure to have instrument read—conditions required for relief**

It is the general rule that one who signs a contract is presumed to know its contents, and an illiterate person signing an instrument without request that it be read to him is chargeable with negligence for which the law affords no redress, unless he has been lulled into security or thrown off his guard and deceived.

2. **Torts § 7— release printed on checks—endorsement—summary judgment improper**

In an action to recover for injuries sustained by plaintiff in an automobile accident where defendant claimed that plaintiff released him from liability by endorsing checks from defendant's insurer, the trial court erred in granting summary judgment for defendant where the evidence tended to show that plaintiff was illiterate; the checks from the insurer contained a proviso that endorsement constituted full settlement of claims "arising out of the loss or occasion referred to on the face of this draft;" plaintiff did not have anyone read the settlement checks to him, but there was no evidence as to whether plaintiff was negligent in failing to have them read to him; three of the checks provided that they were in full settlement of claims against June R. Herndon, but

there was no showing that plaintiff, even if he had had the checks read to him, would have understood that settlement of any claim against June R. Herndon also settled his claim against defendant; and about a week after the checks were issued the defendant presented to plaintiff a release form which he did not sign.

APPEAL by plaintiff from *Graham, Judge*. Judgment entered 8 October 1976, in Superior Court, GASTON County. Heard in the Court of Appeals 22 September 1977.

Plaintiff seeks to recover $50,000 for personal injuries allegedly suffered when his car was struck from behind by a car operated by defendant.

In his answer defendant denied negligence, alleged contributory negligence, and pled as a further defense that on 30 April 1973 his insurer, Unigard Insurance Company, issued four drafts, totaling $900, one payable to the order of plaintiff alone and three payable to plaintiff and others who rendered medical services to him; that the drafts contained a proviso to the effect that endorsement constituted full settlement of any and all claims; and that by his endorsement plaintiff released defendant from liability.

Plaintiff in his reply alleged that he was illiterate; that the purported releases were never explained to him; and that he never intended to release defendant.

In answers to interrogatories and requests for admission, plaintiff admitted that he had endorsed two of the drafts, one payable to him alone in the sum of $681.00, and one payable to him and Gaston Orthopedic Clinic in the sum of $124.00.

Defendant moved for summary judgment on the ground that plaintiff had released defendant by his endorsement of the checks. Plaintiff responded with an affidavit to the effect he had endorsed only two of the drafts; that he was illiterate and did not understand the settlement proviso on the drafts; that about a week after the drafts were issued Unigard sent him a release which he did not sign.

Plaintiff appeals from the summary judgment in favor of defendant.

Childers, Fowler & Whitt by Max L. Childers for plaintiff appellant.

Golding, Crews, Meekins, Gordon & Gray by E. F. Parnell for defendant appellee.

CLARK, Judge.

The four drafts were attached as exhibits, and there appeared on the back of each draft the following provision:

> "Endorsement of this draft constitutes full and complete settlement of any and all claims arising out of the loss or occasion referred to on the face of this draft."

On the face of the draft in the sum of $681.00 payable to plaintiff alone there appears the following: "IN FULL SETTLEMENT OF ALL CLAIMS AGAINST JUNE R. HERNDON RESULTING IN AN ACCIDENT OCCURRING 11/19/72 AT OR NEAR KINGS MOUNTAIN, N.C." Plaintiff's endorsement on the back consisted of his printed name, attested to by a bank employee.

On the face of the draft in the sum of $124.00 payable to plaintiff and Gaston Orthopedic Clinic there appears the following: "IN FULL SETTLEMENT OF ALL CLAIMS MEDICAL SERVICES RENDERED NATHANIEL ELLIS." Plaintiff's endorsement on the back consists of his name printed as follows: "NATHANLEL ElliS."

On the face of each of the other two checks, one payable to plaintiff and Mecklenburg X-Ray Associates in the sum of $45.00 and the other payable to plaintiff and Dr. B. W. Brawley in the sum of $50.00, there appears the following: "IN FULL SETTLEMENT OF ALL CLAIMS AGAINST JUNE R. HERNDON RESULTING IN AN ACCIDENT OCCURRING 11/19/72 AT OR NEAR CHARLOTTE, N.C." On the back of each check is the name Nathaniel Ellis in handwriting, indicating that these two checks were not mailed to plaintiff but to the other payees in Charlotte and that the purported endorsements were made by another person signing plaintiff's name.

The question presented by this appeal is whether the endorsement by the illiterate plaintiff of the two checks constitutes a release of plaintiff's claim against the defendant under the circumstances presented by defendant's motion for summary judgment under G.S. 1A-1, Rule 56.

[1] It is the general rule that one who signs a contract is presumed to know its contents, and an illiterate person signing an instrument without request that it be read to him is chargeable with negligence for which the law affords no redress, *unless he has been lulled into security or thrown off his guard and deceived. W. R. Grace & Co. v. Strickland*, 188 N.C. 369, 124 S.E. 856 (1924); 35 A.L.R. 1296. See *Sexton v. Lilley*, 4 N.C. App. 606, 167 S.E. 2d 467 (1969).

The illiterate signer does not have to show fraud to attack the validity of the agreement. If the circumstances are such that the failure to have the agreement read to him is excusable, he is not estopped from avoiding it. An agreement signed without negligence, under the belief that it was an instrument of a different character may be avoided. 17 Am. Jur. 2d, Contracts, § 149. Illiterate persons ignorant of the contents of contracts signed by them may be relieved of their obligations thereunder on proof of anything in the nature of overreaching or unfair advantage taken of their illiteracy. 17 C.J.S., Contracts § 139.

The defendant supported his motion by the pleadings, answers to interrogatories, admissions on file, and copies of the four checks issued by defendant on 30 April 1973 and their endorsements following the settlement provisions. The burden was on defendant to establish that there is no genuine issue of any material fact and that he is entitled to judgment as a matter of law. Shuford, N.C. Civil Practice and Procedure, § 56-6.

[2] It is uncontroverted that plaintiff was illiterate, that he endorsed only two of the four drafts issued by defendant, that he did not have someone read to him the settlement checks, that about a week after the drafts were issued the defendant presented to him a release form which he did not sign, and that two of the four drafts were not sent to plaintiff but were endorsed by another person signing plaintiff's name.

We must look at the record in the light most favorable to the plaintiff. *Hinson v. Jefferson*, 20 N.C. App. 204, 200 S.E. 2d 812 (1973). In doing so, we find that defendant has failed to establish that there is no genuine issue of any material fact. First, there is the question of whether the illiterate plaintiff was negligent in failing to have the drafts read to him. Were the circumstances such that plaintiff could not reasonably expect the drafts to con-

tain settlement provisions? Was overreaching or unfair advantage taken of his illiteracy? The jury should be allowed to apply the standard of the reasonably prudent man to the facts in determining whether plaintiff's endorsement without having the drafts read to him was negligence.

Further, the draft in the sum of $681.00 payable to plaintiff alone, admittedly endorsed by him, provides on its face that it is in full settlement of the claim against June R. Herndon. Nowhere in the record on appeal is there any other reference to June R. Herndon. Even if plaintiff had someone read to him the two drafts which he endorsed, there may be a question as to whether he would have understood that settlement of any claim against June R. Herndon also settled his claim against defendant Henry Spears Mullen, Jr. It does appear from the record that defendant was the operator of the vehicle which struck plaintiff's vehicle, but the relationship of June R. Herndon to defendant is not shown.

It is a reasonable inference that before defendant's insurer issued the four drafts, and later presented a release form, there were negotiations between plaintiff and defendant's insurer, possibly followed by an understanding or agreement between them. Evidence of such at trial may reveal the circumstances surrounding the issuance of the drafts and the acceptances of two of them by plaintiff, but from the record on appeal we find that defendant has failed to establish as a matter of law that he was entitled to summary judgment.

Reversed and remanded.

Judges VAUGHN and HEDRICK concur.

STATE OF NORTH CAROLINA v. WILLIAM EARL SUTTON

No. 778SC417

(Filed 2 November 1977)

1. Constitutional Law § 52— new trial ordered—two months between order and trial—no undue delay

The trial court properly determined that there was no undue delay between certification on 4 January 1977 of an order from the appellate division

ordering a new trial and trial on 7 March 1977 where the district attorney stated as reasons for the delay that some of the State's witnesses were unavailable until 7 March and there were numerous jail cases, including some murder cases, in the county during that period of time which the State felt should be given priority; moreover, defendant offered no evidence to show that the delay was caused by any neglect on the part of the State.

2. **Criminal Law § 92.5— severance—no grounds for motion—denial proper**

The trial court did not err in denying defendant's motion to sever one offense from trial with offenses which took place on a different date, since defendant's motion failed to state any grounds or facts for consideration by the trial judge as to why the motion should have been allowed.

3. **Continuance § 91.7— continuance to subpoena witness—denial proper**

In a prosecution for possession and sale of heroin where a federal officer who bought the heroin from defendant named a police informant who accompanied him at the sale, defendant failed to show that the trial judge abused his discretion in failing to order a continuance so that defendant could subpoena the informant as a witness.

4. **Searches and Seizures § 1— search pursuant to arrest—admissibility of contraband**

Defendant's contention that contraband seized when officers went to his apartment to serve orders of arrest should have been excluded from evidence because the officers did not give notice of their authority and purpose before making the entry is without merit where the evidence disclosed that the officers knocked on the door, identified themselves as police officers, demanded entry, received no response from the occupants, heard sounds that would justify their conclusion that admittance would be unreasonably delayed so that the occupants could escape, and broke down the door; moreover, mere failure to comply with the letter of G.S. 15A-401 in making the arrest does not require that evidence discovered as a result of the arrest be excluded.

APPEAL by defendant from *James, Judge.* Judgments entered 10 March 1977 in Superior Court, LENOIR County. Heard in the Court of Appeals 17 October 1977.

Defendant was tried on bills of indictment charging him with the sale and delivery of heroin on 16 October 1975, possession of heroin with intent to sell on 16 October 1975, and possession of heroin on 21 October 1975. An earlier appeal from trial on these indictments is reported in *State v. Sutton*, 31 N.C. App. 697, 230 S.E. 2d 572 (1976).

The State's evidence disclosed that on 16 October 1975 defendant sold a federal officer 12 bags of heroin. A police informant accompanied the federal officer when he made the purchase.

At about 7:10 a.m. on 21 October 1975, state officers went to the premises occupied by defendant where the sale of heroin had taken place. Their purpose was to serve defendant with orders of arrest arising out of indictments for the sale and possession of heroin on 16 October 1975. The officers also had orders of arrest for others who were believed to be at that address. One of the officers knocked on the door. Someone from the inside said, "Who is there." The officer replied, "Police, open the door." There was no compliance with that request. Instead, the officers heard a noise and someone running away. The officers then kicked the door open. They found that a window had been broken. Defendant was apprehended on the ground outside the apartment. He was naked and attempting to hide on the ground in a collard patch. Two packets of heroin were found on the ground near defendant.

The officers then returned to the room from which defendant had fled. They saw several packets of heroin lying on the floor near the broken window and a pistol on a nearby table.

Defendant was found guilty as charged in the three bills of indictment.

Attorney General Edmisten, by Associate Attorney Patricia B. Hodulik, for the State.

Gerrans & Spence, by Willaim D. Spence, for defendant appellant.

VAUGHN, Judge.

[1] Defendant moved to quash the indictments and dismiss the cases because the case was not ". . . placed upon the docket for trial at the first ensuing criminal session of the court after the receipt . . ." of certification of an order from the appellate division ordering a new trial, as required by G.S. 15-186. The opinion of the court ordering a new trial was certified to the Superior Court on 4 January 1977. In 1977, there were criminal sessions of Superior Court in Lenoir County on 10 January, 31 January, 7 February and 28 February. The case was not placed on the docket for trial until 7 March.

Our Supreme Court has held that the statute, G.S. 15-186, gives a defendant on retrial no right to "a more speedy trial than that guaranteed to all by the Constitution of the United States

and the Constitution of North Carolina." *State v. Jackson*, 287 N.C. 470, 473, 215 S.E. 2d 123, 125 (1975). Whether a defendant has been deprived of his constitutional right to an expeditious trial must be determined by considering a number of interrelated facts such as the length and cause of the delay, waiver by the defendant, and prejudice to him. *State v. Brown*, 282 N.C. 117, 123, 191 S.E. 2d 659, 663 (1972).

In the case before us the Court, in determining that there had been no undue delay, considered the following reasons advanced by the District Attorney:

> "(1) that some of the witnesses who were in the State's case were from Baltimore, Maryland, and were not available for trial on the dates above mentioned; (2) that there were numerous jail cases in Lenoir County during this period of time which the State felt should be given priority; and (3) that there were some murder cases also that the State felt it had to give priority to."

Defendant, on the other hand, offered nothing to show that the delay was caused by any neglect on the part of the State. The burden is on the defendant who asserts the denial of his right to a prompt trial to show that the delay is due to the neglect or wilfulness of the State. *State v. Brown, supra.*

[2] Defendant also assigns as error the denial of his motion to sever the offense that occurred on 21 October 1975 from trial with the offenses that took place 16 October 1975. The motion to sever was renewed before the close of the evidence, as required by G.S. 15A-927(a)(2). Defendant's motion, however, failed to state any grounds or facts for consideration by the trial judge as to why the motion should have been allowed. On appeal, defendant's only assertion of possible prejudice is that he might have elected to testify in one of the cases and not in the others. This unsupported statement of possible prejudice is not sufficient to show abuse of discretion on the part of the trial judge in denying defendant's motion to sever the cases for trial. *State v. Davis*, 289 N.C. 500, 223 S.E. 2d 296 (1976); *State v. Hyatt*, 32 N.C. App. 623, 233 S.E. 2d 649 (1977).

[3] During cross-examination of the federal officer who bought the heroin from defendant, the officer was asked to state the name of the police informant who accompanied him. The State ob-

jected but, after a recess, withdrew the objection and the officer named the informant. The officer did not know the present whereabouts of the informant but stated that about two weeks prior to trial, he was in Florida. Defendant moved for a continuance so that he could subpoena the informant as a witness. We conclude that defendant has failed to show that the judge abused his discretion in failing to order a continuance. We further conclude that defendant was not thereby deprived of any of his constitutional rights to due process under the Federal Constitution or the Constitution of the State of North Carolina. The assignment of error is overruled. *State v. Rigsbee*, 285 N.C. 708, 208 S.E. 2d 656 (1974).

[4] Defendant contends that the contraband seized on 21 October 1975, when the officers went to defendant's apartment to serve orders of arrest, should not have been admitted into evidence. Defendant cites, quotes and argues G.S. 15A-249 and G.S. 15A-251, which relate to service of search warrants. The officers in the present case were armed with *arrest* warrants, and the relevant statute is G.S. 15A-401. Defendant argues that the evidence should have been excluded because the officers, as he contends, did not give notice of their authority and purpose before making the entry. The argument is without merit. The evidence discloses that the officers knocked on the door, identified themselves as police officers, and demanded entry. They received no response from the occupants of the premises. Instead, they immediately heard sounds that would justify them in concluding that admittance would be unreasonably delayed so that the occupants could escape. Moreover, mere failure to comply with the letter of G.S. 15A-401 in making the arrest does not require that evidence discovered as a result of the arrest be excluded. *State v. Eubanks*, 283 N.C. 556, 196 S.E. 2d 706 (1973). *See also* G.S. 15A-974.

Defendant has brought forward several other assignments of error. We conclude that they fail to disclose prejudicial error.

No error.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. FRANK HASKINS, NORMAN MELVIN

No. 7715SC440

(Filed 2 November 1977)

1. **Criminal Law § 66.9— photographic identification procedure**

A photographic identification procedure was not so impermissibly suggestive so as to give rise to a substantial likelihood of irreparable misidentification and did not taint an in-court identification of defendants by the victim of an attempted armed robbery where the victim was shown a total of fifteen color photographs which were all of young black males shown from the waist up and all of the same size; furthermore, the victim had a sufficient opportunity to observe defendants during the crime where he looked at defendants while they were sitting in a car in a well-lighted setting.

2. **Criminal Law § 99.8— court's request for clarifying questions**

In this prosecution for attempted armed robbery, defendants were not prejudiced by the trial judge's request that the prosecutor ask certain clarifying questions.

3. **Criminal Law § 113.9— court's reference to exhibit not in evidence**

Defendants were not prejudiced by the court's reference in the charge to an exhibit which had been used during a *voir dire* hearing but had not been introduced into evidence where the court thereafter instructed the jurors to strike such reference from their minds.

APPEAL by defendants from *Hobgood, Judge*. Judgment entered 7 January 1977, in Superior Court, ORANGE County. Heard in the Court of Appeals 18 October 1977.

Defendants were indicted for attempted armed robbery to which they entered a plea of not guilty. At the trial the State put on evidence tending to show that on the evening of 23 September 1976, defendants, along with Scott Knight, went to Travelers Service Station in Carrboro in a 1975 burgundy Cadillac and that the man sitting in the front passenger seat stuck a shotgun out the driver's window and demanded money from the station attendant. The attendant, Milan Joseph Poole, told them to follow him, and the man in the backseat did. Poole, upon reaching the office, took a three-foot long nightstick and drew back to hit the man following him. The man ran back to the car which then drove away.

The two defendants, Knight, and two women were later stopped in a Cadillac which matched the description Poole had given to the police. The defendants and Knight were arrested and

photographed; they were later identified through a photographic lineup shown to Poole as the men who had attempted to rob him. Scott Knight testified for the State that he was with defendants on the night of 23 September 1976, that he was drunk and had passed out in the rear of the Cadillac, that he was the one who followed Poole into the service station, but that defendant Melvin told him to come back to the car.

The defendants put on no evidence. The jury returned a verdict of guilty of attempted armed robbery and the court sentenced each defendant to a prison term of fifteen years.

Attorney General Edmisten, by Associate Attorney Jane Rankin Thompson, for the State.

Winston, Coleman and Bernholz, by Barry T. Winston, for defendant appellant Haskins.

Levine and Stewart, by John T. Stewart, for defendant appellant Melvin.

ARNOLD, Judge.

[1] During presentation of the State's evidence, witness Poole, who had previously identified the photographs of defendants, was allowed to testify as to the identity of the men who attempted to rob him. Defendants claim that under *Simmons v. United States*, 390 U.S. 377, 19 L.Ed. 2d 1247, 88 S.Ct. 967 (1968), which sets forth the reason for excluding in-court identifications following pretrial photographic identifications, the in-court identification of the two defendants should not have been allowed. We cannot agree. In *State v. Knight*, 282 N.C. 220, 225, 192 S.E. 2d 283, 287 (1972), the North Carolina courts adopted *Simmons*:

> " '[C]onvictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.' "

In the present case, upon objection by defense counsel, the trial court properly ordered a *voir dire* hearing to determine the admissibility of Poole's testimony. During *voir dire*, there was competent evidence that Poole was shown a total of fifteen color

photographs, all of young black males shown from the waist up and all of the same size. Defendants argue that since the pictures of the three defendants had a noticeably different background, the identification procedure was impermissibly suggestive. The defendants, however, having failed on this appeal to submit copies of the photographs, may not now ask this Court to reverse the findings of the trial court on this question.

Defendants' further suggestion that witness Poole did not have a sufficient opportunity to observe the defendants during the criminal act is likewise without merit. There was competent evidence that Poole looked at both defendants in a well-lighted setting. The trial court, therefore, properly concluded that the pretrial photographic procedure was in no way so unnecessarily suggestive as to lead to irreparable mistaken identification.

[2] Defendants also contend that the trial court erred by failing to conduct the trial in an impartial manner, to wit, by assisting the prosecuting attorney during the trial, and by improperly instructing the jury on the facts. We find no merit in these contentions. In the exercise of his duty to supervise and control the course of a trial so as to insure justice for all parties, a trial judge may interrogate a witness for the purpose of clarifying his testimony. *State v. Colson*, 274 N.C. 295, 163 S.E. 2d 376 (1968), cert. denied *sub nom. Colson v. North Carolina*, 393 U.S. 1087, 21 L.Ed. 2d 780, 89 S.Ct. 876 (1969). We have reviewed the record in the present case and find that the trial judge's request that the prosecutor ask certain clarifying questions was in no way prejudicial to either defendant.

[3] Defendants also argue that the court improperly instructed the jury by making reference to a drawing of a service station, an exhibit which was not in evidence but which had been used during a *voir dire* hearing. The court later corrected itself and asked the jurors to strike from their minds any such reference. In reviewing the whole record, we do not believe that the court's mistaken reference to the existence of an exhibit not in evidence had any bearing on the outcome of this case.

We have considered defendants' other assignments of error and we find

No error.

Chief Judge BROCK and Judge PARKER concur.

THE TRAVELERS INSURANCE COMPANY, PLAINTIFF v. RYDER TRUCK RENTAL, INC., DEFENDANT, THIRD PARTY PLAINTIFF v. SAN-BAR CORPORATION OF THE CAROLINAS, THIRD PARTY DEFENDANT

No. 7714SC61

(Filed 2 November 1977)

Rules of Civil Procedure § 41— voluntary dismissal—no affirmative relief sought by defendant—motion properly granted

Where defendant was sued by plaintiff to recover sums paid by plaintiff to certain persons for injuries sustained in an automobile accident with an employee of the third party defendant, and defendant cross-claimed against third party defendant for any claims defendant would have to pay to plaintiff, defendant's cross-claim for indemnification was contingent upon plaintiff's recovery and was in no way affirmative relief; therefore, the trial court properly allowed plaintiff to take a voluntary dismissal against defendant.

APPEAL by defendant from *Hobgood, Judge.* Judgment entered 1 November 1976, in Superior Court, DURHAM County. Heard in the Court of Appeals 24 October 1977.

The plaintiff Travelers Insurance Company (hereinafter Travelers) instituted this action against defendant Ryder Truck Rental, Inc. (hereinafter Ryder) to recover money plaintiff had paid to a Mr. and Mrs. Nobles who received personal injury and property damage in an automobile accident with an employee of San-Bar Corporation (hereinafter San-Bar). Travelers paid the Nobles pursuant to an insurance policy insuring San-Bar against loss; Travelers, however, alleged that Ryder, who had leased to San-Bar the truck involved in the accident, had a contractual as well as a statutory (G.S. 20-281) obligation to provide automobile liability insurance coverage, and that Ryder was liable to plaintiff for the amount plaintiff had paid the Nobles. Plaintiff furthermore alleged that Ryder's refusal to provide the insurance coverage constituted an unfair and deceptive trade practice within the

meaning of G.S. 75-1.1 which entitled plaintiff to recover treble damages (G.S. 75-16) plus reasonable attorney's fees (G.S. 75-16.1).

Defendant answered and denied liability, specifically alleging that the San-Bar employee involved in the accident was, at the time of the accident, under the age of 21 years; that San-Bar thereby breached the truck rental agreement; and that Ryder was not, therefore, obligated under the rental agreement to furnish liability insurance to San-Bar. Defendant Ryder also filed a third-party complaint against San-Bar seeking indemnity, pursuant to a contract provision, for any claims Ryder would have to pay under statutory requirements of insurance but which Ryder would not otherwise be obligated to pay.

After the answer to the third party complaint and some pretrial discovery and motions, plaintiff, pursuant to G.S. 1A-1, Rule 41(a), gave notice of dismissal without prejudice of its action against Ryder. Ryder, pursuant to G.S. 1A-1, Rule 12(f), moved the court to strike the notice of voluntary dismissal on the ground that Ryder had sought affirmative relief and that plaintiff, therefore, had no right to submit a voluntary dismissal. Defendant's motion was denied and defendant appeals.

Spears, Barnes, Baker and Boles, by J. Bruce Hoof, for plaintiff appellee.

Henson & Donahue, by Daniel W. Donahue, for defendant and third party plaintiff appellant.

Pulley and Wainio, P.A., by John C. Wainio, for third party defendant appellee.

ARNOLD, Judge.

Defendant, the third party plaintiff, argues on appeal that the trial court committed prejudicial error in failing to strike plaintiff's notice of voluntary dismissal without prejudice. We should note at the outset that a motion to strike "any insufficient defense or any redundant, irrelevant, immaterial, impertinent, or scandalous matter" under G.S. 1A-1, Rule 12(f) is not the proper motion by which to challenge a notice of dismissal without prejudice. In order to reach the real issue of this case, however, we shall treat defendant's motion as a motion to set aside plaintiff's notice of dismissal. The question is whether or not defendant's third-party complaint asserted grounds for affirmative relief such

that plaintiff's notice of dismissal would defeat some substantive right of defendant. *See, e.g., Griffith v. Griffith*, 265 N.C. 521, 144 S.E. 2d 589 (1965). If so, plaintiff would not be entitled to take a voluntary dismissal. *Id.*

Having reviewed the pleadings in the present case, we can find no affirmative relief sought by the defendant. Defendant cross-claims against San-Bar to recover any sums which it may be required to pay to the plaintiff. This action for indemnification is contingent upon plaintiff's recovery and is in no way "affirmative relief," as defendant asserts. The trial court, therefore, correctly overruled defendant's motion and allowed the dismissal.

Defendant's further argument that, since the voluntary dismissal should not have been allowed, the court erred in declaring moot defendant's motion for summary judgment, is likewise without merit. After the notice of dismissal was properly allowed, there remained no claim against defendant for which defendant would be entitled to indemnity. Defendant's motion for summary judgment against San-Bar thereby became moot.

Affirmed.

Chief Judge BROCK and Judge PARKER concur.

JOSEPH S. GRISSOM v. NORTH CAROLINA DEPARTMENT OF REVENUE

No. 7710SC1

(Filed 2 November 1977)

Administrative Law § 5; Appeal and Error § 4— dismissal of State employee— judicial review—jurisdiction—change of theory on appeal

A petitioner who contended in the superior court that such court had jurisdiction under G.S. 143-314 to review his dismissal without a hearing as an employee of a State agency may not contend in the appellate court that the superior court had jurisdiction under G.S. 7A-240 on the ground that he was dismissed because he exercised his constitutional rights of freedom of speech and association, since an appeal has to follow the theory at trial.

APPEAL by petitioner from *McLelland, Judge*. Order entered 16 September 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 26 September 1977.

Blanchard, Tucker, Twiggs & Denson, by Howard F. Twiggs, and R. James Lore, for petitioner appellant.

Tharrington, Smith & Hargrove, by J. Harold Tharrington, for respondent appellee.

ARNOLD, Judge.

In December 1974, the appellant petitioned Superior Court of Wake County for an order, pursuant to G.S. 143-312, to stay the decision of the Department of Revenue (the Department) terminating petitioner's employment, and for judicial review of the Department's decision pursuant to G.S. 143-314.

In May 1975, Judge Brewer of Superior Court, Wake County, dismissed the action on the grounds that the petitioner was not entitled to judicial review since he had not exhausted his administrative remedies. In *Grissom v. Dept. of Revenue*, 28 N.C. App. 277, 220 S.E. 2d 872, cert. denied 289 N.C. 613, 223 S.E. 2d 391 (1976), this Court reversed that order, holding that petitioner was not required, before seeking judicial review, to appeal to the State Personnel Board which could only render an advisory recommendation and which could not grant petitioner the reinstatement he sought. The matter was remanded to Superior Court for judicial review. Before the Superior Court could review petitioner's dismissal, the Supreme Court of North Carolina decided the case of *Nantz v. Employment Security Commission*, 290 N.C. 473, 226 S.E. 2d 340 (1976), which held that, since, under then existing law, employment by the State does not *ipso facto* confer a property right in the position, petitioner was not deprived of due process of law when she was dismissed without a hearing; and that, since Article 33, Chapter 143 of the General Statutes does not provide for judicial review of such an administrative action as discharging an employee, the employee is not entitled, unless it is a matter of constitutional right, to an agency hearing prior to being discharged. This Court followed that decision in *Darnell v. Department of Transportation*, 30 N.C. App. 328, 226 S.E. 2d 879, cert. denied 290 N.C. 776, 229 S.E. 2d 32 (1976). Upon remand the superior court based its findings on the *Darnell* decision and concluded that petitioner Grissom did not have a constitutional right to a hearing, and that he was not entitled to judicial review of the termination of his employment.

Petitioner argues on appeal that, since his petition may also be construed as a complaint and since he has alleged facts to show that he was dismissed solely because he exercised his constitutional rights of freedom of speech and freedom of association under the First and Fourteenth Amendments, the trial court erred in concluding that it did not have jurisdiction. He argues, therefore, that he did have a constitutional right to a hearing and judicial review, and that the superior court had original subject matter jurisdiction pursuant to G.S. 7A-240.

According to the record, petitioner did not make this argument before the trial court in response to the Department's motion to dismiss. Instead, petitioner continued to rely upon jurisdiction which he specifically alleged was under G.S. 143-314, but which was defeated by *Nantz*. Petitioner may not now elect to argue a new theory on appeal.

Whether the facts alleged in the petition will support the theory now argued by petitioner is not before us. An appeal has to follow the theory of the trial, and where a cause is heard on one theory at trial, appellant cannot switch to a different theory on appeal. *See Lawson v. Benton*, 272 N.C. 627, 158 S.E. 2d 805 (1968); and *Leffew v. Orrell*, 7 N.C. App. 333, 336-37, 172 S.E. 2d 243, 245-46 (1970), where this Court said, "[f]urthermore, when a case has been tried in the trial court on a particular theory, a litigant may not switch theories when he gets to the appellate court. 1 McIntosh, N.C. Practice and Procedure § 999(4)(5) . . . ."

Having asserted jurisdiction in Superior Court pursuant to G.S. 143-314 petitioner may not now contend in the Court of Appeals that the Superior Court had jurisdiction under a totally different theory.

Affirmed.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. ALAN KEITH BLAND

No. 775SC476

(Filed 2 November 1977)

1. **Criminal Law § 26.2— insufficient evidence—nonsuit—attachment of jeopardy**

Where a judgment as of nonsuit is entered in a criminal prosecution on the ground that the evidence offered by the State is insufficient to warrant submission to the jury, the defendant has been subjected to jeopardy.

2. **Weapons and Firearms— discharging firearm into occupied building—trailer fired into—no variance**

Defendant's contention that there was a fatal variance between the indictment and proof because the State put on evidence showing that defendant discharged a firearm not into an occupied building as alleged in the indictment but into an occupied trailer is without merit, since the indictment specifically noted that the occupied building was located at 5313 Park Avenue, the address of the victim's trailer.

3. **Weapons and Firearms— discharging firearm into occupied building—lesser offenses**

In a prosecution for discharging a firearm into an occupied building, the trial court did not err by failing to instruct on assault with a deadly weapon and assault by pointing a gun, since those are not lesser included offenses of the crime charged.

APPEAL by defendant from *Rouse, Judge*. Judgment entered 27 January 1977, in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 20 October 1977.

Defendant appellant Bland, and Ronald Bordeaux, John Keel, and O'Neal Wright, were charged with breaking and entering, firing into an occupied building, and firing into an occupied vehicle. All defendants entered pleas of not guilty as to all charges. At trial the State put on evidence that on the night of 15 November 1976, defendant Bland and others approached a small trailer occupied at the time by Ronald Reeves and Judy Walker. Reeves testified that he heard shooting outside his trailer, that some of the shots were hitting his trailer, and that he and Walker escaped through the back door and hid in the woods. Defendant Bland was seen approaching the trailer with a stick while two other defendants were seen with guns. Reeves and Walker ran to the home of Reeves' father, and the two Reeves returned to the trailer by car and with a gun. They chased the two automobiles of defend-

ants and were fired upon. After several miles they gave up the chase and reported the incident to the Sheriff's office.

Defendant Bland offered no evidence. The jury returned a verdict against Bland of guilty of discharging a firearm into occupied property. On the charge of breaking and entering defendant was found not guilty. Defendant Bland appeals.

Attorney General Edmisten, by Associate Attorney Christopher P. Brewer, for the State.

Harold P. Laing for defendant appellant.

ARNOLD, Judge.

Defendant contends that the trial court erred by failing to grant defendant's motion to dismiss at the close of the State's evidence and at the close of all the evidence. He argues that there was a fatal variance between the indictments against defendant and the evidence adduced at his trial, and that jeopardy did not attach under either of the bills of indictment. Defendant's contention is without merit.

[1] The record shows that one indictment charged defendant with discharging a firearm into an occupied building and the second indictment charged him with discharging a firearm into an occupied 1969 Volkswagen. At the close of the State's evidence, the Court dismissed the latter charge upon motion for judgment as of nonsuit. Where a judgment as of nonsuit is entered in a criminal prosecution on the ground that the evidence offered by the State is insufficient to warrant submission to the jury, the defendant has been subjected to jeopardy. *State v. Vaughan* and *State v. Catena* and *State v. Smith*, 268 N.C. 105, 150 S.E. 2d 31 (1966).

[2] As to the first indictment, defendant argues that the State put on evidence showing that defendant discharged a firearm not into an occupied building as alleged in the indictment but into an occupied trailer. The indictment, however, specifically noted that the occupied building was located at 5313 Park Avenue, the address of the Reeves trailer in Wilmington. Under the facts, therefore, there was no fatal variance which would warrant dismissal.

Defendant also contends that the trial court incorrectly instructed the jury as to "acting in concert" and "aiding and abet-

ting." Defendant, however, points out, and in reviewing the instructions, we find, no error prejudicial to defendant.

[3] Defendant's final contention, that the court erred by failing to instruct as to lesser included offenses, namely assault with a deadly weapon and assault by pointing a gun, is also without merit. Since assault with a deadly weapon (G.S. 14-32) and assault by pointing a gun (G.S. 14-34) each involve the element of assault on a person, these two criminal offenses contain an element not essential to discharging a firearm into an occupied building and are not, therefore, lesser included offenses.

We have reviewed defendant's other contentions, and find

No error.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. FLOYD COLLINS WILLIAMS

No. 773SC550

(Filed 2 November 1977)

1. **Criminal Law § 74.3— admission of co-defendant's statements—error cured by co-defendant's subsequent testimony**

   Any violation of the rule of *Bruton v. United States*, 391 U.S. 123, by the admission of a co-defendant's statements which implicated defendant by his silence at the time they were made was cured when the co-defendant thereafter changed his plea to guilty and testified at the trial.

2. **Criminal Law § 76.5— co-defendant's incriminating statements—voir dire hearing—dictation of findings after trial**

   Defendant was not prejudiced by the court's failure to dictate its findings of fact on voir dire relating to the admission of a co-defendant's statements implicating defendant until approximately one month after the trial, although it is the better practice for the court to make such findings at some stage during the trial.

APPEAL by defendant from *Browning, Judge.* Judgment entered 11 February 1977, in Superior Court, PITT County. Heard in the Court of Appeals 24 October 1977.

Defendant was charged by two indictments with feloniously breaking and entering two occupied buildings, with the intent to

commit larceny, and larceny. To each indictment, he entered a plea of not guilty. Prior to trial, and over objection, defendant's trial was consolidated with that of defendant, Clarence Wise. A jury found defendant guilty on all counts and from that conviction he appeals to this Court.

Attorney General Edmisten, by Associate Attorney Donald W. Grimes, for the State.

Everett & Cheatham, by James T. Cheatham, for defendant appellant.

ARNOLD, Judge.

[1] The first issue presented by defendant on this appeal is whether the trial court cured a violation of the rule of *Bruton v. United States*, 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968), by allowing a co-defendant, whose incriminating statement had been admitted into evidence, subsequently to change his plea of not guilty and to testify. The record shows that State's witness Annie Simpson offered the following testimony:

> "On a day which the case at hand had been set for some sort of disposition in the courthouse, I don't remember exactly when, I had a conversation with defendant Wise. Out in the hallway, with defendant Williams standing with him, defendant Wise said, 'Mrs. Simpson, I'm sorry. If I knew you lived there, I wouldn't have went in your house. I thought whites lived there.' That is what he told me and I asked him, what difference did that make, who lived there."

The *Bruton* case held that where a co-defendant did not testify, the introduction of his confession, implicating the other co-defendant, added substantial weight to the government's case in a form not subject to cross-examination and, therefore, violated the other co-defendant's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment.

Assuming, *arguendo*, that defendant was implicated by his silence during the conversation between Mrs. Simpson and Wise, we nevertheless must conclude that any violation of the *Bruton* rule was cured by Wise's later testimony in defendant's trial. Defendant admits that at that time he had the opportunity to cross-examine his former co-defendant; hence, the underlying

reason of the *Bruton* decision is not present in the instant case. *See, e.g., Duggar v. United States*, 434 F. 2d 345 (10th Cir. 1970).

[2] Defendant's second argument is that the trial court erred when it dictated its findings of fact on *voir dire* relating to the admission of statements of co-defendant Wise, after court had adjourned and approximately one (1) month after trial. While we agree with *State v. Doss*, 279 N.C. 413 at 424, 183 S.E. 2d 671 at 678 (1971), modified and remanded 408 U.S. 939, 33 L.Ed. 2d 762, 92 S.Ct. 2875 (1972), that "it is better practice for the court to make such findings at some stage during the trial, preferably at the time the statement is tendered and before it is admitted," defendant has failed to set forth any prejudice which resulted from the trial court's delay.

Having reviewed defendant's other assignment of error, we conclude that there was

No error.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. JAMES BERNARD DIXON

No. 778SC392

(Filed 2 November 1977)

Robbery § 5— common law robbery—larceny from the person

The State's evidence was sufficient for submission to the jury on the issue of defendant's guilt of common law robbery and did not require submission of an issue of larceny from the person where the victim testified that defendant came to his home and asked if he had any money; the victim stated that he had none and defendant insisted that he did; defendant then grabbed the victim, twisted him around and ran his hand into the victim's pocket and got his money; the victim was trying to keep defendant from getting the money; and the victim was so scared that he could not remember how long defendant was in his presence.

APPEAL by defendant from *Smith (David I.), Judge*. Judgment entered 23 February 1977 in Superior Court, WAYNE County. Heard in the Court of Appeals 29 September 1977.

Defendant was indicted for and convicted of common law robbery. Judgment imposing a prison sentence of ten years was entered.

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

Hulse & Hulse, by H. Bruce Hulse, Jr., for defendant appellant.

VAUGHN, Judge.

Defendant argues that his motion for nonsuit should have been allowed and that the jury should have been allowed to consider a verdict of larceny from the person.

The evidence tends to show the following. Fairley, the robbery victim, lived alone in a house that was about one block from the home where defendant lived with his blind grandfather. Defendant, who was well known to Fairley, came to Fairley's home and knocked. Fairley turned on the light and opened the door. Defendant then asked if he had any money, and Fairley replied that he did not. Defendant then said, "Yes you do." Fairley testified:

> "then he grabbed me and got my little money and keys and pushed me back and got gone. He grabbed me and twisted me around and ran his hand in my pocket and got the money. I was trying to keep him from it but he got it. The money was in the right side pocket in one of those old timey long snap pocketbooks. I had a twenty dollar bill, a ten dollar bill and four fives and three ones, for a total of $53.00."

Fairley then testified that he was so scared that he could not remember exactly how long defendant was in his presence, but that it could have been less than five minutes. Defendant testified that, although he knew Fairley and had seen him on the day of the alleged robbery, he did not go to Fairley's home and did not rob him.

There was, therefore, ample evidence of defendant's guilt of the crime charged in the bill of indictment, and the court did not err in failing to instruct on the offense of larceny from the person. Robbery is the felonious taking of money or goods from the person of another, or in his presence, against his will, by violence

or putting him in fear. *State v. Stewart*, 255 N.C. 571, 122 S.E. 2d 355 (1961). "It is not necessary to prove both violence and putting in fear—proof of *either* is sufficient." *State v. Moore*, 279 N.C. 455, 458, 183 S.E. 2d 546, 547 (1971). In the case before us, the evidence shows a forcible taking both through violence and putting the victim in fear. The degree of force is immaterial so long as it is sufficient to cause the victim to part with his property. *State v. Sawyer*, 224 N.C. 61, 29 S.E. 2d 34 (1944). Where, as here, all the evidence tends to show that the crime charged was committed, and there is no evidence tending to show the commission of a crime of less degree, the court does not err in failing to instruct on the lesser offense. *State v. Sawyer, supra.*

Defendant had testified that he did not work. Defendant was then asked on cross-examination how he lived and if he lived off his blind grandfather. Defendant replied that he lived with his grandfather but did not live off him. He explained that he was a vegetarian and only ate about three times a week. We find that no prejudicial error resulted from overruling defendant's objection to the question.

Defendant's remaining assignments of error have been considered. We find no prejudicial error.

No error.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. HENRY FRANK HAMMOND

No. 7720SC470

(Filed 2 November 1977)

1. **Criminal Law § 5.1— insanity—burden of proof on defendant**

The trial court in a first degree murder prosecution did not err in placing the burden of proof on defendant as to the issue of insanity.

2. **Homicide § 30— first degree murder charged—instruction on second degree murder proper**

In all cases in which the State relies upon premeditation and deliberation to support a first degree murder conviction, the court must submit the issue of second degree murder.

State v. Hammond

APPEAL by defendant from *Wood, Judge.* Judgment entered 14 January 1977, in Superior Court, ANSON County. Heard in the Court of Appeals 20 October 1977.

Defendant was tried upon a proper bill of indictment for the first degree murder of Herman Capel. At the first trial defendant was found guilty of first degree murder but in *State v. Hammonds* [sic], 290 N.C. 1, 224 S.E. 2d 595 (1976), a new trial was awarded. At this new trial defendant was found guilty of second degree murder and was sentenced to a prison term of forty years. He appeals to this Court.

Attorney General Edmisten, by Associate Attorney Patricia B. Hodulik, for the State.

Chambers, Stein, Ferguson & Becton, P.A., by James E. Ferguson II and Louis L. Lesesne, Jr., for defendant appellant.

ARNOLD, Judge.

[1] Defendant first contends that the trial court's allocation of the burden of proof on the issue of insanity denied defendant due process of law. He argues that the State must carry the burden of proof as to sanity. As defendant notes, this question was considered on his appeal to the Supreme Court. *State v. Hammonds, supra,* and our Supreme Court rejected his argument. We must also find no error in the trial court's placing the burden of proof on defendant as to the issue of insanity.

[2] Defendant's argument that the court erred in instructing the jury that it might return a verdict of guilty of second degree murder is also rejected. In all cases in which the State relies upon premeditation and deliberation to support a first degree murder conviction, the court must submit the issue of second degree murder. *State v. Harris,* 290 N.C. 718, 228 S.E. 2d 424 (1976).

No error.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. STEVE WILKINS

No. 778SC393

(Filed 16 November 1977)

1. **Criminal Law § 169.3— evidence excluded—similar evidence subsequently introduced—no error**

Even if the trial court erred in excluding testimony offered by defendant relevant to his defense of entrapment, defendant was not prejudiced, since substantially the same evidence was admitted at other times during the trial without objection.

2. **Criminal Law § 87.4— witness impeached—character evidence on redirect examination—evidence admissible**

After the impeachment of a witness, evidence is admissible to restore and strengthen the credibility of the witness; therefore, the trial court in a prosecution for possession and sale of marijuana did not err in allowing the State to introduce evidence of a witness's good character where the witness had been subjected to vigorous cross-examination in a somewhat successful effort to discredit her testimony in chief.

3. **Criminal Law § 88.3— cross-examination on collateral matters—witness's answers binding**

Defense counsel is bound by the witness's answer to cross-examination on collateral issues and may not contradict it by extrinsic evidence or other testimony.

4. **Criminal Law § 169.3— testimony admitted over objection—subsequent similar testimony admitted without objection**

The admission of testimony over objection is harmless to defendant when he elicits the same testimony on cross-examination for the purpose of amplifying the information given on direct examination.

5. **Criminal Law § 7.1— entrapment—no showing as a matter of law**

In a prosecution for possession and sale of marijuana, evidence was insufficient to show entrapment as a matter of law where it tended to show that the relationship between defendant and an undercover agent was very casual; the agent and defendant had met only once before the sale was consummated; defendant agreed to acquire marijuana and sell it to the agent after only two requests from the agent, both of which were made over the phone; and defendant refused the request for a sale made in the first phone call only because there was no marijuana available.

6. **Criminal Law § 88.4— cross-examination—violation of probation terms—admissibility of evidence**

It was within the trial judge's discretion to allow cross-examination regarding violations of the terms of probation and the defendant's failure to disclose criminal activity, since both of these matters tended to cast light on the character of the witnesses.

7. Criminal Law § 117.3— undercover agent—instruction to scrutinize testimony —no error

An instruction that the jury should scrutinize the testimony of an undercover agent in the light of the witness's interest or bias, but that if the jury should conclude that he is telling the truth his testimony is to be given the same value as any other believable evidence is without error.

8. Criminal Law § 117.3— undercover agent—instruction on scrutiny of testimony proper

The court's instruction, "You may find from the evidence that the State's witness, Judith Lynn Melvin, is interested in the outcome of this case because of her activities as an undercover agent," resulted in no prejudice to defendant even though it allowed the jury to consider whether Miss Melvin was in fact an agent before it was required to scrutinize her testimony, since the role of the witness Melvin as an undercover agent was unchallenged at trial and there could be no confusion among the jurors as to whether her testimony was to be subjected to close scrutiny.

9. Criminal Law § 115— instruction on lesser included offense—consideration of greater offense first—no error

In a prosecution for possession with intent to sell and sale of marijuana, there was no error in a charge directing the jury to deliberate first on the greater offense of possession with intent to sell and that they must consider the lesser included offense of possession of a controlled substance only after they decided that defendant was not guilty of the greater offense.

10. Criminal Law §§ 7, 121— entrapment—burden of proof on defendant—instructions proper

Mullaney v. Wilbur, 421 U.S. 684, does not require that the State carry the burden of proving that defendant was not entrapped in order to prove the requisite criminal intent.

11. Conspiracy § 7— identity of conspirators—instructions proper

In a prosecution for possession with intent to sell and sale of marijuana and conspiracy, the trial court's instructions clearly indicated that the conspiracy for which defendant was tried was between defendant and one Minshew, not between defendant and an undercover agent.

12. Conspiracy § 3.1— undercover agent—circumstances under which conspiracy can exist

There can be no conspiracy between a defendant and one who only feigns acquiescence in a crime; however, if an undercover agent acts in conjunction with more than one person to violate a law, his participation will not preclude a conviction of the others for a conspiracy among themselves.

APPEAL by defendant from *Browning, Special Judge.* Judgment entered 28 January 1977 in Superior Court, WAYNE County. Heard in the Court of Appeals 29 September 1977.

Defendant was indicted on two counts of sale and delivery of a controlled substance, two counts of possession of a controlled substance with intent to sell, and one count of conspiracy. He entered a plea of not guilty to each indictment. The jury returned a verdict of guilty as to each charge and from a judgment sentencing him to a term of five years on each charge, three terms to run concurrently and two terms to run consecutively to the previous three but concurrently with each other, defendant appealed.

The State introduced evidence, through the testimony of Judith Melvin, an undercover agent, tending to show: that on two occasions, 2 June and 3 June 1976, Judith Melvin met the defendant at a Kwik Pik for the purpose of purchasing marijuana from him; that at the Kwik Pik on 2 June, the defendant entered Melvin's car, received $40 from Melvin, and then told her to wait in the car as he left; that immediately thereafter Gary Minshew got into Melvin's car and gave her approximately two ounces of marijuana; that on 3 June Melvin called the defendant and requested that he sell her more marijuana; that defendant again told Melvin to go to the Kwik Pik, and a sale of one ounce of marijuana transpired in substantially the same manner as the first sale. Miss Melvin testified that the sale was arranged after she had called the defendant on two occasions asking him to sell her some marijuana; that on the first occasion he refused, stating that none was available, but on the second call he told her to call him back; and that when she called him back, the sale which transpired on 2 June was arranged. Gary Minshew testified for the State and substantially corroborated the testimony of Melvin.

The defendant attempted to establish entrapment and testified in his own behalf that he sold marijuana to Miss Melvin only because she was harassing him with phone calls at his mother's house; that his mother was critically ill and eventually died; that his mother asked him to have Miss Melvin cease the phone calls; that he requested Melvin not to call him, which Melvin agreed to do if he sold her some marijuana. Three defense witnesses testified that they had heard the defendant refuse Melvin's request to sell her drugs and that defendant had complained about the calls from Melvin asking for drugs. Other relevant facts are set forth below.

Attorney General Edmisten, by Associate Attorney Henry H. Burgwyn, for the State.

Hulse and Hulse, by Herbert B. Hulse, for defendant appellant.

MORRIS, Judge.

[1] The defendant presents 16 arguments to the Court preserving 20 of 22 assignments of error. The defendant's first argument (assignments of error Nos. 2 and 7) is directed to the trial court's exclusion of testimony offered by the defendant relevant to his defense of entrapment. Assuming, *arguendo*, that the offered testimony should have been admitted as relevant to the defense, there was no prejudice to the defendant, for the record discloses that substantially the same evidence was admitted at other times during the trial without objection. The exclusion of evidence is not prejudicial when substantially the same evidence is thereafter admitted or introduced. *State v. Creech*, 229 N.C. 662, 51 S.E. 2d 348 (1949); *State v. Elder*, 217 N.C. 111, 6 S.E. 2d 840 (1940).

[2] The defendant's second argument (assignment of error No. 3) is directed to the admission of evidence of the general character and reputation of State's witness Melvin. Defendant argues that "in view of the moral turpitude and illegality of much of Miss Melvin's conduct as brought out in her own testimony, the defendant respectfully contends that the allowance by the court of evidence as to her good character fortified her position before the jury and encouraged the jury to minimize, if not ignore, the unsavory aspects of her behavior". Melvin had been subjected to vigorous cross-examination in an effort to discredit her testimony in chief, and the efforts of defendant's counsel were not totally unavailing. After the impeachment of a witness, evidence is admissible to restore and strengthen the credibility of the witness. *Gibson v. Whitton*, 239 N.C. 11, 79 S.E. 2d 196 (1953). In *Lorbacher v. Talley*, 256 N.C. 258, 260, 123 S.E. 2d 477 (1961), Justice Bobbitt, later Chief Justice, quoted with approval from *Jones v. Jones*, 80 N.C. 246, 250, the following:

> "In whatever way the credit of the witness may be impaired, it may be restored or strengthened by this [proof of prior consistent statements] or any other proper evidence tending to insure confidence in his veracity and in the truthfulness of his testimony."

[3] The defendant also objects, by his eleventh assignment of error, to the exclusion of certain testimony offered to impeach witness Melvin by proof of a prior inconsistent statement. Testimony was offered by defense witness Russell tending to show that Melvin, during the course of her undercover work, had stated she enjoyed smoking marijuana, supposedly in contradiction of her testimony that she had only simulated smoking marijuana during the course of her assignment. Whether Melvin enjoyed, or simulated smoking pot is a collateral issue to the question of the defendant's guilt. Defense counsel is bound by the witness's answer to cross-examination on collateral issues and may not contradict it by extrinsic evidence or other testimony. *State v. Poolos*, 241 N.C. 382, 85 S.E. 2d 342 (1955). *See* Stansbury, N.C. Evidence 2d, § 48, p. 138 (Brandis Rev. 1973). This assignment of error is overruled.

[4] The defendant's third argument (assignment of error No. 5) is directed to the admission, over defendant's objection, of testimony by witness Minshew relating other criminal acts of the defendant. The record discloses, however, that the defendant elicited substantially the same evidence on cross-examination to clarify Minshew's testimony. The admission of the testimony over objection is harmless to the defendant when he elicits the same testimony on cross-examination for the purpose of amplifying the information given on direct examination. *State v. Landingham*, 283 N.C. 589, 197 S.E. 2d 539 (1973). This assignment of error is overruled.

By his sixth assignment of error defendant contends that the trial judge erred by not granting his motions for nonsuit. The defendant cites *State v. Stanley*, 288 N.C. 19, 215 S.E. 2d 589 (1975), evidently asserting entrapment was established as a matter of law. He also argues that he was guilty of possession only as the agent of the State's agent Melvin. We conclude the denial of the motion was not error.

[5] Examining the evidence relating to entrapment in the light most favorable to the State, it is clear that the facts of this case are distinguishable from *Stanley* and do not compel a finding that defendant's actions in violation of the law were not his voluntary acts but acts he had no intention of committing absent the strong and clear importuning and coercion of the agent of the

State. Justice Branch, in *State v. Stanley, supra* at 32, wrote the following:

> "The rule governing the application of the offense of entrapment as a matter of law is clearly and concisely stated by the New Hampshire Supreme Court in *State v. Campbell*, [110 N.H. 238, 265 A. 2d 11]. We quote from that case:
>
> > 'Ordinarily, if the evidence presents an issue of entrapment it is a question of fact for the jury to determine. The court can find entrapment as a matter of law only where the undisputed testimony and required inferences compel a finding that the defendant was lured by the officers into an action he was not predisposed to take.' " (Citations omitted.)

The Court in *Stanley* found entrapment as a matter of law when a State agent ingratiated himself into the confidence of a 16-year-old boy and used the trust and confidence accompanying that friendship to coerce the young boy to acquire drugs and make a sale. In the case *sub judice* the State presented evidence tending to show: that the relationship between the defendant and Agent Melvin was very casual; that Melvin and the defendant had met only once before the sale was consummated; that the defendant agreed to acquire marijuana and sell it to Melvin after only two requests from Melvin, both of which were made over the telephone; and that the defendant refused the request for a sale made in the first phone call only because there was no marijuana available. The evidence presented by the State is ample to show that the defendant was predisposed to commit the crime and that Agent Melvin only presented him with an opportunity to act. The question of entrapment was, therefore, properly left for the jury. The contention that a nonsuit should have been granted because the evidence shows that the defendant was acting as the agent of Melvin is a novel contention attempting to apply the law of agency to criminal activity. It is, however, a contention without merit.

Defendant's assignments of error Nos. 9, 10, 12, 13 and 14 are directed to the scope of cross-examination allowed to the State. No authority is cited in support of these arguments, but the defendant objects to questions eliciting information regarding violations of probation by witness Parker and the defendant, and to questioning which the defendant contends was beyond the

proper bounds of cross-examination regarding previous offenses and collateral issues. The scope of cross-examination rests in the discretion of the trial judge and his rulings should not be disturbed except upon a showing of prejudicial error. *State v. Ross*, 275 N.C. 550, 169 S.E. 2d 875 (1969), *cert. den.* 397 U.S. 1050, 25 L.Ed. 2d 665, 90 S.Ct. 1387 (1970). Our review of the record discloses no abuse of discretion nor prejudicial error in the trial judge's control of the cross-examination. He was in a position to observe the demeanor of the witnesses, he knew the background of the case and was in a favorable position to control the scope of the questioning. *State v. Ross*, supra.

[6] A witness may be cross-examined on matters that tend to show interest or bias, or impeach his credibility. *State v. Warren*, 4 N.C. App. 441, 166 S.E. 2d 858 (1969). A witness's credibility may be impeached by proof of bad character, and on cross-examination, a witness may be asked questions concerning prior specific acts of misconduct which tend to show bad character. *State v. Gainey*, 280 N.C. 366, 185 S.E. 2d 874 (1972). It was within the trial judge's discretion to allow cross-examination regarding violations of the terms of probation and the defendant's failure to disclose criminal activity. Both of these matters tend to cast light on the character of the witnesses. These assignments of error are overruled.

[7, 8] By assignments of error Nos. 15, 16, 17, 18 and 19, the defendant preserves exceptions to the trial judge's charge to the jury. The defendant first contends that the court improperly charged the jury on the law with respect to the scrutiny of the testimony of an undercover agent.

> "The general rule is that the jury should be directed to scrutinize the evidence of a paid detective and make proper allowances for the bias likely to exist in one having such an interest in the outcome of the prosecution and in reference to any other relevant facts calculated to influence the testimony of the witness; but where this is done, *the exact terms in which the rule may be expressed are left, by our decisions, very largely in the discretion of the trial judge.*" (Emphasis added.) *State v. Boynton*, 155 N.C. 456, 464, 71 S.E. 341 (1911).

The trial judge in his charge to the jury stated:

> "Also you may find from the evidence that the State's witness, Judith Lynn Melvin, is interested in the outcome of this case because of her activities as an undercover agent. If so you should examine her testimony with care and caution in light of that interest. If after doing so you believe her testimony in whole or in part you should treat what you believe the same as you would any other believable evidence in this case."

An instruction that the jury should scrutinize the testimony of an undercover agent in the light of the witness's interest or bias, but that if the jury should conclude that he is telling the truth his testimony is to be given the same value as any other believable evidence is without error. *State v. Hunt*, 246 N.C. 454, 98 S.E. 2d 337 (1957). There is no required formula for an instruction to the jury and a charge is adequate so long as it accurately presents the applicable principles of law. *State v. Alexander*, 279 N.C. 527, 184 S.E. 2d 274 (1971). The charge relating to witness Melvin was sufficient and there was no error. The defendant contends that the phrase "You may find from the evidence that the State's witness, Judith Lynn Melvin, is interested in the outcome of this case because of her activities as an undercover agent", contained in the charge allowed the jury to consider whether Miss Melvin was in fact an agent before it was required to scrutinize her testimony. We conclude, however, that this resulted in no prejudice to the defendant. The role of witness Melvin as an undercover agent was unchallenged at trial and there could be no confusion among the jurors as to whether her testimony was to be subjected to close scrutiny. This assignment of error is overruled.

[9] The defendant's second objection to the charge is directed to the court's instruction on the law with respect to the offenses of possession with intent to sell and deliver. The defendant contends that the lesser included offense of possession of a controlled substance should have been submitted in such a way that the jury might consider the lesser included offense at the same time as the greater offense. We disagree. In *State v. Wall*, 9 N.C. App. 22, 175 S.E. 2d 310 (1970), we considered this issue and concluded there was no error in a charge directing the jury to first deliberate on the greater offense and that they must consider the lesser included offense only after they decided the defendant was

not guilty of the greater offense. This assignment of error is overruled.

[10] The defendant's third objection to the charge to the jury is directed to the trial judge's instruction on the defense of entrapment. He argues that *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975), requires that the State carry the burden of proving that the defendant was not entrapped in order to prove the requisite criminal intent. In *State v. Braun*, 31 N.C. App. 101, 228 S.E. 2d 466 (1976), *cert. den.* 291 N.C. 449 (1976); however, we held that *Mullaney* did not apply to the affirmative defense of entrapment. This contention is overruled. The defendant also contends that the trial judge did not fully present to the jury the defendant's evidence tending to prove entrapment. The charge must be construed as a whole, in the manner in which it was given. *State v. Alexander, supra.* The record reveals that in his summary to the jury the trial judge included the defendant's evidence of harassment and coercion of the defendant by Agent Melvin. The judge's summary of the defendant's evidence, when considered with his instruction on entrapment, which he repeated on every charge of the five counts, fully presented the defense of entrapment arising from the defendant's evidence in this case.

[11, 12] The defendant further contends that the trial court erred in his instruction to the jury on the law of conspiracy. We disagree. The defendant argues that the jury might conclude that there could be a criminal conspiracy between the defendant and Agent Melvin. This would be in contradiction of the rule that there can be no conspiracy between a defendant and one who only feigns acquiescence in a crime. *State v. Horton*, 275 N.C. 651, 170 S.E. 2d 466 (1969); *cert. den.* 398 U.S. 959, 26 L.Ed. 2d 545, 90 S.Ct. 2175 (1970). If an undercover agent acts in conjunction with more than one person to violate a law, however, his participation will not preclude a conviction of the others for a conspiracy among themselves. *State v. Walker*, 251 N.C. 465, 112 S.E. 2d 61 (1960); *cert. den.* 364 U.S. 832, 5 L.Ed. 2d 58, 81 S.Ct. 45 (1960). The instruction in the instant case clearly indicates that the conspiracy for which the defendant was tried was between the defendant and Gary Minshew, not Agent Melvin. This assignment of error is overruled.

The defendant next urges that the trial court erred in denying defendant's request to charge the jury that if he was acting as

the agent of Miss Melvin he would not be guilty of selling or possession with intent to sell. No authority is presented to support this position, nor was the request for this special instruction presented in writing in apt time in accordance with the requirements of G.S. 1A-1, Rule 51(b). However, had the request been in compliance with the rule, the court would not have committed reversible error in denying it.

By his last assignments of error the defendant contends that the court erred in denying his motion to set aside the verdict and grant a new trial and in the entry of judgment. Defendant's motions to set aside the verdict and to grant a new trial are addressed to the discretion of the trial court and refusal to grant them is not reviewable in the absence of an abuse of discretion. *State v. Lindley*, 286 N.C. 255, 210 S.E. 2d 207 (1974). Having concluded there was no error in the trial of the defendant, there was no abuse of discretion and this assignment of error is without merit.

The defendant also objects to the entry of judgment which presents the face of the record for review. *State v. Kirby*, 276 N.C. 123, 171 S.E. 2d 416 (1969). No error is apparent on the face of the record and this assignment of error is overruled.

No error.

Judges VAUGHN and CLARK concur.

CLARENCE BERNARD ROBINSON v. CITY OF WINSTON-SALEM; J. C. HASSELL; AND D. G. BURTON

No. 7621SC962

(Filed 16 November 1977)

1. False Imprisonment § 1— arrest of wrong person under warrant—liability of officer

A police officer who arrests the wrong person under a valid arrest warrant because of a mistake in the identity of the person arrested will be liable for false imprisonment only when the officer failed to use reasonable diligence to determine that the party arrested was actually the person named in the warrant.

2. False Imprisonment § 3— officer's arrest of wrong person—good faith—punitive damages

While the good faith of an arresting officer, in the sense of absence of malice, does not by itself relieve the officer from liability for compensatory damages for false imprisonment because good faith implies due diligence and the failure to exercise ordinary care is inconsistent with good faith, a showing of malice or of conduct demonstrating reckless disregard of the rights of others is required to support an award of punitive damages for such false imprisonment.

3. False Imprisonment § 2— officers' arrest of wrong person under warrant—reasonable diligence—genuine issue of material fact

In this action against two police officers for false arrest, there was a genuine issue of material fact as to whether defendants exercised due care in determining whether plaintiff was the person named in the warrant, and summary judgment was improperly entered for defendants, where the arrest warrant directed defendants to arrest "Bernard Jackson" for the crime of selling heroin; plaintiff's name is Clarence Bernard Robinson and nothing in the record suggests that he was known by any other name; even if defendants can show that a confidential informant who told one defendant that "Bernard Jackson" lived at plaintiff's address was reliable, such defendant's affidavit shows that when the officers went to the address they were informed that Clarence Bernard Robinson was the only black male who lived there; defendants' affidavits asserted that an SBI agent who purchased the heroin in question identified a photograph of plaintiff and later identified plaintiff himself as the person from whom the purchase was made, but the SBI agent's affidavit was to the effect that he never positively identified either the photograph or the plaintiff as the heroin seller; and it was uncontradicted that even after defendants knew that they had arrested the wrong person, plaintiff was still held in jail overnight before he was allowed to go free.

APPEAL by plaintiff from *Collier, Judge.* Judgment entered 25 October 1976 in Superior Court, Forsyth County. Heard in the Court of Appeals 23 August 1977.

Plaintiff instituted this civil action against the defendant city and two of its police officers to recover damages on claims for malicious prosecution, false imprisonment, and abuse of process arising out of the arrest and jailing of the plaintiff on 10 December 1975. Summary judgment was granted in favor of all defendants on the grounds that there was no genuine issue as to any material fact and that defendants were entitled to judgment as a matter of law.

Plaintiff conceded upon this appeal that the entry of summary judgment in favor of the defendant, City of Winston-Salem, was proper because of its governmental immunity. Plaintiff fur-

ther conceded that the entry of summary judgment in favor of the two individual defendants on the claims for malicious prosecution and abuse of process was proper. Therefore, the sole issue raised on this appeal concerns the trial court's ruling granting summary judgment against the plaintiff on his claim for damages for false imprisonment against the two police officers, the defendants Hassell and Burton.

The pleadings and affidavits filed in support of the motion for summary judgment show the following:

On 9 December 1975 the Forsyth County Grand Jury returned as a true bill an indictment which charged that on 6 October 1975 one Bernard Jackson had feloniously sold heroin to W. M. Riggsbee. Based on the indictment, on 9 December 1975 an order for arrest of Bernard Jackson was issued by a magistrate pursuant to G.S. 15A-203(b)(1), and this order was placed in the hands of the police for service. At the time the sale referred to in the indictment was made, Riggsbee was working as an undercover agent for the State Bureau of Investigation. Earlier in December 1975, prior to return of the indictment, Officer Burton, one of the individual defendants, had been advised through a confidential informant "that an individual with a description similar to that of Clarence B. Robinson was living at 1121 East 21st Street, that this individual was named 'Bernard Jackson,' and that he was believed to be somehow involved with illegal drugs." On 10 December 1975 Officer Burton and other officers went to that address, where they talked with an occupant who advised that the only black male who lived there was Clarence Bernard Robinson. Following this a photograph of clarence Bernard Robinson was shown to the SBI agent, who stated that the person in the photograph was the person who had sold him drugs illegally on 6 October 1975 using the name of "Bernard" or "Denard," and that the person in the picture was the same person who had been indicted by the Grand Jury. With this information, Officer Hassell, accompanied by another officer, located the plaintiff, Clarence Bernard Robinson, and placed him under arrest. They took the plaintiff to the Clerk's office, where they contacted Officer Burton and the SBI agent and requested that they come in order to verify the prior photographic identification of the plaintiff, Robinson, as the Bernard Jackson referred to in the bill of indictment. Upon arrival of Officer Burton and the SBI agent at the

Clerk's office, the Agent stated that Mr. Robinson was the one who had sold him the drugs illegally and was the one the Grand Jury indicted for that offense. With this verification of the identity of Clarence Bernard Robinson as the person to be arrested, the officers proceeded to process him and take him to jail. Subsequently, the officers were advised by the sister of Clarence Bernard Robinson that he was not the same person as Bernard Jackson, that she knew Bernard Jackson, and that she would help them find Bernard Jackson. With this information, Officer Burton discussed the matter with the SBI agent, who stated that it was possible that Clarence Bernard Robinson and Bernard Jackson were not one and the same. The District Attorney, upon being advised of this, then arranged for the release of Mr. Robinson. Prior to the events above described, neither Officer Burton nor Officer Hassell had known or had ever heard of Clarence Bernard Robinson, and neither had any reason to want to cause him any harm.

In opposition to the defendants' motion for summary judgment, plaintiff filed his own affidavit and the affidavit of SBI Agent Riggsbee. In his affidavit plaintiff stated in substance that when the two officers came to his place of employment on the morning of 10 December 1975, he told them he was not Bernard Jackson, but despite this they handcuffed him and took him to the police station; that at the police station another policeman, whose name plaintiff did not know, also told them that plaintiff was not Bernard Jackson; that plaintiff continued to protest that the officers had arrested the wrong person, but they ignored his protests and appeared to be primarily interested in being photographed by the television cameras as they took plaintiff across the street from the police station to the jail; and that plaintiff was kept in jail overnight before he was informed by the officers that they had the wrong person and he could go.

SBI Agent Riggsbee stated in his affidavit that on 6 October 1975, while working in an undercover capacity, he purchased three bags of heroin from a black male known as "Denard" on Liberty Street in Winston-Salem; that this person remained unidentified to him, and on 4 December 1975 he told Officer Burton that he had been unable to identify Denard for such a long period that he was unsure that a positive identification could be made; that when Officer Burton showed him a photograph on the morning of 10 December 1975, he told Burton, "I can only say that

this might or might not be the suspect; both the suspect and the man in the picture have light skin"; that at approximately 10:00 a.m. on the same morning of 10 December 1975 he was in the Forsyth County Clerk's Office when the officers brought in Robinson, and at that time he took Burton aside and told him he could not positively identify the suspect; and that later the same morning he again told Burton that he could not make a positive identification.

From the order granting summary judgment in favor of all defendants, plaintiff appeals, contending that the court erred insofar as it granted summary judgment dismissing plaintiff's action for false imprisonment against the individual defendants.

Wilson and Morrow by Harold R. Wilson and John F. Morrow for plaintiff appellant.

Ronald G. Seeber, City Attorney and Womble, Carlyle, Sandridge and Rice by Roddey M. Ligon, Jr., for defendant appellees, City of Winston-Salem and D. G. Burton.

Hall, Booker, Scales and Cleland by George M. Cleland for defendant appellee, J. C. Hassell.

PARKER, Judge.

This appeal presents the following question: What is the proper test for determining the civil liability of a Police Officer for false imprisonment when the officer, acting under a valid arrest warrant, arrests the wrong person because of a mistake in the identity of the person arrested? So far as research of counsel and our own research reveals, this is a question of first impression in this State.

In *Melton v. Rickman*, 225 N.C. 700, 703, 36 S.E. 2d 276, 277-78 (1945), Barnhill, J. (later C.J.), speaking for our Supreme Court, said:

> A cause of action for false arrest or false imprisonment is based upon the deprivation of one's liberty without legal process. It may arise when the arrest or detention is without warrant, *Allen v. Greenlee*, 13 N.C., 370; *S. v. DeHerrodora*, 192 N.C., 749, 136 S.E., 6; *Cook v. Hospital*, 168 N.C., 250, 84 S.E., 352; *Hoffman v. Hospital*, 213 N.C., 669, 197 S.E., 161, or the warrant charges no criminal offense, *Rhodes v. Collins*,

> 198 N.C., 23, 150 S.E., 492, or the warrant is void, *or the person arrested is not the person named in the warrant.* 4 Am. Jur., 81, sec. 132. *All that must be shown is the deprivation of one's liberty without legal process.* (Emphasis added.)

Taken literally, this language would appear to impose strict liability upon the officer for false arrest in any case where the person arrested is not the person named in the warrant, no matter what care the officer may have exercised to avoid the mistake. The case in which this language appears, however, involved an action for abuse of criminal process, and the question whether in an action for false arrest or false imprisonment the officer who arrests the wrong person is strictly liable or is liable only in the absence of reasonable diligence was not presented for decision.

Those jurisdictions which have considered the question now presented have adopted two approaches to its solution. Some have adopted the rule of strict liability, that an officer in executing a warrant assumes the risk that the person arrested may be the wrong one. Under this rule, if the officer arrests the wrong person he will be liable for false imprisonment no matter the degree of care he may have exercised, at least absent misleading conduct on the part of the person arrested. Other jurisdictions have adopted the view that the good faith of the arresting officer and his reasonable care in ascertaining the identity of the person arrested with the one named in the warrant should be the proper test of his liability. Under this view, the officer will not be liable for false imprisonment for mistaking the identity of the person named in a warrant if he exercises reasonable diligence to ascertain the identity correctly before he serves the warrant. *See* 32 Am. Jur. 2d, False Imprisonment, § 71, p. 132; Annot., 127 A.L.R. 1057 (1940), supplemented in Annot., 10 A.L.R. 2d 750 (1950).

[1] The strict rule which requires the officer to assume the risk of mistake puts him in an unenviable dilemma: failure to serve the warrant may amount to dereliction of duty, but no amount of caution protects him from liability if he arrests the wrong person. In our opinion this imposes an unreasonable burden upon the officer who is both careful and diligent. Accordingly, we adopt the rule, which appears to be the one followed by the majority of jurisidctions that have considered the matter, and hold that liability for false imprisonment will be imposed only when the ar-

resting officer has failed to use reasonable diligence to determine that the party arrested was actually the person described in the warrant. For examples of cases following this rule, see *Miller v. Fano*, 134 Cal. 103, 66 P. 183 (1901); *Wallner v. Fidelity & Deposit Co.*, 253 Wis. 66, 33 N.W. 2d 215 (1948); State *ex rel. Anderson v. Evatt*, 63 Tenn. App. 322, 471 S.W. 2d 949 (1971).

[2] Under the rule which we adopt, the good faith of the arresting officer, in the sense of absence of malice, does not by itself relieve the officer from liability for compensatory damages. This is so because in this context good faith implies due diligence, and the "failure to exercise ordinary care . . . is inconsistent with good faith." *Blocker v. Clark*, 126 Ga. 484, 490, 54 S.E. 1022, 1024 (1906). Although lack of actual malice is no defense to a claim for compensatory damages, a showing of malice or of conduct demonstrating reckless disregard of the rights of others is required to support an award of punitive damages. *See Alexander v. Lindsey*, 230 N.C. 663, 55 S.E. 2d 470 (1949); *Rhodes v. Collins*, 198 N.C. 23, 150 S.E. 492 (1929).

[3] Applying the rule which we have adopted to the facts shown on the present record, we first note that the trial court's ruling granting summary judgment in favor of the defendants can be sustained only if the record, viewed in the light most favorable to the plaintiff as the party opposing the motion, discloses no genuine issue as to any material fact and that defendants are entitled to judgment as a matter of law. G.S. 1A-1, Rule 56; *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). We find that genuine issues as to material facts bearing on the question whether the defendant police officers exercised due care are raised on the present record. The officers acted under authority of an order for arrest which directed them to arrest Bernard Jackson. Plaintiff's name is Clarence Bernard Robinson, and nothing in the record suggests that he has ever been known by any other name. Even if Officer Burton can show that the confidential informant who told him that Bernard Jackson lived at plaintiff's address was reliable, a fact which was not asserted in any of defendants' affidavits, Burton's affidavit shows that when the officers went to the address they were informed that Clarence Bernard Robinson was the only black male who lived there. Although defendants' affidavits assert that the SBI agent who had made the drug purchase identified a

photograph of the plaintiff and later identified the plaintiff himself as the person from whom the purchase was made, Agent Riggsbee's affidavit sharply contradicts these assertions and is to the effect that Riggsbee never positively identified either the photograph or the plaintiff as the person from whom he purchased heroin. Finally, it is uncontradicted that even after the officers knew that they had arrested the wrong person, plaintiff was still held in jail overnight before he was allowed to go free. On this record, genuine issues of material facts were clearly raised bearing on the question whether each of the individual defendants exercised due care to avoid the mistake which was made. Accordingly, it was error to grant summary judgment dismissing plaintiff's claim for false imprisonment against the two individual defendants.

The result is:

The summary judgment dismissing all of plaintiff's claims against the defendant City of Winston-Salem is affirmed;

The summary judgment dismissing plaintiff's claims for malicious prosecution and abuse of process against the two individual defendants is affirmed;

The summary judgment dismissing plaintiff's claim for false imprisonment against the two individual defendants is reversed and this cause is remanded to the Superior Court in Forsyth County for further proceedings in connection with that claim.

Affirmed in part; reversed in part; and remanded.

Judges MARTIN and ARNOLD concur.

STATE OF NORTH CAROLINA v. ROGER WILLIAMS

No. 7723SC423

(Filed 16 November 1977)

1. Criminal Law § 91.4— absence of counsel—motion for continuance—denial proper

The trial court did not err in denying defendant's motion for continuance made on the ground that defendant's retained counsel was engaged in a trial in another county where the case had been continued once before at counsel's re-

quest because of a similar conflict; defendant was represented at trial by two attorneys who were proven advocates of many years' experience; and the two attorneys had been employed by defendant for several months prior to the trial and had every reason to be thoroughly familiar with the case.

2. **Criminal Law § 169— testimony excluded—failure to show what testimony would have been—no prejudice shown**

Where the record fails to show what witnesses' answers to questions would have been had they been permitted to testify, defendant has failed to show prejudicial error.

3. **Homicide § 15.4— psychiatrist's testimony—invasion of province of jury**

The trial court did not err in sustaining the State's objection to questions asked a psychiatrist as to whether he considered defendant a reliable informant and whether he had an opinion as to what might or could have prompted defendant to kill deceased, since the evidence was properly excluded on the ground that it invaded the province of the jury.

4. **Homicide § 26— unlawfulness—guidelines in jury instructions unnecessary**

Defendant's contention that the holding of *State v. Hankerson*, 288 N.C. 632, should be further refined to disallow an inference of unlawfulness unless appropriate guidelines are provided to the jury is without merit.

APPEAL by defendant from *Crissman, Judge.* Judgment entered 7 January 1977 in Superior Court, WILKES County. Heard in the Court of Appeals 18 October 1977.

Upon a plea of not guilty, defendant was tried on a bill of indictment charging him with the murder of Jimmy Lee Wilson on 11 September 1976. Evidence presented by the State tended to show:

Deceased was the former husband of Brenda Williams, wife of defendant. Deceased and Brenda were married on 1 March 1965 and had one child, Richard. Following a custody hearing, an order was entered on 9 September 1976 awarding Richard's custody to deceased effective at 12:00 noon on Saturday, 11 September 1976.

On that date deceased, his wife and their child, together with David and Helma Wilson, went to the residence of defendant to pick up Richard. The Wilsons were in the front seat while deceased, his wife and child were in the backseat. Upon stopping the automobile David Wilson got out on the driver's side and observed defendant and one Plato Shepherd sitting in chairs in the carport.

Defendant jumped up and with a high-powered rifle in his hand ran toward the car and said, "You son of a bitch, I told you

not to step on my property". Deceased, who was still in the backseat of the automobile said, "Sir, I am not on your property". Before deceased finished making that statement defendant fired the rifle, hitting deceased in his neck. Deceased said nothing to defendant except the statement aforesaid and never got out of the car.

Defendant then pointed the rifle at Helma Wilson, who was outside of the automobile, and said, "Get the hell out of here or I will kill you all". The Wilsons got back into the car and drove away. Deceased died from the gunshot wound inflicted.

Defendant presented evidence tending to show:

He met Brenda in the fall of 1972 while she was separated from deceased. Brenda and deceased were divorced in January of 1973 and defendant married her in March of 1973.

On 22 July 1973 deceased told defendant that if he ever whipped Richard, or touched him or spoke harshly to him, deceased would kill defendant even if he had to spend 20 years of his life in jail. On several occasions after that defendant tried to carry on casual conversations with deceased, but as deceased was talking there was something about his tone of voice to indicate that he "was ready to explode any minute".

In August of 1976 defendant asked his wife to write a letter to deceased telling him not to come to their home. On the day of the shooting, when the car drove up, defendant observed deceased in the car. Defendant picked up his rifle and approached the car with the intention of talking to deceased. Defendant thought that deceased had a pistol and was going to shoot him, thereupon, defendant jerked his rifle around and fired, hoping it would give him a chance to get away.

On cross-examination defendant stated that the only threats made against him by deceased were the incidents in July of 1973, an incident around Christmas of 1973 in which deceased allegedly followed Brenda, a telephone call by deceased to Brenda in August of 1976, and the appearance at defendant's home on the day in question. Defendant admitted that deceased never touched him or shot at him.

On 9 August 1976, at defendant's request, Brenda wrote deceased a letter telling him to stay away from defendant's prop-

erty. Thereafter deceased telephoned Brenda and stated, ". . . I can shoot too, and I can shoot pretty damn good. . . ."

The jury returned a verdict finding defendant guilty of second-degree murder and from judgment imposing a prison term of not less than 30 nor more than 35 years, he appeals.

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

Winston, Coleman and Bernholz, by Barry T. Winston, for defendant appellant.

BRITT, Judge.

[1] Defendant assigns as error the failure of the trial court to grant his motion for a continuance of the trial on the ground that his principal attorney was engaged in the trial of another case and could not be present.

On 22 December 1976 Attorney Barry T. Winston of Chapel Hill, N.C., filed a motion in this cause stating that he was counsel of record for defendant; that he was advised that the district attorney had calendared this case for trial on Monday, 3 January 1977; that defendant was free on bond; that he (Attorney Winston) had been appointed to represent one Haskins in Orange County Superior Court for attempted armed robbery; that Haskins was in jail, unable to make bond, and did not want a continuance of his case; that the Haskins case was calendared for trial in Orange County on 3 January 1977; that this case (Williams) had been continued once before at counsel's request because of a similar conflict; that the district attorney had refused to agree to a further continuance; that counsel would be able to appear at the 14 February 1977 Session of Wilkes Superior Court and would be ready for trial at that time.

The case was called for trial by the district attorney during the week of 3 January 1977, evidently on 5 January 1977. At that time defendant's attorneys, Messrs. Max Ferree and John Hall of the Wilkes County Bar, were present. Mr. Ferree asked for a continuance on the grounds set forth in Mr. Winston's motion. He stated that he had talked with Mr. Winston over the telephone the night before; that Mr. Winston advised him that the Haskins trial was in its second day and would probably consume the re-

mainder of the week. Mr. Ferree further stated that defendant's decision to employ Mr. Winston was without any suggestion from Mr. Hall or him, but that they readily agreed for Mr. Winston to appear with them in the case.

The district attorney opposed the motion for continuance, stating that the case had been continued once before on the same grounds. He pointed out that defendant had able representation in Messrs. Ferree and Hall; that this was the fourth time witnesses had travelled 197 miles to testify in the case, at considerable financial loss to them.

After stating that he felt that defendant was ably represented by Messrs. Ferree and Hall, the trial judge denied the motion for continuance.

Included in the record on appeal is an affidavit by Judge Hobgood, dated 4 April 1977, stating that he was the presiding judge at the 3 January 1977 Session of Orange Superior Court; that the Haskins trial began on the first day of the session and ended on Friday; that on Wednesday, 5 January, at the request of Mr. Winston, he attempted to call Judge Crissman on the telephone; that the lady who answered the telephone advised that Judge Crissman was on the bench; that he requested the lady to write Judge Crissman a note informing him of the call and that Mr. Winston was engaged in the trial of a case in Orange County; and that the lady returned to the telephone a short while later and stated that Judge Crissman said there "was no problem", that he was proceeding with the Williams trial without Mr. Winston.

Also included in the record is an affidavit by Attorney Winston dated 4 April 1977 stating, among other things, that he was privately employed to represent defendant Williams on 4 October 1976; that he appeared at a preliminary hearing on 15 October 1976; that although Messrs. Ferree and Hall were also employed to represent defendant, neither of them had the opportunity to review his file in the case or the benefit of interviews he had conducted with numerous witnesses.

Although the record does not reveal just when Messrs. Ferree and Hall were employed in the case, all indications are that they were employed prior to the time Mr. Winston was employed.

"A motion for continuance is ordinarily addressed to the sound discretion of the trial court and its ruling thereon is not subject to review absent abuse of discretion. *State v. Baldwin*, 276 N.C. 690, 174 S.E. 2d 526 (1970); *State v. Stinson*, 267 N.C. 661, 148 S.E. 2d 593 (1966). However, if the motion is based on a right guaranteed by the federal or state constitution, the question presented is one of law and not of discretion and the decision of the court below is reviewable. *State v. Phillip*, 261 N.C. 263, 134 S.E. 2d 386, *cert. denied* 377 U.S. 1003, 12 L.Ed. 2d 1052, 84 S.Ct. 1939 (1964) . . . ." Justice Huskins in *State v. Miller*, 288 N.C. 582, 587, 220 S.E. 2d 326, 331 (1975).

Defendant argues that since he is financially able to employ counsel of his choice, he has a constitutional right to be represented by any duly licensed attorney he might employ. Assuming, *arguendo*, that this is *generally* true, we think there have to be certain limitations. Were the right unlimited, conceivably all persons charged with offenses in North Carolina, or within a given area of the State, and able to employ their own counsel, could agree to employ one particular attorney and thus completely frustrate the trials of criminal cases.

We do not believe this is a right without limitation. We think a reasonable line must be drawn between the rights of defendants to be represented by counsel of their choice, and the rights of society to have the many criminal courts of the State operated with a reasonable degree of efficiency. That being true, considerable discretion has to be vested in the trial judge who is on the scene and has the superior vantage point to view and consider the merits of a particular case.

As of the time of the trial of the case at hand, Judge Crissman had presided over many sessions of criminal court in Wilkes County. He was well acquainted with the various lawyers at that bar, particularly with Messrs. Ferree and Hall, and was well qualified to pass upon their abilities to provide defendant with proper representation. While another judge might have ruled differently on defendant's motion for a continuance, we fail to perceive that Judge Crissman abused his discretion or deprived defendant of his constitutional right to be represented by competent counsel at his trial.

We think the case at hand is easily distinguished from the recent case of *State v. McFadden*, 292 N.C. 609, 234 S.E. 2d 742

(1977), cited by defendant. In that case the Supreme Court ordered a new trial where the trial court denied defendant's motion for a continuance on the ground that defendant's retained counsel was engaged in the trial of a case in federal court. In *McFadden*, it was shown that on the day the case was set for trial retained counsel's junior associate appeared and moved for a continuance; that the court ordered the trial to proceed, requiring said associate to represent defendant although he had practiced law only 18 months, had previously tried only one jury case, knew nothing about the case until 90 minutes before trial, and defendant insisted on his retained counsel being present. In the case at hand the two attorneys who represented defendant at trial were proved advocates of many years' experience, who had been employed by defendant for several months prior to the trial and had every reason to be thoroughly familiar with the case.

Defendant's first assignment of error is overruled.

[2] Next, defendant assigns as errors the trial court's exclusion of evidence tending to show the attitude of deceased as perceived by defendant and the number of occasions on which deceased had assaulted Brenda. We find no merit in these assignments. The record fails to disclose what the answers to the questions would have been, therefore, defendant has failed to show prejudicial error. *State v. Miller, supra.*

[3] By the next assignment of error argued in his brief, defendant contends the court erred in sustaining the State's objection to a question asked Dr. Rollins, a psychiatrist, as to whether he considered defendant a reliable informant. We find no merit in this assignment. We think the evidence was properly excluded on the ground that it invaded the province of the jury, it being their function to determine the credibility of a witness. *See State v. Carr*, 196 N.C. 129, 144 S.E. 698 (1928); *State v. Metcalf*, 18 N.C. App. 28, 195 S.E. 2d 592 (1973).

By his next assignment of error, defendant contends the trial court erred in excluding opinion testimony by Dr. Rollins as to what might or could have prompted defendant to kill deceased. We find no merit in this assignment.

Defense counsel propounded to Dr. Rollins a long hypothetical question which concluded by asking if he had an opinion as to what might or could have prompted defendant to kill

deceased. In the absence of the jury Dr. Rollins replied that in his opinion defendant might or could have been acting out of fear of deceased, that defendant's perception and judgment might or could have been impaired by the stress of the situation, and that defendant might or could have felt that he was acting in self-defense. Here again we think the answer would have invaded the province of the jury and that the trial court did not err in excluding the testimony. *State v. Carr, supra.*

Defendant assigns as error the following instruction to the jury:

> "If the State proves beyond a reasonable doubt that the defendant intentionally killed Jimmy Lee Wilson with a deadly weapon or that he intentionally inflicted a wound upon Jimmy Lee Wilson with a deadly weapon that proximately caused his death, you may but you need not infer, first, that the killing was unlawful and, second, that it was done with malice, and if nothing else appears the defendant would be guilty of second degree murder."

We find no merit in this assignment.

[4] Defendant argues that the holding of *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), should be further refined to disallow an inference of unlawfulness unless appropriate guidelines are provided to the jury. We find this argument unpersuasive and hold that the instruction was free from error.

Finally, by the last assignment of error argued in his brief, defendant contends the court in its jury charge did not properly correlate the defendant's apprehension of death or great bodily harm with the evidence of the violent character of the deceased, and the evidence of prior threats made by the deceased toward the defendant. Suffice it to say, we have carefully reviewed the jury charge relating to this contention but conclude that the charge was not erroneous and that the assignment is without merit.

For the reasons stated, in defendant's trial and the judgment entered, we find

No error.

Judges HEDRICK and MARTIN concur.

LINDA D. VAUGHN v. COUNTY OF DURHAM, DURHAM COUNTY DEPARTMENT OF SOCIAL SERVICES, GLADYS JOHNSON AND ANN TIETZ

No. 7714SC28

(Filed 16 November 1977)

1. **Counties § 9— foster care activities—governmental function—governmental immunity**

The placement of children in foster homes by a county department of social services is a governmental, not a proprietary, function, and such activity is protected by the doctrine of governmental immunity. Consequently, that doctrine precluded suit against a county and a county department of social services based on alleged negligence of employees of the department of social services in placing in plaintiff's home a foster child who carried an infectious disease and communicated the disease to plaintiff, thereby necessitating an abortion on the part of the plaintiff.

2. **State § 4— governmental immunity—tort action**

The Court of Appeals is bound by decisions of the Supreme Court that the doctrine of governmental immunity applies in tort actions against the State and its political subdivisions.

APPEAL by plaintiff from *Hobgood, Judge*. Order dismissing plaintiff's complaint entered 12 November 1976 in Superior Court, DURHAM County. Heard in the Court of Appeals 29 September 1977.

Plaintiff filed a complaint alleging that individual defendants Johnson and Tietz were employees of defendants Durham County and Durham County Department of Social Services; that plaintiff and her husband operated a foster home in which the defendants placed children for care; that defendants Johnson and Tietz knew the plaintiff intended to become pregnant in the near future; that defendant Johnson, acting as agent for Durham County and Durham County Department of Social Services, placed James Mason, a four-year-old child in the foster home of plaintiff; that the child was a carrier of cytomegalic inclusion disease, an infectious disease likely to cause birth defects in an unborn fetus if contracted by a pregnant female; that prior to his placement in the plaintiff's foster home, James Mason had been tested regarding cytomegalic inclusion disease, which tests concluded that James Mason was a carrier of the disease; that at the time of the placement, the Durham County Department of Social Services and its agent, Gladys Johnson, knew or in the exercise of due care

and reasonable diligence should have known of the diagnosis of James Mason and the dangers to others from the disease; that at the time of the placement and during the next five months subsequent thereto, no mention of the disease was ever made to the plaintiff by defendant Johnson, defendant Tietz after she replaced Johnson as the caseworker handling the placement of children in the home of the plaintiff, or any other employee of defendants Durham County and Durham County Department of Social Services; that after becoming pregnant the plaintiff contracted cytomegalic inclusion disease, underwent an abortion on the advice of her physician, has suffered greatly from the loss of the unborn child and has required and continues to require psychiatric counseling as a result of the negligence of the defendants.

Individual defendants Johnson and Tietz filed an answer denying negligence and asserting contributory negligence. Defendants Durham County and Durham County Department of Social Services asserted governmental immunity and filed an affidavit to the effect that Durham County had not waived its governmental immunity pursuant to G.S. 153A-435 by purchasing liability insurance. The defendants Durham County and Durham County Department of Social Services filed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted under North Carolina Rules of Civil Procedure 12(b)(6). Hobgood, Judge, dismissed the complaint of plaintiff against Durham County and Durham County Department of Social Services, ruling that governmental immunity applied to the functions of the Durham County Department of Social Services, that Durham County had not waived its governmental immunity, and that the doctrine of governmental immunity precluded suit by the plaintiff against the governmental entities.

Powe, Porter, Alphin & Whichard, by Charles R. Holton and Willis P. Whichard, for plaintiff appellant.

Thomas R. Odom for defendant appellee Durham County.

Lester W. Owen for defendant appellee Durham County Department of Social Services.

MORRIS, Judge.

[1] The plaintiff appellant's first argument to the Court is that the doctrine of governmental immunity does not apply to the

foster care activities of the Durham County Department of Social Services. The plaintiff points out that governmental immunity does not protect a municipal corporation when it engages in a proprietary function and contends that county foster care activities are proprietary in nature. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897 (1972). The plaintiff calls to the Court's attention cases holding the disposal of garbage and the operation of a county hospital to be proprietary functions and cites authority to the effect that "in cases of doubtful liability application of the rule should be resolved against the municipality." *Koontz v. City of Winston-Salem, supra* at 530; *Sides v. Hospital*, 287 N.C. 14, 213 S.E. 2d 297 (1975). The plaintiff contends that the providing of foster care is a case of doubtful liability and uncertain application of the doctrine, because there is no North Carolina case declaring any activity of a Department of Social Services to be a governmental function. The plaintiff then argues that the trend away from application of the immunity doctrine should be followed and that to grant governmental immunity in a case of first impression would be to expand the doctrine in contravention of a judicial mandate that areas of governmental immunity from suit should be restricted rather than expanded. Despite our sympathy for the plaintiff, we must hold otherwise.

The plaintiff's reasoning is persuasive but fails because the facts do not present a case of doubtful application of the doctrine. When the activity of a governmental entity is clearly governmental in nature, and not proprietary, the rule of sovereign immunity will protect the government from suit. As stated in *Moffitt v. Asheville*:

> ". . . where a city or town in exercising the judicial, discretionary or legislative authority, conferred by its charter, or is discharging a duty, imposed solely for the benefit of the public, it incurs no liability for the negligence of its officers. . . ." *Moffitt v. Asheville*, 103 N.C. 237, 254, 9 S.E. 695, 697 (1885).

The plaintiff appellant contends that this standard is vague and referred to *Sides v. Hospital*, supra, where the Court presented guidelines to determine whether an activity is proprietary or governmental in nature. In *Sides*, the Court noted that in all functions declared to be proprietary in nature, a monetary charge was

made for the service. The Court also declared a second factor to be whether the activity complained of has historically been performed by the government or by private corporations. The activity for which liability is urged in the instant case is the placement of a child in a foster home by the Department of Social Services. Applying the guidelines of *Sides* to the general principle announced in *Moffitt*, it becomes evident that the placement of children by the Department of Social Services is a governmental function entitled to immunity. Contrary to a monetary charge being made for the service, G.S. 108-66 requires the General Assembly to appropriate funds to the Department of Human Resources, to give assistance to needy children by providing foster care under the State Foster Home Fund. There is no routine charge made either for the provisions of foster care or for the service of placing a child in a foster home. The placement service is supported from the general tax revenues collected by the State and county governments. Reasoning from the guideline, the activity complained of by the plaintiff is governmental in nature.

The plaintiff contends that, historically, the provision of foster care has been performed by religious, charitable, or other private institutions. This ignores the North Carolina constitutional and statutory mandate to provide care for those in need. Article XI, § 4 of the North Carolina Constitution entitled Welfare Policy, Board of Public Welfare reads:

> "Beneficent provision for the poor, the unfortunate, and the orphan is one of the first duties of a civilized and Christian state. Therefore, the General Assembly shall provide for and define the duties of a board of public welfare."

Pursuant to this section the General Assembly has directed county departments of social services to administer certain programs for the benefit of children in need of foster care, and the General Assembly has also provided funds for foster care services. *See* G.S. 108-23(5), and G.S. 108-66. It is clear from the above that the Durham County Department of Social Services was "discharging a duty, imposed solely for the benefit of the public. . . ." *Moffitt v. Asheville*, *supra* at 254.

Plaintiff argues that statutory authorization of an activity is not enough to make the activity governmental and cites *Rhodes*

v. Asheville, 230 N.C. 134, 52 S.E. 2d 371 (1949), in which the maintenance of an airport was declared to be a proprietary function despite statutory authorization for the construction and maintenance of a municipal airport. The Court in *Rhodes* did state that statutory authorization is not decisive if the function is otherwise proprietary in nature. The Court did not state, however, that statutory authorization is irrelevant to the question of whether a function is proprietary or governmental. The statutory authorization here is not controlling, but it is significant in light of the funds provided to maintain the programs and the unrebutted fact that no monetary charge is made for the service of placing a child in a foster home. It is the totality of these factors which leads to the conclusion that the function was governmental.

A more general consideration was presented by this Court when we stated that "[t]he underlying test is whether the act is for the common good of all without the element of special corporate benefit, or pecuniary profit." *McCombs v. City of Asheboro*, 6 N.C. App. 234, 241, 170 S.E. 2d 169, 174 (1969). The placement of, and provision for children in a foster home is certainly "for the common good" pursuant to our constitutional duty to provide for "the poor, the unfortunate, and the orphan". It is also clear that such an activity is without "the element of special corporate benefit, or pecuniary profit" as no money is charged for the provision of such services. *McCombs v. City of Asheboro, supra.* This assignment of error is overruled.

[2] In her second argument, plaintiff contends that this Court should judicially abrogate the doctrine of governmental immunity. This we cannot do. We are bound by the decisions of the Supreme Court of this State, and in *Steelman v. City of New Bern* the Court stated:

> ". . . It is true that the doctrine was first adopted in North Carolina by this Court. However, this judge-made doctrine is firmly established in our law today, and by legislation has been recognized by the General Assembly as the public policy of the State. See *Galligan v. Town of Chapel Hill*, 276 N.C. 172, 171 S.E. 2d 427 (1969). . . .
>
> The General Assembly has modified the doctrine but has never abolished it. In fact, a bill was introduced in the 1971

General Assembly to abolish governmental immunity in its entirety, but his bill failed to pass.

It may well be that the logic of the doctrine of sovereign immunity is unsound and that the reasons which led to its adoption are not as forceful today as they were when it was adopted. However, despite our sympathy for the plaintiff in this case, we feel that any further modification or the repeal of the doctrine of sovereign immunity should come from the General Assembly, not this Court."

279 N.C. 589, 594-595, 184 S.E. 2d 239, 242-243 (1971).

Since *Steelman*, however, sovereign immunity has been abrogated in breach of contract actions against the State. *Smith v. State*, 289 N.C. 303, 222 S.E. 2d 412 (1976). The decision of the Court contained persuasive reasons for abandoning sovereign immunity in breach of contract actions. Chief Justice Sharp, writing for the Court, was careful to point out, however, that the decision did not apply to actions in tort. As Justice Sharp noted, many authors have listed extensive reasons for the abolition of sovereign immunity in tort, but until the Supreme Court or the General Assembly finds these reasons to be persuasive we are bound by the decision in *Steelman*. This assignment of error is overruled.

Affirmed.

Judges VAUGHN and CLARK concur.

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

No. 7610SC1029

(Filed 16 November 1977)

Negligence § 54— plaintiff working in building under construction—fall through elevator shaft—contributory negligence

In an action to recover damages for personal injury suffered by plaintiff when he fell into an elevator shaft in a building under construction, evidence was sufficient to show that plaintiff was contributorily negligent as a matter of law where it tended to show that plaintiff, an experienced steel erector, knowing of the danger presented by a 27½ inch gap between the floor decking and

the beam beside the elevator shaft and aware of the open elevator shaft itself, was proceeding in such a manner that he could not stop and disengage himself from a cable upon which his pants leg was caught, but instead jerked himself free, and his momentum caused him to make a misstep onto the steel beam and finally to topple into the shaft.

APPEAL by plaintiff from *Godwin, Judge.* Judgment entered 26 May 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 21 September 1977.

This is an action to recover damages for personal injury suffered by plaintiff due to a fall into an elevator shaft.

Defendant, W. H. Weaver Construction Company, was the general contractor for the construction of the Bath Building, a North Carolina State Government building on North Wilmington Street, Raleigh, North Carolina. Tri-State Erectors, Inc. was a subcontractor for the erection of the vertical steel columns and horizontal steel beams. Plaintiff was an employee of Tri-State Erectors, Inc.

At the time of his fall plaintiff was working on the fifth floor. His assignment was to paint red lead on portions of the steel beams which had recently been burned in the installation of steel bolts. The sub-contractor's work on the fifth floor had not been completed.

The jury rendered a verdict that plaintiff was not injured as a result of negligence of defendant. From a judgment for defendant, plaintiff appealed.

Under the provisions of App. R. 10(d) defendant cross-assigned as error the denial by the trial judge of its motion for a directed verdict upon the grounds, *inter alia,* that plaintiff's evidence showed that plaintiff was contributorily negligent as a matter of law.

Blanchard, Tucker, Twiggs & Denson, by Charles F. Blanchard, Marvin Schiller and Robert L. McMillan, by Marvin Schiller, for the plaintiff.

Smith, Anderson, Blount & Mitchell, by J. G. Billings and Joseph E. Kilpatrick, for the defendant.

BROCK, Chief Judge.

We first consider defendant's cross-assignment of error. If defendant is correct, the judgment for defendant must be affirmed. This is so because plaintiff's arguments Nos. 1, 2, and 3 relate to the trial court's instructions to the jury. These would have no bearing upon the question of whether plaintiff's evidence showed contributory negligence as a matter of law. His arguments Nos. 4 (A through I) are directed to rulings by the trial judge upon the admission of testimony and exhibits. A, B, C, D, E, and F relate to objections to defendant's evidence. These would have no bearing upon the question of whether plaintiff's evidence showed contributory negligence as a matter of law. G, H, and I relate to exclusion of testimony from plaintiff's witnesses bearing upon defendant's responsibility for conditions on the fifth floor. These would have no bearing upon the question of whether plaintiff's evidence showed contributory negligence as a matter of law. Plaintiff's arguments Nos. 5 and 6 are formal. They have no bearing upon defendant's cross-assignment of error.

At trial the plaintiff testified in pertinent part as follows:

"Using this model to illustrate, I stepped from this beam to the metal decking, started walking across, got my pant leg caught in a guide cable somewhere in here. A guide cable is a steel cable. And walking like this and jerked, and my momentum carried me forward and I tried to step to this beam to stop myself. My pant leg caught on one of these shear connectors or studs and I toppled over into the elevator shaft, and fell all the way to the ground below this into the pit.

I first saw the cable after it was locked on my leg. I just glanced back and saw it was a cable. Just the frayed ends of it came into contact with my pant leg. I had just a split second as I was going forward to glance back and see it and I jerked. The cable was a brown, rusty color. Most of the time they're five-eights or three-quarters of an inch thick. I assume that's what it was. I'd say the cable was laying somewhere right in here in one of these troughs, I guess. I mean I didn't see the cable but when I caught the frayed end. The decking has rusted due to the weather. The decking and the cable were similar in color.

I did not see the cable until I discovered that it was hooked into my trousers. I was walking across the ridges. I did not step on the cable. The only portion of the cable that I came into contact with was the frayed end. The frayed end was above the trough sticking up. The cable itself was down in the trough. I said I seen the frayed ends sticking up. The ridge wasn't but about that wide (indicating) and the frayed end was sticking up that caught my pant leg, so I would say it was down in the trough. The cable itself was down in the trough when I saw it for the first time."

* * *

"Yes, there is another gap of 27½ inches from the other side of the decking to the center of the beam next to the side of the elevator shaft.

The beam which was next to the elevator shaft was an 8 inch beam, and that is the beam that had the stud connectors on it. The little round studs were in the middle of the beam. They were 10 to 12 inches apart."

* * *

"I had a paint can in my left hand. I had a paint brush in my right hand.

Yes, I can use this brown piece of paper to illustrate to the jury and to the court the first step that I took. Yes, I can use the brown piece of paper to illustrate the second step I took (witness takes his second step and draws that on the brown piece of paper). That is when the cable caught on my leg, on my right leg. I looked down to see what was on there and went on like this (witness indicating) and I didn't have nowhere to step so I went to this beam (the beam beside the elevator shaft where the connector studs were).

I stepped onto that beam because I couldn't stop. I tried to get over to that beam to stop myself. My pant leg got caught on the second beam, on the shear connector stud. Then I was in the elevator shaft. I stepped off the decking with my left foot and then stepped with my right foot and that is where I got the cable caught on my trouser leg. Yes, that was the first time I had put my right foot down on the deck."

* * *

"I first noticed that the end of the cable had caught when I felt a pull and went like this (indicating). Yes, this marking on the brown paper is the heel print of my left foot. Yes, this would be my first step (indicating) and this would be my second step (indicating) and now my third step (indicating) and this would be my fourth step. That's when I was caught. I jerked, and I reached to that beam to stop myself. I couldn't take a normal step because I would have been in the opening. My right foot got caught on the beam. Yes, my right foot. I plunged into the elevator shaft right in here (indicating)."

* * *

"In the course of my ten years' experience as a steel erector, I have acquired a pretty good sense of balance. That's one of the things that I as a steel erector would pride myself in."

* * *

"On the day the accident happened, I was wearing regular work boots. They came up above 8 inches on my leg. I was wearing regular work pants. They were uniform type pants. They were fairly loose around the bottom, just regular uniform type work pants. No, they did not have a rolled up cuff on them. No, sir, they did not have a cuff. No, sir, I did not have my loose pants legs tucked in my boots. My pants legs came down on my legs to about shoe top level. Yes, sir, when I made my first step I stepped with my left foot. I stepped across the 27½ inch gap. And then when I made my second step I placed my right foot. And then when I was taking my third step that is when I first realized that I was caught.

I had the paint in my right hand. I never saw the cable before it actually caught on my pants. I was already in motion walking. It was at that point that I felt the cable on my right cuff, as I was in motion.

I was coming up with this foot (indicating) when I realized it was caught. I just pulled on up because I was walking. My momentum added to my jerk, and carried me over onto

the next beam beside the shaft. The jerk added to the momentum from my natural stride and carried me over there. Yes, I am saying it was a combination of both my natural momentum and the jerk. Yes, I did testify on a prior occasion when Mr. Jernigan took my deposition. Yes, on page 22 of my deposition Mr. Jernigan asked me the question 'Just one of your legs', and I answered 'My right leg.' I was referring to which leg caught the cable. Yes, Mr. Jernigan then asked me 'And what did you do with your right leg then', and I responded 'Jerked it loose.' Yes, and then Mr. Jernigan asked me the question, 'Jerked it and then what happened', and I responded 'Then I went forward and . . . .' I did say that.

And then when he asked me the question, 'When you jerked you went forward, is that right', and I responded 'Right'. That is true. When I gave Mr. Jernigan my testimony in the deposition I didn't say anything about the momentum from my natural stride having anything to do with it. But I told him I was walking across it. That stands to reason. No, when he asked me what caused me to go forward I said the jerk caused me to go forward, I didn't say anything about the momentum of my stride."

* * *

"Yes, I did make the statement in my deposition, 'And there was an old frayed cable here which I caught my foot or pant leg on and I pulled out of that and it gave me momentum going forward.' Yes, you did read that correctly.

The remainder of that question reads, 'and there was an old frayed cable here which I caught my foot or pant leg on and I pulled out of that and it gave me momentum of going forward. And I had to step from this deck which it shows right here over to this beam to stop myself when my pant leg got caught in one of the shear connectors or the studs and toppled me over into the elevator shaft.' That's what it says, and that's just what I showed you. Yes, sir, that is what I told him when he took the deposition.

No I had no difficulty seeing the open shaft when I got up from where I was working and turned to go across to where I was getting ready to work. Yes, I knew it was there.

I knew it was there and I knew it didn't have a cover on it, that's right. Yes, I knew that when I stepped over the metal decking—that after having made my first step with my right foot I was about within 3 feet of the first gap. No, after I felt the metal cable on my pant leg I didn't stop and put down the paint can and put down the brush and use my hands to get the cable off. I think there is something that would have prevented me from doing that. Try walking, getting foot caught and see if you can stop and go back. I was in the motion of walking, sir.

No, I didn't try to rock back and put things down and get myself uncaught with my hands."

In ruling on defendant's motion for a directed verdict, the familiar rule requires that the evidence be taken as true and considered in the light most favorable to the plaintiff.

Plaintiff's testimony shows that he was an experienced steel erector; that he was traversing the uncompleted fifth floor of the Bath Building; that he had a paint can in one hand and a paint brush in the other; that he had no difficulty seeing the 27½ inch opening between the metal decking and the beam upon which he was going to step; that he had no difficulty seeing the open elevator shaft just beyond the beam upon which he proposed to step; that he felt his pant leg catch on the frayed end of a cable lying in a trough of the metal decking upon which he was walking; that he glanced back and saw that his pant leg was caught upon the end of the cable; that he could not stop to disengage his pant leg from the cable end; that he jerked his right leg free of the cable; that due to the combined momentum from his stride and jerking his right leg free it was necessary to step across the 27½ inch gap onto the beam beside the open elevator shaft to undertake to regain his balance; that when he stepped onto the beam beside the open elevator shaft his pant leg caught on a stud and toppled him into the elevator shaft.

The plaintiff, as an employee of a subcontractor working on the construction of a building, was an invitee of the defendant, the general contractor. *Maness v. Fowler-Jones Construction Co.*, 10 N.C. App. 592, 179 S.E. 2d 816 (1971). An invitee must use reasonable care commensurate with the normal activities of the type of establishment whose invitation he accepts. *Holland v.*

Malpass, 266 N.C. 750, 147 S.E. 2d 234 (1966). Plaintiff's testimony in this case shows that he, an experienced steel erector, knowing of the danger presented by the 27½ inch gap between the floor decking and the beam beside the elevator shaft and aware of the presence of the open elevator shaft itself, was proceeding in such a manner that he could not stop and disengage himself from the cable upon which his pant leg was engaged, but instead jerked himself free and his momentum caused him to make a misstep onto the steel beam and finally to topple into the shaft. These facts clearly demonstrate a failure to use ordinary care for his own safety in light of the danger presented by the nature of the work in which he was engaged, the high altitude and openness of the uncompleted fifth floor, and the open elevator shaft, dangers of which plaintiff was fully aware. *See, Deaton v. Elon College*, 226 N.C. 433, 38 S.E. 2d 561 (1946). This failure to use ordinary care under the circumstances, "if not the sole proximate cause of his injury . . . was at least a direct contributing proximate cause thereof." *Id.*, 226 N.C. at 440, 38 S.E. 2d at 566.

Thus defendant's motion for directed verdict on the grounds that plaintiff was contributorily negligent as a matter of law should have been granted. The judgment for defendant is

Affirmed.

Judges BRITT and MORRIS concur.

MARIE CANNON PHILLIPS v. HOWARD LEE PHILLIPS, JR., INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF HOWARD LEE PHILLIPS; HOWARD LEE PHILLIPS III; JOHN BRADFORD PHILLIPS; AND EDGAR W. TANNER, CLERK OF THE SUPERIOR COURT OF RUTHERFORD COUNTY

No. 7729SC19

(Filed 16 November 1977)

1. Wills § 61— right to dissent—determination of "intestate share"

In establishing the right of a surviving spouse to dissent from her deceased spouse's will pursuant to G.S. 30-1(a)(1), the determination of "intestate share" is based on the value of the decedent's net estate as provided in G.S. 29-14(1) rather than on the value of decedent's gross estate as of the date of his death as provided in G.S. 30-1(c), the purpose of G.S. 30-1(c) being to provide a method for determining the "aggregate value" of property passing to the surviving spouse both under and outside the will as a result of decedent's death.

2. Wills § 61— right to dissent—property received less than intestate share

The aggregate value of property passing to plaintiff under and outside her deceased spouse's will was less than her intestate share, and plaintiff was thus entitled to dissent from the will, where the value of decedent's net estate after the deduction of mortgages and estate taxes was $168,665.70, plaintiff's intestate share was one-half of the net estate or $84,332.85, plaintiff received no property under the will, and plaintiff received $70,000 in life insurance proceeds outside the will.

APPEAL by defendants from *Griffin, Judge.* Judgment entered 29 October 1976 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 28 September 1977.

Plaintiff, successive surviving spouse of the deceased Howard Lee Phillips, instituted this action seeking a declaration of her right to dissent from the will of decedent.

Howard Lee Phillips died testate on April 8, 1975. At the time of his death he was survived by Howard Lee Phillips, Jr., a son by a former marriage, two grandchildren and plaintiff, his second wife. Under the terms of decedent's will, plaintiff was given nothing with the entire estate being divided equally among decedent's son and two grandchildren. Outside the will, plaintiff received as a result of her husband's death $70,000.00 in proceeds from Metropolitan Life Insurance Company.

On 11 September 1975, plaintiff filed with the Clerk of Superior Court a dissent from the will of Howard Lee Phillips and petitioned the court to appoint one or more disinterested persons to determine the value of decedent's estate. The court appointed Charles D. Owens who determined and established that the value of the decedent's gross estate as of the date of his death was $302,971.50.

In November, 1975, plaintiff tendered to the Clerk of Superior Court an order which contained a determination as a matter of law that plaintiff was entitled to dissent from the decedent's will, and further, was entitled to one-fourth of the net estate of decedent. This order was never entered by the clerk.

Plaintiff filed this action seeking a declaratory judgment on March 11, 1976. The matter came on to be heard before Judge Griffin in Rutherford County Superior Court. The parties stipulated to findings of fact substantially as detailed above. In addition, the parties stipulated that two deeds of trust en-

cumbered decedent's property: one to Northwestern Bank in the amount of $43,740.56, and the other to First Federal Savings and Loan in the amount of $38,853.79. The parties also stipulated that federal estate tax was an estimated $39,394.69 with accumulated interest of $1,877.16 and a penalty for delay in payment in the amount of $10,439.60.

Based on these findings of fact, the trial judge made the following pertinent conclusions of law:

> "2. That the surviving spouse, Marie C. Phillips [plaintiff], is entitled to dissent from the will of her deceased husband under the provisions of N.C. G.S. § 30-1(a)(1), as she received less than her intestate share from all other sources under or outside of her deceased spouse's will;
>
> * * *
>
> "5. That the plaintiff, as the surviving spouse, and under the provisions of N.C. G.S. § 30-3, is entitled to ¼ of the net estate of her deceased spouse."

To the entry of judgment in plaintiff's favor, defendants excepted and appealed to this Court.

Roberts, Caldwell and Planer, P.A., by Joseph B. Roberts III, for the plaintiff.

George R. Morrow and Robert W. Wolf, for the defendants.

MARTIN, Judge.

The question raised by defendants on this appeal is whether *intestate share*, as used in G.S. 30-1(a) for purposes of establishing the right of a surviving spouse to dissent from the will of the deceased spouse, is to be determined from the testator's net estate or from his gross estate valued as of the date of death. Defendants contend that the trial judge erred in concluding that plaintiff was entitled to dissent in that the trial judge computed plaintiff's intestate share from decedent's *gross estate* rather than making such determination from his *net estate* as required by G.S. 29-14(1). In considering defendants' contention, we note at the outset that the trial judge's conclusion of law does not indicate the manner in which it was reached and thus, we review only his result in light of the applicable law.

The determination of this figure—intestate share—is essential to the establishment of the right to dissent as prescribed by G.S. 30-1(a). Under G.S. 30-1(a), the right of a surviving spouse to dissent arises when the aggregate value of property passing under the will and outside the will to the surviving spouse as a result of the testator's death is (1) less than the intestate share of such spouse, or (2) less than one-half the net estate of the testator where neither lineal descendant nor parent survive.[1] Thus, where the testator is survived by his spouse and a lineal descendant, the right of the surviving spouse to dissent is established by the determination and comparison of two figures: (1) the aggregate value of property passing under the will and outside the will to the surviving spouse; and (2) the intestate share of the surviving spouse. In the instant case, as plaintiff received nothing under the decedent's will and $70,000 in insurance proceeds, the aggregate value of property passing under and outside the will to plaintiff is $70,000. Under the statutory scheme set out by G.S. 30-1(a), the only figure remaining to be determined in order to establish plaintiff's right to dissent is her *intestate share*. If, upon proper determination of this figure, the $70,000 in proceeds is *less than* plaintiff's intestate share, plaintiff has a statutory right to dissent from the decedent's will. G.S. 30-1(a)(1).

The determination of a surviving spouse's intestate share is governed in the first instance by the "Intestate Succession Act" (Chapter 29 of the General Statutes). Under the provisions of the Act, when an intestate is survived by only one child the share of the surviving spouse is one-half of the decedent's *net estate*, including one-half of the personal property and one-half undivided interest in the real property. G.S. 29-14(1). Net estate is defined by statute as the estate of a decedent exclusive of family allowances, costs of administration, and all lawful claims against the estate. G.S. 29-2(5). Thus, a literal interpretation of the term "intestate share" as it is employed by G.S. 30-1(a) for purposes of establishing the right to dissent requires intestate share to be computed from net estate.

This interpretation is less clear in view of the language of G.S. 30-1(c) which provides that:

1. The 1975 amendment to G.S. 30-1(a), which makes special provision for determination of the right to dissent where the surviving spouse is a successive or second spouse, is applicable only to the estates of decedents dying after 1 October 1975, and thus, does not apply to the instant case.

"*For the purpose of establishing the right to dissent, the estate of the deceased spouse* and the property passing outside of the will to the surviving spouse as a result of the death of the testator *shall be determined and valued as of the date of his death,* which determination and value the executor or administrator with the will annexed and the surviving spouse are hereby authorized to establish by agreement subject to approval by the clerk of the superior court. If such personal representative and the surviving spouse do not so agree upon the determination and value, or if the surviving spouse is the personal representative, or if the clerk shall be of the opinion that the personal representative may not be able to represent the estate adversely to the surviving spouse, the clerk shall appoint one or more disinterested persons to make such determination and establish such value. Such determination and establishment of value made as herein authorized *shall be final for determining the right of dissent and shall be used exclusively for this purpose.*" (Emphasis added.)

[1] The question now before this Court is whether the language of G.S. 30-1(c) emphasized above requires intestate share to be determined—for purposes of establishing the right to dissent—from decedent's *gross estate* valued as of the date of his death rather than from *net estate* as required by G.S. 29-14(1). In our view, G.S. 30-1(c) does not so affect the determination of *intestate share* for purposes of establishing the right to dissent. We hold that in establishing the right of a surviving spouse to dissent pursuant to G.S. 30-1(a)(1), the determination of intestate share is based on the value of the decedent's *net estate* as provided in Chapter 29 of the General Statutes.

In holding that G.S. 30-1(c) does not effectuate a change in the manner in which intestate share is to be determined, we do not render the statute without force or effect. We find that G.S. 30-1(c) provides a method for determining the value of benefits passing to the surviving spouse under and outside the will of the deceased spouse, which values are used to ascertain the "aggregate value" figure essential to the establishment of the right to dissent. Unlike the provisions in Chapter 29 providing for the determination of intestate share from net estate, no other statutory provision exists with respect to the time and manner of

determining these values which comprise the "aggregate value" figure. Thus, it is clear that the legislature intended G.S. 30-1(c) to remove this gap in the statutory scheme. However, it is not clear, and we do not so find, that G.S. 30-1(c) was also intended to change—for purposes of establishing the right to dissent—the method prescribed by Chapter 29 for determining intestate share. In this respect, we note that G.S. 30-1(a)(2) refers to the "net estate" of the deceased spouse for purposes of determining the right to dissent of a surviving spouse where the deceased spouse is survived by neither lineal descendant nor parent. This is further indication that the legislature found no inherent conflict between the concept of "net estate" and the establishment of the right to dissent.

We are not unmindful of the cases which hold generally that the right to dissent can be established once the determination and valuation prescribed by G.S. 30-1(c) has been made. *In re Cox*, 32 N.C. App. 765, 233 S.E. 2d 926 (1977); *In re Estate of Connor*, 5 N.C. App. 228, 168 S.E. 2d 245 (1969). Such language incorrectly suggests that *all* the figures necessary to establish the right to dissent can be determined as of the date of decedent's death pursuant to G.S. 30-1(c). In our view, only the first figure in the statutory scheme—the "aggregate value" of property passing to the surviving spouse under and outside the will—can be determined pursuant to G.S. 30-1(c). The other essential figure—intestate share—can be determined only at such time that "net estate" is ascertainable. We recognize that this may delay the final determination of a surviving spouse's right to dissent past the six month statute of limitation for filing a dissent. G.S. 30-2(a). However, the filing procedure prescribed by G.S. 30-2(a) is merely a limitation on the time within which a surviving spouse must note her dissent of record. It is not conditioned upon or determinative of the *right* to dissent which may not be established until some later date. *In re Cox, supra.* Thus, a surviving spouse can and, in fact, *must* file her dissent within the statutory time period even though her right to dissent is not finally established until "net estate" is acertained.

[2] Applying the foregoing principles to the case at bar, we find that plaintiff is entitled to dissent from the will of her deceased husband and accordingly, we affirm the judgment of the trial court. The record discloses that the estate of Howard Lee Phillips

was valued as of the date of his death at $302,971.50. The record further reveals that the real estate was encumbered by mortgages totaling $82,594.35 and that federal estate tax, including interest and penalty charges, was estimated at $51,711.45. These figures constitute "lawful claims against the estate" and must be deducted to determine net estate. G.S. 29-2(5). From the deduction of these amounts, net estate can be reasonably ascertained—in the amount of $168,665.70—for the purpose of computing the plaintiff's intestate share and establishing her right to dissent. Pursuant to G.S. 29-14(1), plaintiff's intestate share in the instant case is one-half of the sum ascertained as net estate or $84,332.85. Since the aggregate value of property passing to plaintiff under and outside her deceased spouse's will—$70,000—is *less than* her intestate share, plaintiff is entitled to dissent from the will.

Finally, we note that for purposes of determining the actual share to be distributed to plaintiff—a successive surviving spouse—as a result of her dissent, G.S. 30-3(b) is controlling and states that she is entitled to one-half of her intestate share or one-fourth of decedent's net estate.

The judgment entered by the trial judge is

Affirmed.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. WALLACE DEWITT BAKER

No. 7715SC426

(Filed 16 November 1977)

1. Burglary and Unlawful Breakings § 4— evidence of missing items—relevancy in breaking and entering case—no double jeopardy

In a prosecution for breaking and entering, the trial court did not err in allowing a witness to testify concerning silver dollars and stamps missing from her house, since that evidence was a relevant circumstance surrounding the breaking and entering charge and it did not constitute a retrial of defendant on a larceny charge of which he had earlier been acquitted.

2. Criminal Law § 169— testimony excluded—failure to show what testimony would have been—no prejudice shown

Where the record fails to show what a witness would have testified, defendant has failed to show prejudice by the exclusion of that testimony.

3. Criminal Law § 66.11— confrontation at crime scene—in-court identification of defendant proper

Evidence was sufficient to support the trial court's conclusion that defendant's confrontation with two witnesses at the scene of the crime immediately after he was apprehended was not improper and did not impermissibly taint in-court identification of defendant by the witnesses where the witnesses had ample opportunity to observe defendant in daylight as he ran from the scene of the crime, and after he was apprehended, officers returned him to the crime scene where the witnesses immediately identified him as the person they saw run from them.

4. Burglary and Unlawful Breakings § 3.1— description of premises—no fatal variance between indictment and proof

In a prosecution for breaking and entering, there was no fatal variance between the indictment which alleged that the home broken into and entered was owned by Elvin Kitchens and was located at Route 8, Box 138A, Homestead Road, Chapel Hill, and the evidence, which consisted of testimony by Linda Kitchens, that Elvin Kitchens was her husband and that they lived in a house on Homestead Road in Chapel Hill.

5. Criminal Law § 102— evidence introduced by defendant—concluding jury argument by State

The trial court properly denied defendant the last jury argument where defendant, during cross-examination of a witness, introduced a photograph taken of defendant following his arrest for the purpose of illustrating the witness's testimony.

APPEAL by defendant from *David I. Smith, Judge.* Judgment entered 3 February 1977 in Superior Court, ORANGE County. Heard in the Court of Appeals 18 October 1977.

Defendant was indicted for (1) feloniously breaking into and entering a dwelling occupied by Elvin Kitchens with intent to commit larceny, and (2) felonious larceny. It appears that in a former trial, he was acquitted of the larceny charge and a mistrial was ordered on the breaking and entering charge. At the trial under review, he was retried on the breaking and entering charge and pled not guilty.

Evidence presented by the State tended to show:

On the morning of 22 June 1976, Mrs. Burch, the Kitchens' neighbor, observed a green McBroom Rentals truck parked in front of the Kitchens residence. Since the Kitchens family was on vacation, she became suspicious and called her brother-in-law and his son to investigate.

Mr. Vernon Burch and his son, David Burch, immediately drove to the Kitchens residence and found the back door open. Mr. Burch sent his wife to call the sheriff. When David Burch rattled the front door, a man ran out the back door and Mr. Burch, who was standing at the back door, fired his gun at him. David Burch went to the back of the house and both he and his father observed the man for about thirty seconds as he ran out of the house, across a field and into some woods.

On the basis of the description of the intruder given to the investigating officer by Mr. Burch and his son, defendant was apprehended about a quarter of a mile from the house within ten minutes of the time the Burches observed him leave the Kitchens house. He was arrested, advised of his rights and returned to the scene of the alleged crime where he was identified immediately by the Burches as the man they observed run out of the Kitchens residence.

According to the arresting officers, defendant claimed he was seeking help for his disabled McBroom Rentals truck which he had left parked at the Kitchens residence. At the time of his arrest, defendant did not have in his possession any of the coins or stamps which Mrs. Kitchens testified were missing. However, the officers found a flashlight and a tape recorder which belonged to the Kitchens home sitting outside the back door of the house, and they had no difficulty starting the McBroom Rentals truck which defendant contended was disabled.

After voir dire examinations of both Mr. Burch and his son, the court ruled that their in-court identifications of defendant would be admissible since they were not tainted by any improper out-of-court procedure.

During the cross-examination of Deputy Horton, defendant introduced a photograph taken of him following his arrest for the purpose of illustrating Deputy Horton's testimony. Since defendant introduced this evidence, the trial court denied him the right to open and close the oral arguments to the jury.

The jury found defendant guilty of felonious breaking and entering. From judgment imposing a prison sentence of not less than eight nor more than ten years, he appealed.

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

Winston, Coleman and Bernholz, by Donald R. Dickerson, for defendant appellant.

BRITT, Judge.

Defendant makes thirty-three assignments of error and brings nine of them forward in his brief in seven arguments.

[1] In his first argument, he contends the trial court erred in admitting Linda Kitchens' testimony of missing silver dollars and stamps on the grounds that the testimony was irrelevant and prejudicial and subjected him to double jeopardy since he had already been acquitted on the larceny charge. We do not find this argument persuasive.

First, the testimony by the prosecuting witness concerning the missing property was not irrelevant.

> "In criminal cases every circumstance that is calculated to throw light upon the supposed crime is relevant and admissible if competent.
>
> "It is not required that evidence bear directly on the question in issue, and evidence is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known, to properly understand their conduct or motives, or if it reasonably allows the jury to draw an inference as to a disputed fact." 4 Strong's N.C. Index 3d, Criminal Law § 33, pp. 140-41.

The fact that Mrs. Kitchens' lockbox had been pried open and some silver dollars and stamps were missing was a relevant circumstance surrounding the breaking and entering charge. As stated in *State v. Jackson*, 28 N.C. App. 136, 137, 220 S.E. 2d 186, 187 (1975), "[t]he general rule in North Carolina is that '[e]very circumstance calculated to throw light upon the crime charged is admissible in criminal cases.' *State v. Robbins*, 287 N.C. 483, 490, 214 S.E. 2d 756 (1975); *State v. Hamilton*, 264 N.C. 277, 286-287,

141 S.E. 2d 506 (1965), *cert. denied* 384 U.S. 1020; 2 Strong, N.C. Index 2d, Criminal Law, § 33, p. 531."

Second, the testimony by Mrs. Kitchens concerning the missing property did not place defendant in double jeopardy on the larceny charge. "The test of former jeopardy is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. Hence, the plea of former jeopardy, to be good, must be grounded on the 'same offense,' both in law and in fact, and it is not sufficient that the two offenses grew out of the same transaction." 4 Strong's N.C. Index 3d, Criminal Law § 26.3, p. 112.

The crime of larceny of which defendant was acquitted was not the same offense in law and fact as the crime of breaking and entering. Testimony concerning the missing property was relevant to the breaking and entering charge and it did not constitute a retrial of defendant on the larceny charge.

In his second argument, defendant contends the trial court erred in failing to allow his counsel to question Vernon Burch with respect to previous testimony under oath concerning his description of the party who allegedly broke into the Kitchens home. We find no merit in this argument.

[2] It is a well-recognized rule that an appellant has the burden not only to show error but that the error was prejudicial. 1 Stansbury's N.C. Evidence, § 9 (Brandis rev. 1973). Defendant has failed to include in the record what the witness would have answered. "The exclusion of evidence, . . . cannot be held prejudicial when the record fails to show . . . what testimony would have been given by the witness." 1 Strong's N.C. Index 3d, Appeal and Error § 49.1, p. 313. *See State v. Poolos*, 241 N.C. 382, 85 S.E. 2d 342 (1955).

[3] Defendant contends in his third argument that the trial court erred by allowing in-court identifications of him by Vernon Burch and David Burch for the reason that the identifications were obtained in violation of his due process rights. This contention is without merit.

Defendant argues that the confrontation with the two witnesses at the scene of the crime immediately after he was apprehended was so impermissibly suggestive that it tainted their in-court identification.

"When the admissibility of in-court identification testimony is challenged on the ground that it is tainted by an out-of-court identification made under constitutionally impermissible circumstances, the trial judge must make findings as to the background facts to determine whether the proffered testimony meets the test of admissibility; when the facts so found are supported by competent evidence, they are conclusive on appellate courts." 4 Strong's N.C. Index 3d, Criminal Law § 66.20, p. 276. In order to successfully challenge an in-court identification as being tainted by an impermissibly suggestive out-of-court show-up, the defendant must show two things: (1) that the out-of-court identification was impermissibly suggestive, and (2) that it created a substantial likelihood of irreparable misidentification. 4 Strong's N.C. Index 3d, Criminal Law § 66.3, p. 247.

In the present case, the court conducted voir dire hearings and made findings of fact. The court concluded with respect to the identification made by each witness that his in-court identification was based upon his having seen the defendant on 22 June 1976, as he exited the Kitchens residence through the back door; that his identification was not tainted by an improper out-of-court procedure or suggestion; and that no improper out-of-court identification procedure was involved. We hold that the findings and conclusions were amply supported by the evidence.

Defendant contends in his fourth argument that the trial court erred by sustaining the State's objections to his questions during cross-examination of the investigating officer. Here again the record fails to disclose what the answers to the questions would have been, therefore, defendant has failed to show prejudicial error. *State v. Poolos, supra.*

[4] In his fifth argument, defendant contends that the trial court erred in denying his motion for a directed verdict of not guilty and a motion for a new trial. He argues that there is a fatal variance between the allegations in the indictment that the home broken into and entered was occupied by Elvin Kitchens and the proof in the case which was based on testimony of Linda Kitchens. We find no merit in this argument.

"The recommended practice is to identify the location of the subject premises by street address, rural road address, or some other clear description. However, an indictment under G.S. 14-54

is sufficient if the building allegedly broken and entered is described sufficiently to show that it is within the language of the statute and to identify it with reasonable particularity so that defendant may prepare his defense and plead his conviction or acquittal as a bar to further prosecution for the same offense." 2 Strong's N.C. Index 3d, Burglary and Unlawful Breakings, § 3.1, pp. 660-61. In a recent case, this court held that there was no fatal variance in an indictment for breaking and entering when the indictment described the building as being owned and operated by a corporation while evidence showed that it was owned and operated by a family. Although the indictment in that case was held insufficient on the larceny charge, it was sufficient for the breaking and entering charge because "the location of the subject premises [was] set forth with sufficient particularity to enable defendant to prepare his defense and to plead his conviction or acquittal as a bar to further prosecution for the same offense." *State v. Vawter*, 33 N.C. App. 131, 136, 234 S.E. 2d 438, 441 (1977). *See also State v. Sellers*, 273 N.C. 641, 161 S.E. 2d 15 (1968).

Applying these principles to the present case, we find that the indictment prepared pursuant to G.S. 14-54 charged that the defendant "unlawfully and wilfully did feloniously break and enter a building occupied by Elvin Kitchens used as a dwelling house located at Route 8, Box 138A, Homestead Road, Chapel Hill, N.C. with the intent to commit a felony therein, to wit: larceny." At the second trial, Linda Kitchens, the wife of Elvin Kitchens, gave the following testimony:

> "My name is Linda Kitchens. My husband is Elvin Kitchens. We have two children, ages nine and seven. We live in a tri-level brick and wood house on Homestead Road in Chapel Hill. It was our residence on the 22nd of June, 1976."

Based on the detailed description of the residence in the indictment and the testimony of Linda Kitchens, there was not a fatal variance in the allegation in the indictment and the proof at trial on the breaking and entering charge. The premises were described with sufficient particularity to enable the defendant to prepare his defense and to prevent a retrial on the same issues.

[5] In his sixth argument, defendant contends that the trial court erred in denying his motion for the last jury argument

because he asserts that he had not introduced evidence after the State had rested its case. We find no merit in this contention.

During the cross-examination of Deputy James Horton, defendant's counsel presented a photograph of defendant to the deputy for identification. After Deputy Horton identified the photograph, counsel made the following request:

> "Your Honor, at this time I move to introduce this into evidence in an effort to illustrate this witness' testimony as to the appearance of Wallace DeWitt Baker on the 22nd day of June, 1976."

The court allowed the admission of the photograph.

Rule 10, General Rules of Practice for the Superior and District Courts in North Carolina provides:

> "In all cases, civil or criminal, if no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong to him. If a question arises as to whether the plaintiff or the defendant has the final argument to the jury, the court shall decide who is so entitled, and its decision shall be final."

In the present case, the trial court ruled that defendant lost his right to conclude the argument to the jury when he introduced the photograph of the defendant. *See State v. Knight*, 261 N.C. 17, 134 S.E. 2d 101 (1964); *Golding v. Taylor*, 23 N.C. App. 171, 208 S.E. 2d 422, *cert. denied* 286 N.C. 334, 210 S.E. 2d 57 (1974).

In his seventh and final argument, defendant contends that the trial court erred in failing to summarize his evidence and thereby expressed an opinion in violation of G.S. 1-180. It suffices to say that we have carefully reviewed the record with respect to this contention and conclude that it too has no merit.

For the reasons stated, we conclude that the defendant received a fair trial, free from prejudicial error.

No error.

Judges HEDRICK and MARTIN concur.

STATE OF NORTH CAROLINA v. CALVIN CUNNINGHAM

No. 7726SC490

(Filed 16 November 1977)

1. **Criminal Law § 91.8— failure to grant continuance—absence of motion for continuance**

The appellate court will not consider the question of whether the trial court erred in failing to grant defendant a continuance so that a photograph, furnished to defendant on the day of trial and introduced by the State, could have been used in the preparation of defendant's defense where defendant made no motion in the trial court for a continuance.

2. **Criminal Law § 162.3— proper question—improper answer—necessity for motion to strike**

No issue was presented on appeal with respect to a medical expert's improper response to a proper hypothetical question where appellant made no motion to strike the improper response.

3. **Homicide § 15.1— cause of death—hypothetical questions—assumption wounds inflicted by defendant**

Although two hours intervened between the time defendant stabbed deceased in a restaurant and the discovery of deceased's body at another location, hypothetical questions posed to two medical witnesses were not improperly phrased because they allowed the witnesses to assume that wounds observed in an autopsy as the cause of death were the same wounds inflicted by defendant, since defendant introduced no evidence of an intervening agent which might have caused deceased's wounds, and the jury would have been justified in concluding that the wounds which caused the death were the wounds inflicted by defendant.

4. **Homicide §§ 23.2, 30— intervening time between stabbing and death—absence of instructions on intervening cause, felonious assault**

Evidence in a homicide case that some two hours elapsed between the time defendant stabbed deceased in a restaurant and the discovery of deceased's body at another location did not require the court to instruct on intervening agency or on assault with a deadly weapon with intent to kill absent any evidence of an intervening agency as the cause of death.

APPEAL by defendant from *Howell, Judge*. Judgment entered 13 January 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 20 October 1977.

Defendant was indicted for murder and upon his plea of not guilty the jury returned a verdict of guilty of voluntary manslaughter. From a judgment sentencing him to imprisonment for a term of 20 years, defendant appealed.

Prior to trial the defendant moved to dismiss the charge on the ground that the State had not fully complied with a pretrial discovery order entered 23 November 1976 by failing to furnish to defendant a photograph of the deceased used by the State at trial. The State argued that it had not received the photograph until the day of trial, that one week prior to trial it had informed the defendant of its intent to use the photograph at trial, and that it had given the photograph to defendant as soon as possible—the morning of the trial. The trial judge denied defendant's motion to dismiss but permitted defendant's attorney to show the photograph to defendant's witnesses prior to the trial.

At trial, the State offered evidence tending to show: that on the evening of 28 June 1976, defendant and four other people were gathered in Rudean's Restaurant in Charlotte; that around 8:30 p.m. the deceased, Charles Anthony, appeared in the restaurant; that when Anthony entered the restaurant defendant got out of the booth where he was seated with three other people and went into the restroom; that Anthony then took the defendant's seat in the booth; that defendant suddenly ran out of the restroom and began striking Anthony with a small knife; that defendant struck Anthony several times with the knife, and Anthony began to bleed profusely; that Anthony struggled out of the booth and staggered toward the door at which time defendant stabbed him in the back; that Anthony then went out the door and was not seen again by the people in the restaurant; that when Anthony departed, defendant stated that he thought Anthony had come to the restaurant to kill him; that Anthony was discovered bleeding profusely in an empty bus at the bus station at approximately 10:30 p.m. by a police officer; that Anthony was taken to a hospital where he later died. The State also presented medical testimony that Anthony died as a result of complications from knife wounds.

Defendant's evidence tended to show that on the day prior to the knifing defendant learned that he had been accused by Mary Douglas of stealing money from her; that this frightened defendant because he had heard that a boyfriend of Mary Douglas had killed a man accused of stealing from her; that defendant had learned that Miss Douglas had spoken with three men about the alleged theft; that on the night of the stabbing Anthony entered Rudean's Restaurant while two other men remained outside; that

defendant went to the restroom because he was frightened by the situation and feared the men were there to harm him; that when defendant attempted to leave the restaurant, Anthony called him names, pulled something out of his sock, and attempted to strike the defendant; that in response to this assault defendant pulled his small knife from his pocket and slashed, but did not stab, the deceased; that the deceased then ran from the restaurant after being "cut" by the defendant only once, somewhere around his side or abdomen; that the men accompanying Anthony followed defendant when he left the restaurant; that defendant was in such fear of these three men that he became hysterical, and his cousin, with whom he was hiding, called the police.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General Alan S. Hirsch, for the State.

Public Defender Michael S. Scofield, by Assistant Public Defender Mark A. Michael, for defendant appellant.

MORRIS, Judge.

[1] Defendant's first assignment of error is directed to the admission of a photograph of the deceased into evidence over his objection. He argues that the court should have granted the defendant a continuance so that the photograph could be used by the defendant to prepare his defense. The defendant claimed that the State did not fully comply with a pretrial discovery order by not giving a copy of the photograph to the defendant until the day of the trial.

Even a cursory reading of the record reveals that at no time during the discussion with respect to the photograph did defendant request a continuance, nor does he argue that it was improper for the court to deny his motion to dismiss. This Court is limited on appeal to matters raised at trial and properly presented on appeal. We cannot consider the failure of the trial court to allow a continuance when the defendant made no such motion to the judge below. *State v. Taylor*, 240 N.C. 117, 80 S.E. 2d 917 (1954); *State v. White*, 24 N.C. App. 318, 210 S.E. 2d 261 (1974). This assignment of error is overruled.

[2] The defendant's second argument, based upon assignments of error Nos. 7 and 9, is directed to the expert and opinion

testimony of Drs. Wood and Overton. He contends that Dr. Wood invaded the province of the jury by failing to phrase his answer in terms of what "could or might have" been the cause of death, and he contends that the hypothetical questions posed to the doctors were improper in that they assumed that the defendant had inflicted the stab wounds upon which the doctors relied in formulating their opinions as to the cause of death. Below is the question and answer of Dr. Wood to which defendant excepted:

> Q. Dr. Wood, if the jury should find beyond a reasonable doubt that on the 28th day of June, 1976 at approximately 8:30 or 9:00 p.m., that Charles Anthony received multiple stab wounds in Rudean's Grill; that upon the next morning at 9:30 a.m. he was in Charlotte Memorial Hospital, and remained there in critical condition, unable to speak, until his expiration, until he died, do you have an opinion, based upon those facts, and your autopsy, as to what could have, or might have, caused his death?
>
> MR. PAWLOWSKI: I object, Your Honor, for the record.
>
> COURT: Overruled. EXCEPTION NO. 7
>
> My opinion is that Charles Anthony died as a result of stab wounds, complications of stab wounds."

The question was properly phrased for a hypothetical question and it is Dr. Wood's answer which the defendant contends was improperly phrased and as such, unresponsive to the question asked. The question asked for an opinion as to what "could, or might have caused the death", and the answer was phrased as a conclusory statement. The rule is that when the question asked the witness is competent, exception to his answer when incompetent in part, should be taken by a motion to strike out the part that was objectionable. *State v. Patterson*, 284 N.C. 190, 200 S.E. 2d 16 (1973). The objection taken to an unobjectionable question is not sufficient to raise an issue on appeal arising as a result of an improper answer. *State v. Gooding*, 196 N.C. 710, 146 S.E. 806 (1929); *Highway Comm. v. Black*, 239 N.C. 198, 79 S.E. 2d 778 (1954); *State v. Wilson*, 16 N.C. App. 307, 192 S.E. 2d 72 (1972). The defendant did not move to strike the answer and cannot take exception to it at this point.

[3] The defendant also contends that the questions posed to the two medical witnesses were improperly phrased because they

allowed the doctors to assume that the wounds observed as the cause of death in the autopsy were the same wounds inflicted upon the deceased in Rudean's Restaurant. The defendant argues that there was an intervening period of two hours between the occurrence of the stabbing incident at Rudean's and the discovery of the deceased in the empty bus, a period during which the deceased might have received other knife wounds. A hypothetical question should: (1) Include only such facts as are in evidence or such as the jury will be justified in inferring from the evidence; (2) include all of the material facts which will be necessary to enable the witness to form a satisfactory opinion. 1 Stansbury, N.C. Evidence 2d, § 137, pp. 452, 453 (Brandis Rev. 1973).

There was substantial evidence that the defendant repeatedly stabbed the deceased in the chest area and that blood immediately began to soak the front of the deceased's shirt. The jury would be justified in concluding that the wound in the neck, attributed by the doctors as the cause of death, was one of the wounds inflicted by the defendant in Rudean's Restaurant. Defendant introduced no evidence of an intervening agent which might have caused the wounds of the deceased. The hypothetical questions were proper in form as they were based on the evidence presented. It is clear that the jury was to decide whether the wounds forming the basis of the doctors' opinions were a result of the incident at Rudean's Restaurant, and the hypothetical question posed would not have confused the jury on this point. This assignment of error is overruled.

[4] The defendant's last two assignments of error presented are directed to the failure of the court to instruct the jury on the lesser offense of assault with a deadly weapon with intent to kill, arguing that such an instruction was necessary because the defendant contended that an intervening agency was the cause of the death. The purposes of the charge are the clarification of issues, the elimination of extraneous matters, and the application of law arising from the evidence presented. *State v. Jackson*, 228 N.C. 656, 46 S.E. 2d 858 (1948). It is error for the court to charge the jury on a principle of law which does not arise from the evidence. *State v. Duncan*, 264 N.C. 123, 141 S.E. 2d 23 (1965); *State v. Gurley*, 257 N.C. 270, 125 S.E. 2d 445 (1962). The defendant presented no evidence of an intervening agency inflicting wounds upon the deceased and was not entitled to such an in-

struction. It is true that the witnesses to the stabbing did not see the deceased drop dead on the spot, that the deceased was not seen for a brief period of time after the stabbing before he was discovered by a policeman, and that the defendant did not die until a few days after the stabbing. The State's evidence relating to the cause of death was, therefore, circumstantial. The defendant requested and received an instruction regarding proof of death by circumstantial evidence. To this the defendant was entitled. Absent any evidence of an intervening agent as the cause of death, the defendant was not entitled to an instruction on intervening agency, or assault with a deadly weapon with intent to kill.

No error.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. JACK TUNNEY BUCKNER

No. 7727SC414

(Filed 16 November 1977)

1. **Automobiles § 126.4— officer administering breathalyzer test—court's attempt to clarify testimony—no expression of opinion**

In a prosecution for driving under the influence, the trial court did not express an opinion on the evidence when, during testimony by the officer who administered the breathalyzer test, the court attempted to clarify the testimony of the witness by having him relate exactly what rights were explained to defendant.

2. **Automobiles § 126.3— breathalyzer test—time to exercise rights—full thirty minutes provided by statute not mandatory**

G.S. 20-16.2 which provides for the administering of breathalyzer tests allows a delay not in excess of thirty minutes for defendant to exercise his rights, and a delay of less than thirty minutes is permissible where, as in this case, the record is barren of any evidence to support a contention, if made, that a lawyer or witness would have arrived to witness the proceeding had the operator delayed the test for the full thirty minutes.

3. **Criminal Law § 86.2— cross-examination of defendant—prior convictions—presumption of regularity**

Defendant's contention in a prosecution for driving under the influence that the State must show that defendant was represented by counsel or voluntarily waived his right to counsel at prior convictions before the convictions could be used by the State to impeach defendant is without merit, since there

was no burden on the State to prove the regularity of the convictions, but instead the burden was on defendant to show the prior convictions to be void and therefore improper subjects of cross-examination.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 8 March 1977 in Superior Court, GASTON County. Heard in the Court of Appeals 17 October 1977.

Defendant was charged with driving under the influence of alcohol. Defendant was convicted in District Court and appealed the conviction to Superior Court where he entered a plea of not guilty. The jury found defendant guilty, and from a judgment sentencing him to 90 days, 78 of which were suspended upon conditions, defendant appealed.

The State's evidence tended to show: that Officer L. E. Williams observed defendant operating his car on I-85 at 8:30 p.m. on 6 October 1976; that Officer Williams observed defendant's car weaving from the shoulder of the road across the dividing line and back into the right-hand lane and stopped the defendant's car; that when the officer spoke with defendant he smelled alcohol on his breath and noticed that his speech was slurred; that Williams then arrested defendant, informed him of his "*Miranda* rights", and took him to the police station for a breathalyzer test; that upon their arrival at the police station at approximately 9:00 p.m., Williams, in the presence of Officer Helton, a licensed breathalyzer operator, asked defendant to take a breathalyzer test. Helton testified that he advised the defendant of his rights pertaining to the breathalyzer test; that defendant refused to sign the rights form; that defendant made a phone call from the breathalyzer room during a 20-minute "observation period"; that defendant was unable satisfactorily to perform the balance and walking tests as directed by Officer Williams during the observation period; that, in his opinion, defendant was under the influence of alcohol; that after observing defendant for 20 minutes he administered the breathalyzer test which showed a blood alcohol content of .12%.

Defendant offered evidence tending to show: that he had drunk only two beers on the day of his arrest; that he was not under the influence; that he had been seen by a friend shortly prior to the arrest and was walking and talking in his normal manner; that he walks with a limp as a result of injuries suffered

in a fire and that he could not perform the walking and balance tests adequately because of his limp.

Attorney General Edmisten, by Assistant Attorney General William B. Ray and Associate Attorney Mary I. Murrill, for the State.

Harris and Bumgardner, by Don H. Bumgardner, for defendant appellant.

MORRIS, Judge.

[1] The defendant, by his first assignment of error, contends that the trial judge expressed an opinion in favor of the State in violation of G.S. 1-180. During the testimony of State's witness Helton, after he had thoroughly explained the procedures followed when he administered the breathalyzer test, the following exchange took place:

> "QUESTION: Now, after having done what you have testified to that you did, what was the result of the test?
>
> MR. BUMGARDNER: OBJECTION.
>
> THE COURT: SUSTAINED. Go ahead with the foundation as to what rights were explained. He stated he gave him his rights, but I don't recall that he explained specifically what rights he read."

Helton then proceeded to read a copy of the rights of which he advised the defendant before administering the test. The defendant argues that this was an expression of opinion by the trial judge and violated the impartiality required of our trial judges. We disagree. The purpose of G.S. 1-180 is to keep inviolate the distinctions between the role and functions of the judge and jury —the judge as dispenser of the law, and the jury as the trier of facts—and thereby preserving the integrity of trial by jury. *Morris v. Tate*, 230 N.C. 29, 51 S.E. 2d 892 (1942). It is the expression of an opinion by the trial judge leading the jury to conclude that he favors the State or finds the credibility of the State's evidence to be more persuasive that is to be guarded against. *Belk v. Schweizer*, 268 N.C. 50, 149 S.E. 2d 565 (1966). There is nothing in the judge's comment lending itself to the conclusion that he held an opinion regarding the evidence on the case before him. The defendant has the burden of showing that the remarks made were

prejudicial to him under the circumstances under which they were made and a mere possibility of prejudice is insufficient to meet the burden. *State v. Green*, 268 N.C. 690, 151 S.E. 2d 606 (1966); *State v. Green*, 285 N.C. 482, 206 S.E. 2d 229 (1974). The defendant has failed to meet this burden. The trial judge was not expressing an opinion regarding the evidence or the State's case, he was merely attempting to clarify the testimony of the witness by having him relate exactly what rights were explained to the defendant. The criterion for determining whether a trial judge has deprived the defendant of his right to a fair trial by improper comments or remarks is the probable effect upon the jury, considered in the light of circumstances under which it was made. *State v. Cox*, 6 N.C. App. 18, 169 S.E. 2d 134 (1969). There was nothing in this exchange to indicate that the judge held an opinion, or that the role of the jury as trier of fact might be prejudiced. This assignment of error is overruled.

[2] The defendant's second assignment of error is directed to the admission into evidence of the result of the breathalyzer test. The administering officer observed the defendant for a period of 20 minutes. The defendant contends that G.S. 20-16.2 requires the operator to wait 30 minutes before administering the test, absent a showing by the State of a waiver by defendant of his right to have an attorney or witness present. Defendant does not contend that a witness or lawyer was on the way to the scene of the test nor that an additional 10 minutes would have resulted in any change of status. The pertinent part of the statute reads as follows:

> "(a) . . . The person arrested shall forthwith be taken before a person authorized to administer a chemical test and this person shall inform the person arrested both verbally and in writing and shall furnish the person a signed document setting out:
>
> . . .
>
> (4) That he has the right to call an attorney and select a witness to view for him the testing procedures; but that the test shall not be delayed for this purpose for a period in excess of 30 minutes from the time he is notified of his rights."

It is clear that the statute constitutes a maximum of 30 minutes delay for the defendant to obtain a lawyer or witness. It does not

require that the administering officer wait 30 minutes before giving the test when the defendant has waived the right to have a lawyer or witness present or when it becomes obvious that defendant doesn't intend to exercise this right.

> "If it is determined that he was advised of such rights, and did not waive them, the results of the test are admissible into evidence only if the testing was delayed (not to exceed thirty minutes) to give defendant an opportunity to exercise such rights." *State v. Shadding*, 17 N.C. App. 279, 194 S.E. 2d 55 (1973), *cert. denied* 283 N.C. 108, 194 S.E. 2d 636 (1973).

Defendant was informed of his rights but did not sign the waiver of rights form. Defendant argues that *State v. Shadding, id.*, requires a hearing at which the State must affirmatively show that defendant waived his rights or that a period of 30 minutes was allowed for defendant to exercise his rights. No hearing was held in the instant case but in *Shadding* this Court held that the trial judge must conduct a hearing when objection is made to the admission of the result of a breathalyzer test on the ground that defendant was not informed of his rights. The grounds for objection to the admission of the result of the test in the instant case was that *the State had not shown that defendant had waived his rights*, not that defendant was uninformed of his rights. There is no question that defendant had been informed of his rights and a hearing as required under *Shadding* was not necessary. The record also discloses that defendant was afforded an adequate opportunity to exercise his rights under the statute, as he was observed for a 20-minute period, during which he made a phone call, before he was given the test. The statute provides for a delay *not in excess of 30 minutes* for defendant to exercise his rights and a delay of less than 30 minutes is permissible where, as here, the record is barren of any evidence to support a contention, if made, that a lawyer or witness would have arrived to witness the proceeding had the operator delayed the test an additional 10 minutes. This assignment of error is overruled.

[3] The defendant's third assignment of error is directed to the eliciting of evidence of previous convictions of traffic offenses, i.e., drunken driving, by cross-examination of defendant. The defendant contends that the State must show that the defendant was represented by counsel or voluntarily waived his right to counsel at the prior convictions before the convictions may be used to im-

peach the witness. This assignment of error is without merit. The defendant does not contend that the prior convictions were void, but that the State must prove them to be valid before the convictions can be used to impeach the witness. The burden is on the defendant to show the prior convictions to be void and, therefore, improper subjects of cross-examination. There is no burden on the State to prove the regularity of the convictions. Regularity is to be presumed. The defendant offered no evidence proving the prior convictions to be void and, therefore, failed to disqualify the convictions as grounds for impeachment. This assignment of error is overruled.

No error.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. COY KIRKPATRICK, ANTHONY JONES, AND RANDY O. LEE

No. 7715SC356

(Filed 16 November 1977)

1. **Burglary and Unlawful Breakings § 1.1— breaking or entering automobile—intent to commit felonious or misdemeanor larceny**

G.S. 14-56 makes it a felony to break or enter a motor vehicle containing any goods, wares, freight or other things of value with intent to commit larceny therein, whether the larceny be felonious or misdemeanor larceny.

2. **Burglary and Unlawful Breakings § 5.7— breaking or entering automobile—larceny—sufficiency of evidence**

The State's evidence was sufficient for the jury on issues of the guilt of two defendants of felonious breaking or entering of an automobile and larceny therefrom where it would permit the jury to find: one defendant entered a garage for about 30 seconds, undertook to remove a C.B. radio from an automobile therein, left his fingerprint on the dashboard, returned to the automobile in which defendants were traveling and drove it while the second defendant and another went to the garage and successfully removed the C.B. radio; the second defendant left the garage with the C.B. radio, ran when a police officer commanded him to stop, placed the radio beside a tree as he ran, and continued running until cornered in a parking lot.

3. **Criminal Law § 92.5— denial of motion for severance**

The trial court did not err in the denial of defendant's motion to sever his trial from that of two codefendants on charges of breaking or entering an

automobile and larceny of property therefrom where each defendant was charged with participation in the same offenses at the same time and place.

APPEAL by defendants from *Smith (David I.), Judge.* Judgments entered 17 December 1976 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 26 September 1977.

Each defendant was tried upon a bill of indictment charging felonious breaking or entering a motor vehicle with intent to commit larceny, and with misdemeanor larceny therefrom. The cases were consolidated for trial over the objection of defendant Anthony Jones. Each defendant was found guilty as charged.

The State's evidence tends to show the following: About 1:00 a.m., on 27 July 1976, Mr. Mays was awakened by a car stopping in front of his house on Anthony Street in Burlington. Mays looked out his window and observed a light colored old model Rambler automobile. Two black males exited the Rambler and walked up Anthony Street towards Mr. Cassidy's house and garage. A third black male was driving the Rambler. The two entered Mr. Cassidy's garage and stayed about thirty seconds. They then walked back towards the Rambler, reentered the car, and drove slowly down Anthony Street until the Rambler was out of Mays' view. Shortly thereafter, two black males, one wearing a light colored T-shirt and the other wearing dark clothing walked back up the street towards Cassidy's garage. Mrs. Mays then called the police. The two black males went into Cassidy's garage. Police Officer Gregory was in the area and responded to the call from Mrs. Mays. As the police car turned onto Anthony Street, Officer Gregory observed the Rambler parked about 300 feet from Cassidy's residence. Its lights were on and its motor was running. As the police drove up behind the Rambler, defendant Jones stepped out from the driver's side and raised the hood. As the officer was questioning Jones, Mr. Mays saw the two black males emerge from Cassidy's garage where they had been for about four minutes. The one in the dark clothing appeared to be carrying something. Officer Gregory saw the two as they ran around the corner from Cassidy's house and towards the Rambler. Defendant Lee, wearing a light colored T-shirt, stopped about 10 feet from the Rambler when commanded by the officer. Defendant Kirkpatrick, dressed in dark clothing, who was known and

recognized by the officer, fled on foot. Officer Gregory radioed for assistance stating that Coy Kirkpatrick was fleeing on foot and Officer Felts, who was at the scene by this time, gave chase on foot. Defendant Kirkpatrick ran across Mays' yard and into an adjoining vacant lot. Officer Hall responded to the call and observed Officer Felts pursuing defendant Kirkpatrick on foot. As Kirkpatrick ran across a parking lot Officer Hall drove his police car to a point where he could block Kirkpatrick. Kirkpatrick, wearing a dark nylon type leisure suit, was taken into custody in the parking lot.

A C.B. radio, two red socks, a brown sock and a knife were found lying at the base of an oak tree in the vacant lot about forty feet from Mays' driveway in the direction taken by defendant Kirkpatrick as he ran across Mays' yard. The C.B. radio came from Cassidy's car which was in Cassidy's garage which had been entered by the two black males. Defendant Lee was wearing one brown sock at the time of his arrest. The brown sock found under the tree matched the one worn by defendant Lee. A fingerprint taken from the dashboard of Cassidy's automobile matched the fingerprint of defendant Jones. Each of the defendants is a Negro male.

Only the defendant Jones offered evidence. He testified in substance as follows: On the night in question he, Kirkpatrick, and Lee were riding around in Kirkpatrick's Rambler, with Lee driving. As they turned onto Anthony Street the car overheated and stalled. Lee and Kirkpatrick went to get water for the radiator. While they were gone he was able to crank the car and was starting to back up when the officer stopped him. He explained the situation to him and while they were talking, Lee and Kirkpatrick returned. He knew nothing of the C.B. radio and does not know how his fingerprint could have gotten on the dashboard of Cassidy's automobile.

From judgments of imprisonment each defendant appealed.

Attorney General Edmisten, by Special Deputy Attorney General W. A. Raney, Jr., for the State.

Daniel H. Monroe for Anthony Jones.

Hemric & Hemric, by H. Clay Hemric and H. Clay Hemric, Jr. for Coy Kirkpatrick and Randy O. Lee.

BROCK, Chief Judge.

[1] Each defendant argues that it was error to submit the case to the jury under a felonious breaking or entering charge founded upon G.S. 14-56. Defendants argue that in order for a breaking or entering to constitute a felonious breaking or entering under G.S. 14-56, it must be alleged and proved that the larceny was of goods of a value of more than $200.00. In other words defendants argue that the grade of the breaking or entering under G.S. 14-56 depends upon the grade of the larceny alleged and proved. In this case all of the evidence established that the value of the property taken was less than $200.00, which is ordinarily misdemeanor larceny, therefore defendants argue that they can be found guilty of no more than misdemeanor breaking or entering.

Defendants make resourceful arguments upon how G.S. 14-56 should be interpreted, but we are not persuaded. It appears to us that the language of G.S. 14-56 does not require the actual larceny of anything in order to convict of felonious breaking or entering. It is the breaking or entering with intent to commit larceny that is proscribed.

> "If any person shall with intent to commit any felony or larceny therein, break or enter any . . . motor vehicle . . . containing any goods . . . or other thing of value . . . ." G.S. 14-56.

Therefore the success of the larceny venture does not determine the grade of the breaking or entering as defendants argue. It is only necessary to establish the intent to commit larceny in order to establish a felonious breaking or entering of the motor vehicle. In *State v. Quick*, 20 N.C. App. 589, 202 S.E. 2d 299 (1974) the defendant was charged and convicted of felonious breaking or entering a motor vehicle. The evidence disclosed that he took nothing from the vehicle. The vehicle contained only some various papers, pens, cigarettes, matches, and a shoe bag. We held that such items were personal property and subject to larceny. The conviction of the defendant for felonious breaking or entering in *Quick* was held to be without error. The State's evidence in the present case tends to show that defendants were more successful in the larceny than was established in *Quick*.

Defendants' further arguments that G.S. 14-56 should be construed to mean that the breaking or entering must be with intent to commit felonious larceny is not convincing. The statute clearly

says "with intent to commit any felony *or larceny*." In our opinion the statute makes it a felony to break or enter a motor vehicle containing any goods, wares, freight, or other thing of value with intent to commit larceny, whether the larceny be felonious or misdemeanor larceny. This assignment of error is overruled.

[2] Defendants Kirkpatrick and Jones assign as error the denial of their motions to dismiss for insufficiency of the evidence. Considered in the light most favorable to the State, the State's evidence would justify the jury's finding that Kirkpatrick entered Cassidy's garage, removed the C.B. radio from Cassidy's automobile, left Cassidy's garage with the C.B. radio and defendant Lee's brown sock, ran when the police officer commanded him to stop, placed the C.B. radio and socks beside an oak tree as he ran, and continued running until cornered in a parking lot. Considered in the light most favorable to the State, the State's evidence would justify the jury's finding that Jones entered Cassidy's garage for about 30 seconds, undertook to remove the C.B. radio from Cassidy's automobile leaving his fingerprint on the dashboard, returned to the Rambler auto and drove it while Kirkpatrick and Lee returned to Cassidy's garage where they successfully removed the C.B. radio. We think the evidence was sufficient to require submission of the charges against Kirkpatrick and Jones to the jury. This assignment of error is overruled.

[3] Defendant Jones assigns as error the denial of his motion to sever his trial from the trials of Kirkpatrick and Lee. "Consolidation of cases for trial is generally proper when the offenses charged are of the same class and are so connected in time and place that evidence at trial upon one indictment would be competent and admissible on the other." *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976). In the present case each of the defendants was charged with participation in the same offense at the same time and place. "As a general rule, whether defendants who are jointly indicted should be tried jointly or separately is in the sound discretion of the trial court, and, in the absence of a showing that appellant has been deprived of a fair trial by consolidation, the exercise of the court's discretion will not be disturbed upon appeal." *State v. Brower, supra.* Defendant Jones has failed to show that he was deprived of a fair trial in any way. This assignment of error is overruled.

Defendant Jones' exception to the admission of the testimony of the officer who lifted his fingerprint from the dashboard of Cassidy's automobile requires no discussion. This assignment of error is overruled.

In our opinion each of the defendants received a fair trial, free from prejudicial error.

No error.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. HERDIS C. COVINGTON, JR.

No. 7710SC328

(Filed 16 November 1977)

1. **Constitutional Law § 12.1; Professions and Occupations— unlawful practice of engineering—statute not vague**

Former G.S. Chapter 89 which defined the term "practice of professional engineering" was not so vague as to fail adequately to apprise defendant and others of what conduct was in violation of the statute, and defendant's conduct was unquestionably within the purview of Chapter 89 where he performed engineering design work for buildings and machinery of the type covered by the statute and where he represented to an engineer in his employ that he (the defendant) was an engineer.

2. **Professions and Occupations— unlawful practice of engineering—advertisements by firm—defendant as president of firm—admissibility of evidence**

In a prosecution of defendant for the unlawful practice of engineering without first being registered, the trial court did not err in allowing into evidence advertisements for defendant's firm indicating the firm's engineering capabilities, a list of the firm's active jobs containing the notation that some jobs were released by defendant without registered engineer's approval, pamphlets setting forth the firm's fees for performing engineering services, and a brochure promoting the firm's design engineering services, since defendant was the president of the firm; neither of the firm's other two principals had any responsibility for engineering functions; and the firm was practicing engineering and promoting its engineering services with the knowledge of the defendant and under his supervision.

3. **Criminal Law § 162.6— general objection at trial—specific objection raised on appeal—no consideration**

Where defendant objected only generally to the admission into evidence of Xerox copies of pages from a magazine, no question of authenticity of the

document was brought to the attention of the court or the prosecution, and defendant cannot raise the question for the first time on appeal.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 2 December 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 21 September 1977.

Defendant was tried before a jury on charges that he unlawfully, and willfully practiced the profession of engineering without first being registered as required by statute, in violation of G.S. 89-11.

Evidence presented by the State tended to indicate that defendant was president of a corporation, H. C. Covington & Associates, Inc., which performed engineering services and advertised and promoted these services under the firm's name. Some of the advertisements and promotional literature were published at a time when the firm employed no registered engineer. On at least one occasion, defendant represented to an employee that he was an engineer, and on numerous occasions he personally performed engineering design functions. Other pertinent evidence will be discussed in connection with the issues to which they pertain.

The jury returned a verdict of guilty as charged. From judgment imposing imprisonment for 90 days, defendant appeals.

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

Gary S. Lawrence and Maupin, Taylor & Ellis, by Albert R. Bell, Jr., for defendant appellant.

BROCK, Chief Judge.

[1] Defendant first assigns as error the trial court's denial of his motion to dismiss the charges on the grounds that N.C. G.S. Chapter 89 is unconstitutional on its face. Specifically, defendant argues that the definition of the term "practice of professional engineering" is overly broad, vague and ambiguous, and fails adequately to apprise the defendant and others of what conduct is in violation of the statute, in contravention of defendant's rights to due process of law.

At the outset we note that defendant purports to challenge the statute for vagueness *and* overbreadth. These are two distinct doctrines of constitutional law, with the overbreadth doctrine primarily applicable in the first amendment area. *See* Annot. 45 L.Ed. 2d 725 (1976). Yet the substance of defendant's argument relates only to considerations under the vagueness doctrine, and thus we do not consider any questions of overbreadth.

N.C. G.S. Chapter 89, under which defendant was prosecuted, has been repealed and replaced by new Chapter 89C; however, it is Chapter 89 with which we are concerned. The pertinent sections of Chapter 89 which define the practice of professional engineering are as follows:

G.S. 89-2

"(6) The term 'practice of professional engineering' within the meaning and intent of this Chapter shall mean any professional service or creative work requiring engineering education, training, and experience and the application of special knowledge of the mathematical, physical and engineering sciences to such professional services or creative work as consultation, investigation, evaluation, planning, design, and supervision of construction for the purpose of assuring compliance with specifications and design, in connection with any public or private utilities, structures or building incidental to machines, equipment, processes, works or projects, ..."

"A person shall be construed to practice engineering, within the intent and meaning of this Chapter, who practices or offers to practice any branch of engineering; or who, by verbal claim, sign, advertisement, letterhead, card, or in any other way represents himself to be, or capable of being, an engineer, or through the use of some other title implies that he is an engineer; or who does perform any engineering service or work or professional service recognized by the profession as engineering.

(7) The term 'professional engineer' within the meaning and intent of this Chapter shall mean a person who, by reason of his special knowledge of the mathematical, physical and engineering sciences, and the principles and methods of engineering analysis and design, acquired by professional

education, and/or practical experience, is qualified to engage in the practice of professional engineering as hereinafter defined as attested by his legal registration as a professional engineer."

A statute may be unconstitutionally vague "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *In re Burrus*, 275 N.C. 517, 531, 169 S.E. 2d 879, 888 (1969). Defendant contends that terms such as "*any* professional service or creative work requiring . . . the application of *special* knowledge . . . to such *professional* services or creative work as *consultation, investigation, evaluation, planning, design* . . . ." (emphasis defendant's) used to define professional engineering are ambiguous and subject to varying interpretations. Yet "impossible standards of statutory clarity are not required by the constitution. When the language of a statute provides an adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly, constitutional requirements are fully met." *In re Burrus, supra.*

Vagueness challenges not involving first amendment freedoms must be examined in light of the facts of the case at hand. *U.S. v. Mazurie*, 419 U.S. 544, 42 L.Ed. 2d 706, 95 S.Ct. 710 (1975). This principle would appear to apply even though defendant argues only that the statute is unconstitutional on its face and does not argue in the alternative that it is unconstitutional as applied to him. The record reveals testimony that defendant performed engineering design work for buildings and machinery of the type unquestionably covered by the statute. There is also testimony that defendant represented to an engineer in his employ that he (the defendant) was an engineer. This conduct is unquestionably within the purview of Chapter 89.

There is a well-established presumption in favor of the constitutionality of an act of the Legislature, *Mitchell v. Financing Authority*, 273 N.C. 137, 159 S.E. 2d 745 (1968); the courts will not declare a statute unconstitutional unless it is clearly so. *Hobbs v. Moore County*, 267 N.C. 665, 149 S.E. 2d 1 (1966). Defendant has not met his burden of showing that the statute provides inadequate warning as to the conduct it covers or is incapable of

uniform administration by the courts. Nor are we persuaded by defendant's argument that Chapter 89C, which re-defined "the practice of engineering", can be considered an admission by the Legislature that the former statute set forth inadequate guidelines. Defendant's assignment of error challenging the constitutionality of the statute under which he was convicted is overruled.

[2] Defendant next assigns error to the admission into evidence at trial of the following: yellow pages from the 1975 Raleigh, North Carolina, telephone directory showing defendant's firm, H. C. Covington & Associates, Inc. under listings for "Engineers-Consulting" and "Engineers-Industrial"; a page from the 1 March 1975 issue of *Southern Lumberman* containing an advertisement of the firm's engineering capabilities; a page from the 16 January 1975 *Associated General Contractors Weekly Bulletin* depicting the firm as having engineering capabilities; a list of the firm's active jobs dated 26 September 1974 containing the notation "Some jobs released by Mr. Covington without registered engineer's approval"; two pamphlets setting forth the firm's fees for performing engineering services; and a brochure promoting the firm's design engineering services. Defendant argues that this evidence dealt solely with the potential liability of H. C. Covington & Associates, Inc. and was irrelevant to the defendant's individual liability. This contention is without merit.

It is true that the corporate entity, H. C. Covington & Associates, Inc., was not on trial in this case. However, the evidence indicates that defendant was the president of the corporation, that neither of the corporation's other two principals had any responsibility for engineering functions, and that the corporation was practicing engineering and promoting its engineering services with the knowledge of the defendant and under his supervision. Defendant will not be permitted to use the corporate entity as a shield for his activities in violation of the statute. *See Henderson v. Finance Co.*, 273 N.C. 253, 160 S.E. 2d 39 (1968).

The challenged evidence is all relevant as indicating that defendant, through H. C. Covington & Associates, Inc. engaged in or offered to engage in the unauthorized practice of engineering in violation of G.S. 89-11. Thus the trial court properly admitted the exhibits into evidence and this assignment of error is overruled.

[3] Defendant next assigns error to the admission into evidence of xerox copies of pages from the *Southern Lumberman.* Defendant argues that the State failed to lay a proper foundation for the admission of the xerox copies in lieu of the original. By this assignment of error, defendant seeks to question the authenticity of the exhibit under the best evidence rule; however, he only objected generally to the admission of the evidence at trial. No question of the authenticity of the document was brought to the attention of the court or the prosecution. Under these circumstances, defendant will not be heard to raise the question for the first time on appeal. This assignment of error is overruled.

The next assignment of error deals with the denial of defendant's motion for judgment as of nonsuit. This raises the question of the sufficiency of the evidence for the jury to find that the defendant committed the offense charged. *State v. Hines,* 286 N.C. 377, 211 S.E. 2d 201 (1975). Having carefully examined the record in this case, we hold that there was substantial evidence that defendant engaged in and offered to engage in the unauthorized practice of engineering in violation of G.S. 89-11 and the trial court properly overruled defendant's motion for judgment as of nonsuit.

Defendant's remaining formal assignments of error are overruled.

No error.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. WILLIE JOE McWHORTER

No. 7722SC424

(Filed 16 November 1977)

1. Arson § 2— burning of storage building— sufficiency of indictment

An indictment charging defendant with the felony of burning "a certain unhabited [sic] storage house, to wit: a storage building" was sufficient to charge an offense under G.S. 14-67.1.

2. **Searches and Seizures § 1— seizure of pistol from defendant's person—lawfulness**

A pistol was lawfully seized from defendant's hip pocket and properly admitted into evidence where the court found upon supporting evidence that the officers had reasonable grounds to believe that defendant was carrying a concealed weapon when they questioned defendant about a secret assault and that removal of the pistol was necessary for their protection.

3. **Criminal Law § 75.10— admission of confession**

The trial court properly admitted defendant's confession where the voir dire evidence supported the court's determination that defendant freely, understandingly and knowingly waived his rights to counsel and against self-incrimination and that defendant's confession was made voluntarily without coercion or promises.

4. **Assault and Battery § 14.7— secret assault—sufficiency of evidence**

Evidence as to the character and nature of the assault perpetrated upon the victim by defendant was sufficient to show an intent to kill and to take the case to the jury on a charge of secret assault in violation of G.S. 14-31.

5. **Arson § 4.1— burning a building—sufficiency of evidence**

The State's evidence was sufficient for the jury on a charge of burning a building in violation of G.S. 14-67.1.

6. **Assault and Battery § 16.1— secret assault—failure to submit lesser offenses**

The trial court in a prosecution for secret assault did not err in failing to submit to the jury the lesser included offense of assault with a deadly weapon.

7. **Arson § 6— sentence under incorrect statute—remand for proper sentence**

Where defendant was charged, tried and convicted of burning a building in violation of G.S. 14-67.1, but the trial judge recited that defendant was found guilty of a violation of G.S. 14-62, the judgment must be vacated and the cause remanded for entry of a proper judgment consistent with the conviction for a violation of G.S. 14-67.1 although the sentence imposed by the trial judge, 10 years, was within the limits prescribed for a violation of G.S. 14-67.1.

APPEAL by defendant from *Long, Judge.* Judgment entered 13 January 1977 in Superior Court, IREDELL County. Heard in the Court of Appeals 18 October 1977.

Defendant was charged in bills of indictment with feloniously setting fire to a storage house and with the secret assault of Don Brady, G.S. 14-31. Upon a plea of not guilty, the State offered evidence tending to show the following:

Don Brady owns a farm located in Iredell County. There is a tenant house on the farm about two miles from his own house. The defendant, his mother and family had lived in the tenant

house for about 27 years as sharecroppers on Brady's farm but had moved out some time before 1 August 1976. On the evening of 1 August 1976 Brady received a phone call from a neighbor that a building was on fire near the tenant house. When he arrived at the tenant house Brady found that a small building which he used for storage was burning. After extinguishing the fire Brady drove his truck home and into the garage. As he started to get out of the truck he saw a man come from behind a car parked in the garage. The man jumped on Brady and forcing him to the ground wrestled Brady's pistol away from him. The assailant then hit him over the head, knocking him unconscious and fled from the scene. When Brady awoke he made his way to a phone and called for help. Later he was taken to the hospital where he was treated for a serious head wound. Officer Barnette of the Sheriff's Department was called to the scene of the assault and questioned Brady as to the occurrence. Brady told the officer that he had seen his assailant for an instant during the attack and thought that it was the defendant, Willie Joe McWhorter. The officer searched the garage and found a tire tool lying on the floor between the car and the truck.

After looking for defendant all weekend the officers found him at his place of employment on 3 August 1976 and confronted him with their suspicions. The defendant agreed to go to the sheriff's department with the officers for questioning and Officer Barnette asked him if he had a gun or knife. As defendant reached for his hip pocket the officers saw the imprint of what appeared to be a gun and one of the officers grabbed it from defendant's pocket. A knife was found in his other pocket. Defendant was arrested for carrying a concealed weapon and taken to the sheriff's department. After being advised of his rights at the sheriff's department, defendant signed a waiver and told the officers that he did not want to make a statement. He was informed by the officers that he would be charged with carrying a concealed weapon, and that since the serial number on the gun matched the serial number of Brady's gun, he would also be charged with secret assault. As defendant was being escorted to jail by one of the officers he indicated that he had changed his mind and wanted to make a statement. After being advised of his rights a second time he made a statement in which he confessed to starting the fire in the storage house and assaulting Brady with a tire tool.

The defendant offered no evidence.

The jury returned verdicts of guilty as to both charges. From a judgment imposing consecutive prison terms of 10 years for the unlawful burning of a building and 20 years for the secret assault, defendant appealed.

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

McElwee, Hall & McElwee by E. Bedford Cannon for the defendant appellant.

HEDRICK, Judge.

[1] Defendant first assigns as error the denial of his motion to quash the bill of indictment charging him with the felony of burning "a certain unhabited [sic] storage house, to wit: a storage building, ..." Defendant argues that the language of the bill is not sufficient to charge an offense under G.S. 14-62. We need not respond to this contention since the bill is clearly sufficient to charge an offense under G.S. 14-67.1, and the trial court correctly denied the defendant's motion to quash.

Defendant has abandoned assignments of error numbers two and three by his failure to bring forward and argue these assignments in his brief. N.C. App. R. 28(b)(3).

[2] By his fourth assignment of error defendant contends that the court erred "by failing to suppress State's Exhibit #1 (a .38 caliber pistol) . . . ." This assignment of error has no merit simply because State's Exhibit #1 was not admitted into evidence. Assuming *arguendo*, however, that the trial judge's statement to counsel for defendant that "[i]t will not be necessary for you to object further to introduction of pistol . . . ," and the State's exhibiting the gun to the jury amounted to an admission of the gun into evidence, we find no prejudicial error. Before the trial judge ruled that Exhibit #1 could be admitted into evidence, and before the gun was exhibited to the jury, the trial court conducted a *voir dire* as to the circumstances surrounding the seizure of the weapon and made detailed findings of fact with respect thereto and made the following conclusion:

> "[T]hat at the time of the removal of the pistol from the defendant's pocket Barnette and Redmond had reasonable grounds to believe defendant was carrying a concealed weapon; that the removal was necessary to their own protec-

tion; that their removal of the pistol was legal and not the fruit of illegal search; upon the foregoing findings of fact and conclusions of law, the court rules that the objection to the introduction of the pistol should be overruled."

The trial judge's findings and conclusions are supported by the evidence in the record.

[3] Defendant's fifth assignment of error reads as follows:

> "The failure of the trial judge to suppress the defendant's statement marked State's Exhibit #4 as the fruit of an unlawful search and seizure and as a result of lack of voluntariness."

Before the defendant's extrajudicial statements were allowed into evidence, the court conducted a *voir dire* into the circumstances surrounding said statements and made findings of fact and drew the following conclusions:

> "[O]ne — that the defendant freely, understandingly, and knowingly waived his rights to counsel and his rights against self-incrimination; two — the defendant's statement to the detectives was voluntarily made without coercion or promises or threats; . . . ."

The findings and conclusions made after *voir dire* are amply supported by evidence in the record. This assignment of error has no merit.

Defendant's sixth assignment of error is not supported by an exception in the record, and presents no question for review.

Defendant's seventh assignment of error is abandoned. N.C. App. R. 28(b)(3).

[4] Defendant assigns as error (number nine) the trial judge's denial of his motion for judgment as of nonsuit. He argues that the State offered no evidence as to the defendant's intent to kill in Case No. 76CR7410. Evidence as to the character and nature of the assault perpetrated upon Mr. Brady by the defendant is sufficient to take the case to the jury on the charge of secret assault, G.S. 14-31, and to support the verdict.

[5] Defendant's tenth assignment of error has no merit. The evidence in the record is sufficient to require submission of the

case to the jury and to support the verdict on the charge of a violation of G.S. 14-67.1.

[6] The defendant assigns as error the trial court's failure to submit to the jury the lesser included offense of assault with a deadly weapon in the case wherein the defendant was charged with secret assault. It is well-established in this State that the trial court is not required to submit a lesser included offense to the jury when there is positive evidence of each element of the offense charged and no conflicting evidence relating to any of the elements. *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972); *State v. Thacker*, 281 N.C. 447, 189 S.E. 2d 145 (1972). The "[m]ere 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, 160, 84 S.E. 2d 545, 547 (1954). In the present case there was positive evidence that the defendant committed every element of the offense charged in the bill of indictment, and there was no conflicting evidence as to any element of the offense. The defendant's contention that the jury might have convicted the defendant of the lesser included offense of assault with a deadly weapon if they had been given the opportunity does not support the submission of the lesser included offense to the jury. This assignment of error has no merit.

[7] We have carefully considered all of the defendant's assignments of error in both charges and find that the defendant had a fair trial in both cases free from prejudicial error. However, we note that in Case No. 76CR7411 wherein the defendant was charged, tried and convicted of violating G.S. 14-67.1, the trial judge recited that the defendant had been found guilty of a violation of G.S. 14-62. Although the prison sentence imposed (10 years) in that case is within the limits prescribed for a violation of G.S. 14-67.1, the judgment must be vacated and the cause remanded to the Superior Court for the entry of proper judgment consistent with the conviction for a violation of G.S. 14-67.1.

The result is: in Case No. 76CR7410 wherein the defendant was charged with secret assault, we find no error; in Case No. 76CR7411 wherein the defendant was charged with a violation of G.S. 14-67.1, we find no error in the trial, but the judgment is vacated and the cause is remanded to the Superior Court of Iredell County for resentencing pursuant to a charge and conviction under G.S. 14-67.1.

No error in trial.

Remanded for judgment in Case No. 76CR7411.

Judges BRITT and MARTIN concur.

STATE OF NORTH CAROLINA v. DON FREDERICK HICE

No. 7725SC505

(Filed 16 November 1977)

1. **Constitutional Law § 50— speedy trial—factors to be considered**

There are four interrelated factors to be considered in determining whether a defendant has been denied his right to a speedy trial: the length of time of the delay, the reason for the delay, the defendant's assertion of his right to a speedy trial, and the prejudice resulting to defendant from the delay.

2. **Constitutional Law § 51— twelve months between offense and trial—speedy trial not denied**

In a prosecution for manslaughter where defendant was allegedly driving an automobile under the influence of intoxicating liquor, the car crashed, and a passenger died, defendant's constitutional right to a speedy trial was not violated, although there was a twelve month delay from the time of the accident until the trial, since there was only an eight month delay from the date the first charges of driving under the influence and death by vehicle were dismissed and the manslaughter indictment was issued; there was only a two month delay between the date the indictment was issued and the trial date; the two earlier charges were dismissed by the prosecutor before jeopardy attached and without objection by defendant; defendant knew or should have known that, since the first charges were dismissed before jeopardy attached, he was still subject to prosecution; defendant never demanded a speedy trial and he failed to show that he was prejudiced by the delay; and defendant failed to show that the delay was caused by willfulness or neglect of the State.

3. **Automobiles § 112.1; Criminal Law § 26.2— evidence of defendant's intoxication—manslaughter—no double jeopardy**

In a prosecution for manslaughter arising from an automobile accident where defendant was earlier charged with death by vehicle and driving under the influence, the trial court did not err in allowing an officer to testify concerning the physical condition of defendant as it was affected by alcohol and in refusing to dismiss the manslaughter charge on the ground of double jeopardy, since the earlier charges were dismissed by the prosecution, without objection by defendant, before a jury was impaneled or evidence was introduced.

4. Automobiles § 113.1— manslaughter—sufficiency of evidence

Evidence was sufficient for the jury in a prosecution for manslaughter where it tended to show that defendant drove an automobile after he had drunk four or five beers; defendant increased the speed of the car whereupon one passenger told him he had better slow down; the car reached a speed of approximately 100 mph after which it began sliding, went off the road and crashed; and one passenger died from head injuries received in the collision.

APPEAL by defendant from *Lewis, Judge*. Judgment entered 10 February 1977 in Superior Court, CALDWELL County. Heard in the Court of Appeals 21 October 1977.

On 18 January 1976 defendant was charged in warrants with (1) operating a motor vehicle on a street or highway while under the influence of intoxicating liquor, in violation of G.S. 20-138, and (2) unintentionally causing the death of another person while engaged in the violation of a state law applying to the operation or use of a vehicle, in violation of G.S. 20-141.4. These charges were dismissed on 19 March 1976 by the district attorney.

On 2 December 1976 defendant was indicted for the manslaughter of Darrell Wayne Bentley. He was arraigned on 9 February 1977 and moved to dismiss the charge on the ground that he had been denied a speedy trial. The motion was denied, he pled not guilty, and was tried before a jury.

Evidence for the State tended to show:

On the night of 17 January 1976 defendant was driving an automobile in which Ralph Bentley, Darrell Bentley, Boyd Hollar and Rusty Auton were also riding. Prior to their ride, defendant had drunk four or five beers. While traveling on Draco Road, the automobile "started getting up to a high rate of speed" and the tape player was playing. One of the passengers told defendant he had better slow down. The car reached a speed of approximately 100 m.p.h. after which it began sliding, went off the road and crashed. Darrell Bentley died from head injuries received in the collision.

The investigating highway patrol officer saw defendant a short while after the collision, and, in his opinion, defendant was under the influence of intoxicants at that time.

The court interrupted the testimony of the highway trooper to conduct a voir dire in the absence of the jury to determine

whether the dismissal of the earlier charges against defendant would require a dismissal of the manslaughter charge on the ground of double jeopardy. Following the hearing His Honor found that the court records disclosed that at the time the previous charges were dismissed by the prosecutor, a jury had not been impaneled and evidence had not been introduced.

Defendant offered no evidence.

At the conclusion of the evidence, the court allowed defendant's motion to dismiss the voluntary manslaughter charge and submitted the case to the jury on the charges of involuntary manslaughter and death by vehicle.

The jury returned a verdict of guilty of involuntary manslaughter. From judgment imposing a prison sentence of three years, defendant appeals.

Attorney General Edmisten, by Associate Attorney Henry Burgwyn, for the State.

Wilson and Palmer, by Bruce L. Cannon, for defendant appellant.

BRITT, Judge.

By his first assignment of error defendant contends the court erred in denying his motion to dismiss for failure of the State to provide him a speedy trial. We find no merit in this assignment.

[1] In *State v. Hill*, 287 N.C. 207, 211, 214 S.E. 2d 67, 70 (1975), the court set out four interrelated factors to be considered in determining whether a defendant has been denied his right to a speedy trial: (1) the length of time of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) the prejudice resulting to defendant from the delay.

In order to determine whether a defendant has been denied a speedy trial, the trial judge must consider the particular circumstances in each case. In *State v. Spencer*, 281 N.C. 121, 124, 187 S.E. 2d 779, 781 (1972), we find:

> ". . . The accused has the burden of showing that the delay was due to the State's wilfulness or neglect. Unavoidable delays and delays caused or requested by the defendant do not violate his right to a speedy trial. Further, a defendant

may waive his right to a speedy trial by failing to demand or to make some effort to obtain a speedier trial. (Citations.) The constitutional right to a speedy trial prohibits arbitrary and oppressive delays by the prosecution. *State v. Johnson*, 275 N.C. 264, 167 S.E. 2d 274. But this right is necessarily relative and is consistent with delays under certain circumstances. *Beavers v. Haubert*, 198 U.S. 77, 25 S.Ct. 573, 49 L.Ed. 950."

[2] Applying the stated principles to the present case, we conclude that defendant's constitutional right to a speedy trial was not violated. Although there was a twelve month delay from the time of the accident until the trial, there was only an eight month delay from the date the first charges were dismissed and the manslaughter indictment was issued, and only a two month delay between the date the indictment was issued and the trial date. In addition, the two earlier charges were dismissed by the prosecutor before jeopardy attached and without objection by defendant. Defendant knew, or should have known, that since the first charges were dismissed before jeopardy attached he was still subject to prosecution. He never demanded a speedy trial, and he failed to show that he was prejudiced by the delay. Finally, he failed to show that the delay was caused by willfulness or neglect of the State. He based his motion to dismiss solely on the bill of indictment without offering any other evidence.

[3] In his seventh assignment of error, defendant argues that the court erred in allowing Trooper Webster to testify with respect to the condition of defendant as he was affected by alcohol on the night of the accident, since the driving under the influence charge which arose out of the same set of events was dismissed. In his eighth assignment of error, he contends in a related argument that the trial court should have dismissed the manslaughter charge because jeopardy had attached when he was charged with death by vehicle and driving under the influence and these charges had been dismissed by the prosecutor in district court. We find neither of these arguments persuasive.

G.S. 15A-931, which became effective on 1 July 1975, provides as follows:

"15A-931. Voluntary dismissal of criminal charges by the State. — (a) The solicitor may dismiss any charges stated in a criminal pleading by entering an oral dismissal in open court

before or during the trial, or by filing a written dismissal with the clerk at any time. The clerk must record the dismissal entered by the solicitor and note in the case file whether a jury has been impaneled or evidence has been introduced.

(b) No statute of limitations is tolled by charges which have been dismissed pursuant to this section."

The official commentary following this statute points out that the "section does not itself bar the bringing of new charges. That would be prevented if there were a statute of limitations which had run, or if jeopardy had attached when the first charges were dismissed."

"Jeopardy attaches when a defendant in a criminal prosecution is placed on trial on a valid indictment or information, before a court of competent jurisdiction, after arraignment and plea, and when a competent jury has been impaneled and sworn to make true deliverance in the case." 4 Strong's N.C. Index 3d, Criminal Law § 26.2, p. 110.

In the present case, the record shows that both the death by vehicle charge and the driving under the influence charge were dismissed by the prosecution, without objection by the defendant, before a jury was impaneled or evidence introduced. The trial court conducted a voir dire on the double jeopardy question as it affected evidence concerning defendant's inebriated condition on the evening of the accident and concluded as a matter of law "that observations and evidence pertaining to the defendant's condition as that condition [was] reflected by alcohol [were] not rendered inadmissible by the dismissal in the District Court of the charge of driving under the influence and death by vehicle." Since a jury was not impaneled and evidence was not heard prior to the voluntary dismissal, jeopardy had not attached when the prosecutor dismissed the driving under the influence and death by vehicle charges. It was proper for the trial judge to allow Trooper Webster to testify concerning the physical condition of the defendant as it was affected by alcohol and to refuse to dismiss the manslaughter charge on the ground of double jeopardy.

By his ninth assignment of error, defendant contends the trial court erred in denying his motion to dismiss on the ground that the evidence showing that the defendant had violated the

motor vehicle laws was not sufficient to go to the jury. Since this assignment of error is not properly supported by an exception in the record, we are not required to consider it on appeal. Rules of Appellate Procedure, Rule 10, 287 N.C. 671, 698 (1975).

[4] Nevertheless, we think the evidence, when considered in the light most favorable to the State and giving it the benefit of every reasonable inference, was sufficient to survive defendant's motion to dismiss and to allow the case to be submitted to the jury on involuntary manslaughter and death by vehicle. *State v. McNeil*, 280 N.C. 159, 185 S.E. 2d 156 (1971).

By his tenth and eleventh assignments of error, defendant contends that the trial court erred in denying his motions to set aside the verdict and grant a new trial and for arrest of judgment. We find no merit in these assignments.

A motion to set aside a verdict and grant a new trial is addressed to the discretion of the trial judge and will not be reviewed on appeal in the absence of abuse of discretion. *State v. Harris*, 21 N.C. App. 550, 204 S.E. 2d 914 (1974). Defendant has failed to show an abuse of discretion by the trial judge.

"In a criminal prosecution, . . . judgment may be arrested when—and only when—some fatal error or defect appears on the face of the record proper." *State v. Kirby*, 276 N.C. 123, 133, 171 S.E. 2d 416, 423 (1970). The record proper in this case fails to disclose any defect.

We have considered the other assignments of error set forth in defendant's brief but finding no merit in any of them, they are all overruled.

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

No error.

Judges HEDRICK and MARTIN concur.

STATE OF NORTH CAROLINA v. BILLY VAN WILSON

No. 7721SC498

(Filed 16 November 1977)

1. **Criminal Law § 96— withdrawal of evidence—denial of mistrial**

In a prosecution for obtaining money from defendant's employer by false pretense, the trial court did not err in the denial of defendant's motion for mistrial made when a witness testified that the employer's "paper work compared to B. F. Goodrich's paper work" verified his testimony where the trial court allowed defendant's motion to strike the testimony and instructed the jury not to consider it.

2. **False Pretense § 2.1— indictment—obtaining money and property**

An indictment for obtaining money by false pretense was not fatally defective in alleging that defendant obtained money from his employer by false pretense and that defendant obtained a color television and a clothes dryer from a B. F. Goodrich store in exchange for the money.

3. **False Pretense § 3.1— obtaining money from employer—use of money to buy property—no fatal variance**

There was no fatal variance between an indictment alleging that defendant obtained $747.24 from his employer by false pretense and evidence that, pursuant to an agreement between defendant and the manager of a B. F. Goodrich store, defendant's employer was overbilled in the amount of $747.24 for tire tubes not actually received and the employer's overpayment was applied to the purchase price of a television set and clothes dryer obtained by defendant from the store.

4. **Criminal Law § 97.1— jury view of exhibits after deliberations had begun**

The trial court did not abuse its discretion in permitting the jury to view the exhibits after it had commenced its deliberations.

APPEAL by defendant from *Lupton, Judge*. Judgments entered 4 February 1977 in Superior Court, FORSYTH County. Heard in the Court of Appeals 21 October 1977.

Defendant, Billy Van Wilson, was charged in bills of indictment with obtaining money by false pretense and conspiracy to obtain money by false pretense. Defendant entered a plea of not guilty to each charge and the State presented evidence tending to show the following:

In December of 1974 and January of 1975, defendant was employed as the Director of Purchasing for Pilot Freight Carriers, and was authorized to purchase tires for the company trucks. During the same period of time, John Gordon was the

manager of the B. F. Goodrich Store and periodically made sales to Pilot. On or about 1 December 1974, Gordon and the defendant entered into an arrangement pursuant to which Gordon delivered 150 truck tubes to Pilot while billing Pilot for 225 tubes. In remittance of this bill the accountant for Pilot issued checks payable to B. F. Goodrich for the total amount of $2,241.72, the price of 225 tubes. In the meantime, Gordon shipped to defendant for his personal use a color television set and a clothes dryer which had a combined value of $747.24, an amount equal to the value of the 75 tubes which were paid for by Pilot but not received. Gordon's own books contained entries to the effect that 150 truck tubes, a color television set and a clothes dryer had been sold and delivered to Pilot Freight Carriers. Gordon further testified that similar transactions had taken place in the past pursuant to agreements between the defendant and him.

Defendant offered evidence tending to prove that he had never entered into any arrangement with Gordon as described above; that during the period of time in question his television had broken down and Gordon had offered to let him borrow a television from his store while his was being repaired; that he accepted the offer and returned the television as soon as his own set was repaired.

A verdict of guilty was rendered as to each charge and judgments were entered imposing a prison sentence of two years for each conviction. Defendant appealed therefrom.

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

Harold R. Wilson for defendant appellant.

HEDRICK, Judge.

[1] Defendant first contends that the trial judge erred in denying his motion for "mistrial" based on a statement made by an employee of Pilot (a state witness) that their (Pilot's) "paper work compared to B. F. Goodrich's paper work verified" his testimony. The trial judge allowed the defendant's motion to strike the testimony and instructed the jury not to consider it. Clearly, the trial judge did not abuse his discretion in denying defendant's motion. This assignment of error has no merit.

[2] Next, defendant assigns as error the denial of his motion for arrest of judgment in Case No. 76CR28781 where the defendant was charged with obtaining money by false pretense. A motion in arrest of judgment challenges the sufficiency of the indictment and the record to support the judgment because of some fatal defect appearing on the face of the record. *State v. Davis*, 282 N.C. 107, 191 S.E. 2d 664 (1972). In the present case defendant argues that the indictment is fatally defective in charging that defendant obtained $747.24 in "good and lawful *money*" and then in a subsequent paragraph alleging that defendant obtained "property." Defendant's contention has no merit. The indictment charges that the defendant obtained $747.24 *from* Pilot Freight Carriers by false pretense, and in substance that the defendant obtained for himself *from* B. F. Goodrich in exchange for the $747.24 a color television set and a clothes dryer. The bill of indictment and the verdict support the judgment and the trial judge correctly denied the motion in arrest thereof.

[3] Defendant further assigns as error the denial of his motions for judgment as of nonsuit in each case. He argues that there was a fatal variance in the allegations that the defendant obtained money and the evidence that he obtained property, to wit: a color television set and a clothes dryer. The evidence was sufficient to require submission of both cases to the jury and to support the verdicts. The gist of the offense described in G.S. 14-100 is obtaining something of value from the owner thereof by false pretense. It is not legally significant whether the thing gained by the party perpetrating the criminal act is in the same form as it was when taken by false pretense from the owner. Thus, there is no variance in these cases where the bills of indictment charge that the defendant obtained money from Pilot Freight Carriers and the evidence discloses that he received a color television set and a clothes dryer from B. F. Goodrich.

By his fourth assignment of error defendant contends that the bill of indictment wherein the defendant was charged with conspiracy to obtain money by false pretense, Case No. 76CR28779, is fatally defective because the bill alleges that the defendant conspired to obtain money by false pretense without alleging the precise amount of money. This assignment of error is not supported by the exceptions noted in the record. Nevertheless, we have carefully examined the bill of indictment and

hold that it is not defective, and that it supports the verdict and judgment entered. *State v. Davenport*, 227 N.C. 475, 42 S.E. 2d 686 (1947).

Defendant's sixth assignment of error is stated as follows:

> "The Trial Court erred in charging the jury erroneously using the term 'property' when referring to money and in referring to what the defendant was charged with in the indictments. As the indictments show on their face, the defendant was charged in one bill of indictment with obtaining $747.27 [sic] in money and in the other bill of indictment was charged with obtaining money."

We have carefully examined each exception upon which this assignment of error is based and find no prejudicial error. As pointed out before, the gist of the offense of which the defendant was charged is obtaining money by false pretense *from* Pilot Freight Carriers. The trial judge fairly and correctly declared and explained the law arising on the evidence in these cases. This assignment of error has no merit.

[4] Finally, the defendant contends that the trial judge erred in allowing the jury to view the exhibits after it had commenced its deliberations. Defendant concedes that the trial judge has broad discretion to reopen a case to allow additional evidence at any stage of the trial before the jury returns with its verdict. *State v. Shutt*, 279 N.C. 689, 185 S.E. 2d 206 (1971); Stansbury, North Carolina Evidence, Brandis Revision, § 24. It is also settled that this discretion extends to allowing a witness to be recalled to contradict his former testimony. *Hunter v. Sherron*, 176 N.C. 226, 97 S.E. 5 (1918). Defendant, without the aid of authority, argues that the judge's discretion to reopen the case should be limited with respect to evidence which had previously been admitted and observed by the jury. We fail to see any significant distinction between new evidence and previously admitted evidence which would compel the curtailment of the judge's discretion to reopen the case for the one and not the other. Furthermore, since the judge had already declared and explained the law arising on the evidence, and since the exhibits viewed by the jury had already been admitted into evidence, there was no necessity for the court to repeat its instructions. Defendant has failed to show any abuse of discretion on the part of the trial judge.

No error.

Judges BRITT and MARTIN concur.

PIEDMONT CATTLE CREDIT COMPANY v. CARL W. HALL, JR.

No. 7715SC50

(Filed 16 November 1977)

Assignments § 1— sale of cattle—debt assigned—sufficiency of evidence—assignment not for collection only

In an action to recover a debt allegedly due for the sale of cattle to defendant, evidence was sufficient to support findings by the trial court that there was absolute assignment to plaintiff of defendant's account for consideration where the evidence tended to show that defendant did in fact owe $18,200 to assignor for cattle; a document purporting to be an assignment of defendant's account with assignor was properly authenticated; and the assignment contained no words indicating an intent that the assignment be for collection only, but instead demonstrated that the intent was to "sell and assign . . . the accounts owed by [defendant] and any and all rights of suit and collection thereon."

APPEAL by defendant from *Preston, Judge.* Judgment entered 6 April 1976 in Superior Court, CHATHAM County. Heard in the Court of Appeals 25 October 1977.

This is a civil action wherein plaintiff, Piedmont Cattle Credit Company, instituted suit to recover a debt allegedly due for the sale of cattle to defendant. Defendant in his answer admitted to a debt of $10,202.81 for previous purchases of cattle but denied the purchase and receipt of 28 cows on 28 November 1971.

The case was tried without a jury and the court entered findings of fact as follows:

Carolina Cattle Company (hereinafter "Carolina"), a cattle sales business, is located in Siler City, North Carolina. B. Zaitz & Sons (hereinafter "B. Zaitz") is a cattle dealer in New Jersey, who on 26 November 1971, shipped a truckload of cattle to Carolina for display and sale. The cattle were owned by B. Zaitz and Kenneth G. Stults and Betty Zaitz, trustees. On 27 November 1971 defendant observed the cattle at Carolina and selected 28 cows for purchase at $650.00 per cow. The sale was consummated by

Max Zaitz, an agent of the owners, and the 28 cows were delivered to defendant on 28 November 1971. In August of 1973 defendant auctioned his entire herd and went out of business.

Plaintiff, Piedmont Cattle Credit Company (hereinafter "Piedmont"), is a North Carolina corporation in the business of financing the purchase of dairy cows and purchasing accounts for such sales. In 1972 the trustees sold and assigned the defendant's account to Piedmont.

On the basis of these findings the court concluded that "[d]efendant is indebted to plaintiff in the sum of $18,200.00 with interest from November 28, 1971 at the rate of six percent per annum, said interest being in the sum of $4,765.23 as of April 6, 1976;" and ordered "that plaintiff have and recover of defendant the sum of $22,965.23 and the cost of this action . . . ." Defendant appealed.

Boyce, Mitchell, Burns & Smith by G. Eugene Boyce and James M. Day for plaintiff appellee.

Thigpen & Hines by C. Wells Hall III and Bryant, Groves & Essex by Alfred S. Bryant for defendant appellant.

HEDRICK, Judge.

The following finding of fact made by the trial judge is critical to all questions raised on this appeal:

> "9. Trustees in 1972 as owner of the account due from defendant, for consideration, sold and assigned said account to the plaintiff herein. The assignment of the account was later acknowledged in writing by the assignor (Trustees) and assignee (plaintiff, Piedmont) and also by the defendant on October 23, 1974."

By assignments of error numbers 1, 2, 3 and 4 defendant contends that the judge erred in the admission and exclusion of certain evidence. By assignments of error numbers 9, 12 and 16 defendant argues that Finding of Fact No. 9 is not supported by competent evidence. By assignments of error numbers 11 and 12 defendant asserts that plaintiff is not the real party in interest because the assignment was for collection only.

Resolution of all questions raised by these assignments of error depends on whether there is any competent evidence in the

record to support Finding of Fact No. 9. There is a strong presumption that when the judge is the trier of facts and conflicting evidence is presented, some competent and some incompetent, he bases his findings on the competent evidence and disregards the incompetent evidence. *City of Statesville v. Bowles*, 278 N.C. 497, 180 S.E. 2d 111 (1971). Thus, if the record reflects any competent evidence to support the findings "they are binding on this Court even though there is evidence to the contrary." *Cogdill v. Highway Commission*, 279 N.C. 313, 320, 182 S.E. 2d 373, 377 (1971).

The essential elements of a valid assignment are "an assignor, an assignee, and a thing assigned." *Morton v. Thornton*, 259 N.C. 697, 699, 131 S.E. 2d 378, 380 (1963). In the present case the "thing assigned" was the defendant's indebtedness (the account) of $18,200.00 to the assignor. The trial court found and concluded that the defendant was indebted to Carolina in the amount of $18,200.00 for cattle sold. The defendant concedes in his brief that there is evidence in the record to support this finding. Thus, the first essential element of a valid assignment, "a thing assigned," was established.

Plaintiff's Exhibit 6 purports to be an assignment from "Carolina Cattle Company of Betty Zaitz and Kenneth Stults, trustees" to plaintiff of an itemized account between defendant and Carolina, including the $18,200.00 indebtedness here in issue. Thus, in light of the above presumption we think that if plaintiff's Exhibit 6 is competent evidence then Finding of Fact No. 9 is sufficiently supported to withstand this challenge. Upon proper authentication an instrument such as plaintiff's Exhibit 6 is admissible. It is an established rule of evidence that such authentication may be accomplished by "any evidence tending to show the execution of the instrument." *Henrico Lumber Co. v. Dare Lumber Co.*, 185 N.C. 237, 239, 117 S.E. 10, 11 (1923); *see also* Stansbury, North Carolina Evidence, Brandis Revision, § 195. In the present case plaintiff offered the testimony of an attesting witness to the assignment and that of the agent of the assignor. Both witnesses acknowledged the document and the signing of their names thereon, and both also identified the third signature on the document as that of Kenneth Stults, trustee. This evidence was clearly sufficient to authenticate the document. Accordingly, Exhibit 6 was competent to support Finding of Fact No. 9.

Defendant, citing *Abrams v. Cureton*, 74 N.C. 523 (1876), also argues that the alleged assignment was for collection only, and that therefore, plaintiff is not the real party in interest. Exhibit 6 is again competent evidence to negate this contention and support Finding of Fact No. 9 that the "[t]rustees . . . for consideration, sold and assigned said account to the plaintiff . . . ." The case cited is readily distinguishable. In *Abrams* the plaintiff's testimony as well as the assignment itself clearly disclosed consideration for the notes assigned, and that he agreed to collect on the notes and pay over the money received to the assignor, retaining reasonable compensation for his services. The assignment in this case, Exhibit 6, contains no words indicating an intent that the assignment be for collection only. To the contrary, the assignment demonstrates that the intent was to "sell and assign . . . the accounts owed by Carl Hall, Jr. and any and all rights of suit and collection thereon." Defendant's contention is without merit.

Thus, we hold that Exhibit 6 was competent evidence to support Finding of Fact No. 9 and that there was absolute assignment of the $18,200.00 account for consideration. The judgment appealed from is affirmed.

Affirmed.

Judges BRITT and MARTIN concur.

ALBEMARLE REALTY AND MORTGAGE COMPANY, INC. AND C. T. S. KEEP v. PEOPLES BANK OF VIRGINIA BEACH; EDWARD T. CATON, III, TRUSTEE; LENNIE L. HUGHES, SUBSTITUTE TRUSTEE; MARY VIRGINIA HOLLADAY; AND GRAYSON M. WHITEHURST; CARL R. TOUCHER AND WIFE, MILDRED M. TOUCHER, HERBERT D. TOUCHER; ALFRED MAGILL RANDOLPH; RALPH GROVES; BILLY D. WILLIAMS, AND VIRGINIA S. FLACOMIO

No. 771SC29

(Filed 16 November 1977)

1. Mortgages and Deeds of Trust § 26— foreclosure sale—requirement of notice by publication and posting

G.S. 45-21.17 (1966 replacement) required notice of a foreclosure sale both by publication in a newspaper and posting at the courthouse door. Therefore, where a deed of trust specified only notice by publication, subsection (b) of that statute came into play and required that notice also be given by posting.

2. Mortgages and Deeds of Trust § 26— foreclosure sale—date on posted notice not conclusive

Defendants could properly show that notice of a foreclosure sale was actually posted at the courthouse door some six days before the date shown on the face of the notice and that they had therefore posted notice at the courthouse door for 30 days immediately preceding the sale as required by former G.S. 45-21.17.

DEFENDANTS appeal from *Small, Judge.* Order filed 16 December 1976 in Superior Court, CAMDEN County. Heard in the Court of Appeals 29 September 1977.

Plaintiffs, maker and endorser of a $100,000 note payable to defendant bank in exchange for a deed of trust, sought to have a foreclosure sale conducted pursuant to default declared invalid. Plaintiffs contended that defendants had not met the requirements of G.S. 45-21.17 (1966 replacement) because they had not posted notice of the sale on the courthouse door within 30 days of the sale. The notice posted was dated 27 March 1975; the sale was held 23 April 1975 as specified in the notice. The deed of trust contained provision only for publication by newspaper, which defendants complied with. Plaintiffs further requested that all deeds made by the purchaser at the sale be declared void. Defendants answered and counterclaimed for deficiency judgment. Plaintiffs replied and moved for summary judgment, as did defendants. After considering the pleadings, the exhibits, admissions, and the affidavits, the court granted plaintiffs' motion for summary judgment. From this order defendants appeal.

J. Kenyon Wilson, Jr. and M. H. Hood Ellis for plaintiff appellees.

White, Hall, Mullen & Brumsey by Gerald F. White and William Brumsey, III for defendant appellants.

CLARK, Judge.

[1] Defendants first assign as error the trial judge's interpretation of G.S. 45-21.17 (1966 replacement). The statute reads in pertinent part:

"(a) When the instrument pursuant to which a sale of real property is to be held contains provisions with respect to posting or publishing notice of sale of the real property,

such provisions shall be complied with, and compliance therewith is sufficient notice.

(b) When the instrument pursuant to which a sale of real property is to be held contains no provision with respect to posting or publishing notice of the sale of real property, the notice shall —

(1) Be posted, at the courthouse door in the county in which the property is situated, for thirty days immediately preceding the sale.

(2) And in addition thereto,

a. If a newspaper qualified for legal advertising is published in the county, the notice shall be published in such a newspaper once a week for at least four successive weeks; . . ."

Defendants argue that this should be interpreted so as to demand notice both by publication *and* by posting *only* when the deed of trust or other instrument makes no provision *either* for posting *or* publication. In other words, if the instrument provides *either* for posting or publication notice per the instrument's provision is sufficient. The double requirement of subsection (b) is not, in such case, reached. As the deed of trust in the instant case specified notice by publication and as defendants unarguably fulfilled that provision, defendants contend that additional notice by posting was not required. Defendants rely on *Huggins v. Dement*, 13 N.C. App. 673, 187 S.E. 2d 412 (1972), for the proposition that G.S. 45-21.17(b) applies when the parties make *no* provision for notice in the instrument.

The trial court adopted plaintiffs' interpretation that G.S. 45-21.17 read as a whole requires both publishing *and* posting for full notice and that, as the instrument did not specify posting, subsection (b) came into play and required posting. In other words, subsection (b) is triggered when either posting *or* publication is omitted from the instrument. Defendants' interpretation violates the accepted construction rule that corresponding sections of a statute be construed together and reconciled with each other when reasonably possible. *Board of Agriculture v. Drainage District*, 177 N.C. 222, 98 S.E. 597 (1919). *Huggins, supra*, is not controlling as the proposition defendants rely on is dicta. *Huggins*

dealt with an instrument that contained provisions for both posting and publishing. Finally, both the statutory provision for notice on resale, G.S. 45-21.29 current at the time of the contested statute, and the current G.S. 45-21.17, as amended in 1975, require both posting and publication. Minimum due process is the central concern in all the statutory provisions, and the legislature obviously intended to meet the due process requirement by demanding both forms of notice.

[2] However, although we agree with the trial court that plaintiffs' interpretation of the statutory notice requirement was correct as a matter of law, we find that the court erred in granting summary judgment for the plaintiffs. Rule 56 precludes summary judgment if there is presented a genuine issue of material fact. The defendants presented an affidavit of Lennie Hughes which tended to show that the notice defendants posted on the courthouse door, although dated 27 March, was actually posted six days earlier, thus meeting the statutory requirement of posting 30 days prior to sale.

Plaintiffs argue that the date on the face of the notice must control as a matter of law and rely on *Strickland v. Contractors, Inc.*, 22 N.C. App. 729, 207 S.E. 2d 399 (1974), which refused to permit a plaintiff to bring in proof that would change the date of "last furnishing" in the claim of lien filed so as to come within the statutory filing period of 120 days. See also *Builders, Inc. v. Bank*, 28 N.C. App. 80, 220 S.E. 2d 414 (1975). However, the statutory lien requirement, and the judicial decisions interpreting them, make clear their particular concern with preserving reliance on the public record. Indeed, G.S. 44A-12(d) precludes any amendment of a claim of lien. Such concern plays no part in the statutory or judicial dealings with the notice requirements in a foreclosure sale. As long as minimum due process is met, there is no reason to preclude proof that the date on the face of the notice was not the actual date of posting. It is clear that the time of sale in the posted notice is inviolate. *Ricks v. Brooks*, 179 N.C. 204, 102 S.E. 207 (1920). But technical defects that have not been shown to "chill" the sale have been held curable by affidavit or other proof. *Britt v. Britt*, 26 N.C. App. 132, 215 S.E. 2d 172, *cert. den.* 288 N.C. 238, 217 S.E. 2d 678 (1975), held that a foreclosure sale was not invalid because the notice of publication filed in the office of the clerk was invalid. Defendants were permitted to sup-

port their motion opposing plaintiffs' attempt to set aside the sale on summary judgment with the affidavit of a newspaper publisher that notice had actually been published.

The Hughes affidavit tended to show that the date (27 March 1975) on the posted notice must have been a clerical error, and that in fact the notice was posted six days before, on 21 March 1975. The purpose of the posting requirement is to give adequate notice. Plaintiffs' presence at the sale in the case *sub judice* is uncontested. The material issue of fact is whether the notice of sale was posted at the courthouse door for 30 days immediately preceding the sale as required by the then current G.S. 45-21.17. We find that summary judgment for plaintiffs was improvidently entered.

Reversed and remanded.

Judge MORRIS concurs.

Judge VAUGHN concurs in the result.

Judge VAUGHN concurring.

I agree that it was error to grant plaintiffs' motion for summary judgment. I also concur in the opinion of the majority that the Hughes affidavit raised a question of fact of whether the notice was posted at the courthouse for thirty days prior to the sale. I do not agree, however, with the majority's interpretation of G.S. 45-21.17 as it was written prior to the 1975 amendment. In my opinion, defendants are correct in their argument that they complied with the statute when they advertised in the newspaper according to the terms of the deed of trust.

STATE OF NORTH CAROLINA v. ALBERT LEBERT WALKER, JR.

No. 7723SC300

(Filed 16 November 1977)

1. Homicide § 28.8— defense of accident—insufficient evidence

Evidence in a homicide case tending to show that defendant intended to fire his gun to the right of the victim's head for the purpose of scaring him but

that he did not intend for the bullet to strike the victim did not present the defense of death by accident.

2. **Homicide § 27.2— instructions—use of gun—unlawful act**

In this prosecution for second degree murder in which defendant testified that he intended to fire to the right of the victim's head for the purpose of scaring him, the trial court, in instructing the jury on involuntary manslaughter, did not err in stating that "the defendant's act was unlawful in using the deadly weapon in assaulting or shooting [the victim]" since the jury had rejected self-defense when it considered defendant's guilt of involuntary manslaughter, and defendant's act was unlawful where he did not point and fire the gun in self-defense.

APPEAL by defendant from *Crissman, Judge.* Judgment entered 20 January 1977. Heard in the Court of Appeals 20 September 1977.

The State elected to try defendant for second-degree murder of Harrison Shores.

The evidence for the State tended to show that just after midnight on 14 March 1976 Ronald Bryant was taking Shores home in his car and defendant was in front and Larry Snow was in the back seat. All had been drinking beer. Shores and defendant began arguing. Shores asked Bryant to "Pull over." Shores got out of the car, then told defendant to get out. Defendant stepped out of the car, pulled a gun and shot Shores in the forehead.

Shores was taken to a hospital where he died during surgery. A small knife (closed) was found in his pocket.

Defendant testified that Shores threatened him, then asked Bryant to stop the car. Shores got out, told defendant he was going to get even, reached in his pocket, then reached for defendant. Defendant, afraid, pulled out his pistol, pointed it to the side of Shores, intending to fire in the air and scare him. The gun went off and Shores fell. Defendant went home, where he was arrested.

Defendant was found guilty of involuntary manslaughter. He appealed from the judgment imposing a prison sentence.

Attorney General Edmisten by Associate Attorney D. Grimes for the State.

Gregory and Joyce by Dennis R. Joyce for defendant appellant.

CLARK, Judge.

The defendant brings forward in his brief only one assignment of error: that the trial judge, in instructing the jury on involuntary manslaughter, erred in stating that "the defendant's act was unlawful in using a deadly weapon in assaulting or shooting Harrison Shores."

A defendant may, in an appropriate factual situation, under his plea of not guilty, rely on more than one defense, *e.g.*, (1) self-defense, and (2) accident. *See State v. Wagoner*, 249 N.C. 637, 107 S.E. 2d 83 (1959), where the defendant's evidence tended to show that the pistol was not intentionally fired but discharged accidentally.

[1] In the case *sub judice* defendant's evidence did not tend to show that the pistol was fired accidentally; it tended to show that defendant did not intend for the bullet to strike Shores but that he intended to fire to the right of his head for the purpose of scaring him. Under these circumstances this evidence does not present the defense of death by accident. See *State v. Price*, 271 N.C. 521, 157 S.E. 2d 127 (1967).

The trial court properly instructed the jury on the right of the defendant to defend himself. After charging on second-degree murder and voluntary manslaughter, the court instructed as follows: "If you do not find the defendant guilty of second degree murder or voluntary manslaughter but the state has proven beyond a reasonable doubt that he did not act in self-defense, then you must determine whether the defendant is guilty of involuntary manslaughter."

[2] The jury, when it considered the crime of involuntary manslaughter, had rejected self-defense. Since defendant was not acting in self-defense, he was acting unlawfully in pointing the gun close to Shores and firing it for the purpose of scaring him, as his testimony tends to show. It is well established that "no man by the show of violence has the right to put another in fear and thereby force him to leave a place where he has the right to be." *State v. Martin*, 85 N.C. 509, 510 (1881); *State v. Douglas*, 268 N.C. 267, 150 S.E. 2d 412 (1966); *State v. Price, supra.* The pointing of a gun without legal justification is a violation of G.S. 14-34.

We find no error in the instruction that the defendant's act was unlawful. Nor do we find prejudicial error in the trial court's instructions on the contentions of the State.

All of the evidence in the case before us tends to show an intentional shooting and, thus, at the least, voluntary manslaughter. Though it was erroneous to charge on involuntary manslaughter, the verdict and judgment is permitted to stand since it is favorable to defendant. *State v. Allen*, 186 N.C. 302, 119 S.E. 504 (1923).

No error.

Judges HEDRICK and VAUGHN concur.

DONALD DELLINGER v. HENDERSON BELK

No. 7626SC1018

(Filed 16 November 1977)

1. Libel and Slander § 10— taxicab inspector—public official—criticism of official conduct—showing of actual malice required

For the purpose of this action for slander and false imprisonment, plaintiff, a Charlotte taxicab inspector, was a "public official," and he could not recover damages unless he showed that defendant made his statements knowing them to be false or in reckless disregard of their falseness.

2. Libel and Slander § 10— public official—criticism to superiors—privilege

Criticism of a public official to his superiors is privileged unless the criticism is made with knowledge at the time that the words are false or without probable cause or without checking for the truth by the means at hand.

3. Libel and Slander § 16— questioning officer's sobriety—summary judgment for defendant proper

Summary judgment was properly entered for defendant in an action for slander where plaintiff, a taxicab inspector, stopped defendant and accused him of speeding; plaintiff took an unusually long time to write a citation; defendant asked plaintiff if he was drunk or sleepy; defendant requested that plaintiff be checked so that the truth about his condition could be known; and if defendant made any false accusations about plaintiff and if they were made to anyone other than plaintiff, except at the invitation and insistence of plaintiff, they were made in good faith and to the proper authorities.

Dellinger v. Belk

4. False Imprisonment § 2.1— taking breathalyzer test—no false imprisonment

Summary judgment was properly granted for defendant, who had questioned plaintiff's sobriety while on the job, on a charge of false imprisonment purportedly based on plaintiff's "restraint" when he submitted to a breathalyzer test because it was required of all officers if a question was raised as to their having been drinking while on duty.

APPEAL by plaintiff from *Snepp, Judge.* Judgment entered 14 October 1976 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 1 September 1977.

Plaintiff, a taxicab inspector, filed this suit for slander and false imprisonment. He seeks damages for what he alleged defendant, a citizen to whom he had just given a traffic citation, said following the issuance of the citation.

Defendant's motion for summary judgment was considered and allowed on the basis of the complaint, depositions of other police officers, and answers to interrogatories.

George S. Daly, Jr., for plaintiff appellant.

Weinstein, Sturges, Odom, Bigger & Jonas, by T. LaFontine Odom, for defendant appellee.

VAUGHN, Judge.

Summary judgment is appropriate when the moving party shows through discovery that the opposing party cannot produce evidence to support an essential element of his claim. *Zimmerman v. Hogg & Allen, P.A.*, 286 N.C. 24, 209 S.E. 2d 795 (1974).

It is not necessary to recapitulate in detail the evidence contained in the depositions and answers to interrogatories. If everything that is favorable to plaintiff is taken as true, it shows nothing more than the following. Plaintiff was a uniformed taxicab inspector for the City of Charlotte. He stopped defendant and accused him of speeding. Because of his inexperience in writing citations, it took him an unusually long time to write the citation. Defendant asked plaintiff if he was drunk or sleepy. Thereupon, plaintiff got on the police radio and began to broadcast that defendant had accused him of being drunk. Plaintiff then told other officers, including his superior, that defendant had accused him of being drunk. Defendant then told the other officers that he thought plaintiff was either drunk or sleepy, and that he thought

he should be checked. He filed no complaint against plaintiff. Pursuant to departmental policy, plaintiff took a breath test for alcohol. Plaintiff had not been drinking. His speech was slurred, but that was the way he normally talked.

[1] For the purpose of the action, plaintiff is a "public official." *Cline v. Brown*, 24 N.C. App. 209, 210 S.E. 2d 446 (1974), *cert. den.*, 286 N.C. 412, 211 S.E. 2d 793 (1975). A public official may not recover "damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964). In *Cline v. Brown, supra*, a deputy sheriff was found to be a public official within the *New York Times* rule because his authority and duties are regulated by law and his position, though low in the governmental hierarchy, has great potential for harm, and is highly visible to the public. Plaintiff, as a Charlotte Police Officer, is a public official for the same reasons. As a public official, he must show that defendant made his statements knowing them to be false or in reckless disregard of their falseness. In *St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed. 2d 262 (1968), the Supreme Court refined the definition of "reckless disregard" to require "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."

[2] The people of this State have long had not only a privilege but a duty to bring official misconduct to the notice of those whose duty it is to inquire into and punish it. *Alexander v. Vann*, 180 N.C. 187, 104 S.E. 360 (1920), [Also involving a deputy sheriff]; *Ramsey v. Cheek*, 109 N.C. 270, 13 S.E. 775 (1891). Moreover, proof that the charge was made in good faith and directed only to the proper authorities raises a presumption that it was made without malice. As an analogy *see Alpar v. Weyerhaeuser Co., Inc.*, 20 N.C. App. 340, 201 S.E. 2d 503 (1974), *cert. den.*, 285 N.C. 85, 203 S.E. 2d 57. In *Ponder v. Cobb*, 257 N.C. 281, 126 S.E. 2d 67 (1962), the North Carolina Supreme Court laid down a rule which was approved by the U.S. Supreme Court in *Times v. Sullivan, supra. Ponder v. Cobb* held that criticism of a public official to his superiors is privileged unless the criticism is made (1) with knowledge at the time that the words are false, or (2) without

probable cause or without checking for truth by the means at hand. Such a rule, we think, balances the equities of freedom of speech and freedom from harassment in a manner appropriate to the special relationship of individual citizens to their governmental officials.

[3] Plaintiff's own evidence indicates that defendant had reason to believe something was unusual about the officer's speech and conduct. It shows that defendant requested that plaintiff be checked so that the truth about his condition could be known. It further shows that if defendant made any false accusations about plaintiff and if they were made to anyone other than plaintiff, except at the invitation and insistence of plaintiff, they were made in good faith and to the proper authorities. No questions of fact as to malice were left existing, and, therefore, summary judgment was proper.

[4] Summary judgment was also properly granted on the claim of false imprisonment. The claim was purportedly based on plaintiff's "restraint" when he submitted to the breath test because it was required of all officers if a question was raised as to their having been drinking while on duty. Involuntary restraint and unlawful restraint are two essential elements of the tort of false imprisonment. *Black v. Clark's Greensboro, Inc.*, 263 N.C. 226, 139 S.E. 2d 199 (1964). The record affirmatively discloses the absence of both of these elements.

The judgment is affirmed.

Affirmed.

Judges HEDRICK and CLARK concur.

STATE OF NORTH CAROLINA v. PRESTON LEE HARRIS

No. 778SC526

(Filed 16 November 1977)

1. Criminal Law §§ 33.2, 73.4— defendant's awareness of his acts—res gestae—criminal intent

In this felonious assault case, defendant's testimony that when he shot the victim he was not aware of what he was doing was not admissible as part of

the *res gestae*. Furthermore, the exclusion of such testimony was not prejudicial error even if it was relevant to show a lack of criminal intent where defendant repeatedly testified that he did not intend to shoot the victim.

2. **Assault and Battery § 15— felonious assault—order of submission of offenses to jury**

The trial court in a felonious assault case did not err in submitting the crime charged and lesser included offenses in the order in which the offenses appear in G.S. 14-32.

3. **Assault and Battery § 15.2— instructions—meaning of "assault"**

In this prosecution for felonious assault, the trial judge sufficiently instructed the jury on the meaning of "assault" when he instructed the jury with respect to each offense submitted that to convict defendant it must find beyond a reasonable doubt "that the defendant assaulted [the victim] by intentionally shooting him with a pistol."

APPEAL by defendant from *Graham, Judge*. Judgment entered 22 March 1977 in Superior Court, LENOIR County. Heard in the Court of Appeals 25 October 1977.

The defendant, Preston Lee Harris, was charged in a proper bill of indictment with the assault of Kenneth Earl Harris with a deadly weapon with the intent to kill inflicting serious injury. Defendant entered a plea of not guilty and the State presented evidence tending to show the following:

Early on the morning of 24 June 1976 the defendant, Preston Lee Harris, Kenneth Earl Harris and a woman drove to the woman's apartment in defendant's automobile. While defendant and the woman were inside her apartment, Kenneth Harris drove the automobile to defendant's mobile home. He knocked on the door and defendant's wife responded. The two went to her bedroom and with her consent engaged in sexual relations. Harris departed from defendant's home at approximately 4:30 a.m., returned to the woman's apartment and picked up defendant. Defendant drove Harris home and then went home himself.

Later in the morning at approximately 7:30 a.m., defendant went to the home where Kenneth Harris lived with his mother. He stated that he intended to kill Harris and confronted him with his wife's accusation that Harris had raped her. Harris denied the charge and the two men left together. As Harris drove defendant to his home in his van, they continued to discuss the charges by defendant's wife. When they reached defendant's home, defendant

drew a .25 caliber automatic pistol with which he shot Harris four times. Harris was taken to the hospital where he stayed until 15 October 1976. As a result of the shooting Harris is permanently deprived of the use of his legs.

Defendant offered evidence tending to show that defendant's wife had been asleep on the morning in question and awoke finding Harris undressed in bed with her. She was then forced to submit to sexual relations.

The jury rendered a verdict of guilty of the offense of assault with a deadly weapon inflicting serious injury. Judgment was entered imposing a sentence of 10 years imprisonment and defendant appealed therefrom.

Attorney General Edmisten by Associate Attorney Rebecca R. Bevacqua for the State.

Hulse & Hulse by Herbert B. Hulse for the defendant appellant.

HEDRICK, Judge.

[1] Defendant first contends that the trial judge erred to his prejudice by not allowing him to testify on direct examination that when he shot Kenneth Harris, "I was not aware of what I was doing." Defendant argues that this evidence was relevant to the question of his intent and admissible as part of the *res gestae*. Obviously, the statement was not a part of the *res gestae* since the excluded evidence related only to defendant's state of mind, and not to a declaration made at the time of the commission of the crime. Assuming *arguendo* that the excluded statement tended to show a lack of criminal intent upon the part of the defendant, we perceive no prejudicial error in the court's ruling since the defendant repeatedly testified that he did not intend to shoot Kenneth Harris. This assignment of error has no merit.

Defendant next contends that the court erred in denying his motion for judgment as of nonsuit. Here defendant merely argues that there was no evidence of defendant's criminal intent. The record is replete with evidence sufficient to require submission of the case to the jury and to support the verdict.

[2] Defendant's sixth assignment of error is stated as follows:

"The Court's instruction to the jury as to the order in which the jury must consider charges for that the same was arbitrary and incorrect."

The trial judge submitted the possible verdicts in the following order: 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; and not guilty. The judge simply submitted the offenses in the order in which they appear in the statute, G.S. 14-32. As this Court has responded to a similar contention by another defendant, "[n]o authority is cited for this position and reason does not support it." *State v. Wall*, 9 N.C. App. 22, 24, 175 S.E. 2d 310, 311 (1970). This assignment of error is overruled.

[3] Next, defendant argues that the trial judge erred in failing to define the term "assault" as it relates to the offenses submitted to the jury. The North Carolina courts have adhered to the "common law rule that an assault is an intentional offer or attempt by force and violence to do injury to the person of another." *State v. Hill*, 6 N.C. App. 365, 369, 170 S.E. 2d 99, 102 (1969). In the present case the trial judge instructed the jury in connection with each offense submitted that to convict defendant it must find beyond a reasonable doubt "that the defendant assaulted Kenneth Harris by intentionally shooting him with a pistol; . . . ." This instruction is clearly distinguishable from the one disapproved in *State v. Hickman*, 21 N.C. App. 421, 422, 204 S.E. 2d 718, 719 (1974), where the trial judge merely instructed the jury that to return a verdict of guilty it must be satisfied that " 'the defendant . . . assaulted Clayton Fenner with a knife . . . .' " Moreover, it is substantially similar to the instruction approved in *State v. Springs*, 33 N.C. App. 61, 234 S.E. 2d 193 (1977). We hold that the trial judge's instruction relating to assault was sufficient to define and explain the law arising on the evidence. This assignment of error is overruled.

Finally, defendant assigns as error the following:

"The Court's instruction to the jury on the element of intent, in that the Court did not extend its instructions to the lesser included offense of assault with a deadly weapon inflicting serious injury."

This assignment of error purports to be based on exception numbers eight and twelve. Exception number twelve is a broadside exception to the charge and does not support the assignment of error. Exception number eight relates to the court's instructions to the jury on the element of specific intent to kill as it related to the charges on assault with a deadly weapon with intent to kill inflicting serious injury and assault with a deadly weapon with intent to kill. Defendant does not challenge the instruction, but contends that the court erred in not bringing this instruction forward with respect to the lesser-included offense of assault with a deadly weapon inflicting serious injury. Obviously, specific intent to kill is not an element of the lesser-included offense of which the defendant was found guilty. We have carefully examined the instructions to the jury with respect to the lesser-included offense and find the charge to be without prejudicial error. Assignment of error number five is without merit.

We hold that the defendant had a fair trial free from prejudicial error.

No error.

Judges BRITT and MARTIN concur.

LAURA Y. CLINE v. CALVIN C. CLINE

No. 7623DC1038

(Filed 16 November 1977)

1. Trusts § 19— wife's action to establish resulting trust—sufficiency of evidence

In an action to establish a resulting trust on lands upon which the parties had lived as husband and wife for nearly 25 years, evidence was sufficient to support the jury's verdict that plaintiff was entitled to a resulting trust where the evidence tended to show that the only consideration for the acquisition of the property from defendant's widowed mother was the agreement to satisfy the existing debt and move onto the land with her; the foregoing consideration was advanced equally by plaintiff and defendant; the consideration passed to his mother before the legal title passed to defendant; and plaintiff did not intend to make a gift of her part of the consideration to her husband.

2. Trusts § 20— resulting trust—when consideration was given—instructions erroneous

In an action to establish a resulting trust on lands upon which the parties had lived as husband and wife for nearly 25 years, the trial court erred in in-

structing on what plaintiff contributed to paying for the lands in question after legal title passed so that the jury could have understood that it could base its verdict on contributions made subsequent to the passing of legal title.

APPEAL by defendant from *Osborne, Judge.* Judgment entered 19 August 1976 and amended 24 August 1976 in District Court, YADKIN County. Heard in the Court of Appeals 21 September 1977.

Plaintiff, defendant's wife, started this action against him seeking, among other things, to obtain alimony and to establish a trust on lands upon which the parties had lived as husband and wife for nearly a quarter of a century. The appeal relates only to the action to establish the trust.

In the light favorable to plaintiff, the evidence, in part, tends to show the following. Plaintiff and defendant were married in 1944. Defendant's parents bought the land in question in February of 1950. They made only one payment on the deed of trust securing the purchase price before defendant's father died in December of that year. A family meeting was held, and none of defendant's brothers or sisters were willing to move on the land and pay for it. Defendant told plaintiff that they would have to move on the farm and finish paying for it. He told plaintiff that if they would move on the land with his mother and pay off the deed of trust, the land would be theirs. Plaintiff agreed to that bargain, and the parties moved on the land in early January, 1951. Thereafter, on 15 January 1951, defendant and his mother caused a deed to be executed conveying the land to defendant. Plaintiff did not know that defendant had taken title in his name only until after defendant left plaintiff in 1975. Plaintiff labored on the farm and at other employment to help provide the funds to satisfy the deed of trust. Plaintiff also provided some of the money to build and later renovate a house on the property. After the parties moved on the land, defendant's mother lived in the house with them most of the time until her death.

The jury found that plaintiff was entitled to have a resulting trust and a constructive trust imposed on the land.

Finger & Park, by Raymond A. Parker II and M. Neil Finger, for plaintiff appellee.

Franklin Smith and Henry B. Shore, for defendant appellant.

VAUGHN, Judge.

Broadly stated, a resulting trust arises where property is acquired and held in the name of one person which, in equity, belongs to another. "[T]he creation of a resulting trust involves the application of the doctrine that valuable consideration rather than legal title determines the equitable title resulting from a transaction; . . . a resulting trust involves a presumption or supposition of law of an intention to create a trust." *Bowen v. Darden*, 241 N.C. 11, 12-13, 84 S.E. 2d 289, 292 (1954). In *Bowen*, a mother paid for a home, and her son-in-law had the deed drawn to the mother for life with the remainder going to the mother's daughter, his wife. The mother's other children sought to impress a trust on the land in their favor. The evidence was sufficient to create a resulting trust because the mother had paid valuable consideration for the property and equity will place title in the one who pays.

[1] Clear, cogent and convincing evidence in the case before us is sufficient to permit the jury to find as follows: (1) the only consideration for the acquisition of the property from defendant's widowed mother was the agreement to satisfy the existing debt and move onto the land with her; and (2) the foregoing consideration was advanced equally by plaintiff and defendant; and (3) the consideration passed to his mother before the legal title passed to defendant; and (4) plaintiff did not intend to make a gift of her part of the consideration to her husband. These findings are sufficient to impress a resulting trust on the land for plaintiff's interest in the property. The jury's verdict, therefore, is fully supported by the evidence.

[2] Defendant brings forward numerous exceptions to the judge's charge to the jury. We will not discuss them separately. It is sufficient to say that the judge placed great emphasis on what plaintiff contributed to paying for the farm *after* legal title passed. A fair reading of the charge compels the conclusion that the jury could well have understood that it could base its verdict on contributions made subsequent to the passing of legal title. That evidence tends to show that the agreement was made and that plaintiff lived up to it, but within itself, it is inadequate to provide the foundation for the creation of a resulting trust in her favor.

The jury was never instructed that it must find that plaintiff advanced the consideration (her promises) before legal title was placed in defendant. "It is elemental that a resulting trust arises, if at all, in the same transaction in which the legal title passes, and by virtue of consideration advanced before or at the time the legal title passes, and not from consideration thereafter paid." *Rhodes v. Raxter*, 242 N.C. 206, 208, 87 S.E. 2d 265, 267 (1955).

For errors in the charge, therefore, we conclude that there must be a new trial. We will not discuss the remaining assignments of error. We note, however, that if upon retrial of the case, the evidence is substantially the same, the judge would be well advised not to attempt to instruct on the theory of a constructive trust. If the evidence that is favorable to plaintiff is believed, it is sufficient to support a finding that a resulting trust was created. If it is disbelieved, the jury could not find that a constructive trust was created.

New trial.

Judges HEDRICK and CLARK concur.

STATE OF NORTH CAROLINA v. JAMES A. GARNER, JR.

No. 7719SC554

(Filed 16 November 1977)

1. **Bastards § 5— refusal to support illegitimate child—payment to prosecutrix by defendant's mother—evidence not hearsay**

In a prosecution of defendant for willfully refusing to support his illegitimate child, the trial court did not err in allowing into evidence testimony concerning conversations and actions of defendant's mother relating to her payment of money to the mother of the child, since the testimony was not hearsay.

2. **Bastards § 5— refusal to support illegitimate child—payment by check to prosecutrix—check not introduced—no error**

In a prosecution of defendant for willfully refusing to support his illegitimate child where there was evidence that defendant's mother gave the prosecutrix money, the trial court did not err in admitting evidence about the check from the mother to prosecutrix where the check itself was not produced, since the terms of the check were not the issue in this case.

State v. Garner

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 3 February 1977 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 26 October 1977.

Defendant was charged with willfully refusing to support his illegitimate child, a violation of G.S. 49-2. The evidence tended to show that during the summer of 1974 defendant and Lucinda Wright dated steadily and had intercourse several times. In September, 1974, Lucinda Wright discovered she was pregnant. Defendant paid her first doctor bill, and sometime later his mother came to her home and gave her a check for $185.00. A daughter was born in May, 1975.

There was some evidence that a registered letter was sent to defendant asking him to support the child. There was also evidence that a previous warrant for refusal to support the child had been issued.

Answering issues submitted by the court, the jury found (1) that defendant was the father of the child; (2) that demand had not been made upon him for support; (3) that he had not willfully neglected to support the child; and (4) that he was not guilty of willful refusal to support the child.

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

Bell and Ogburn, by Charles T. Browne and William H. Heafner, for defendant appellant.

VAUGHN, Judge.

[1] The defendant assigns as error, on several grounds, the admission into evidence of conversations and actions of his mother relating to the payment of money. He first argues that testimony that defendant's mother came to the prosecutrix's home and gave her a check was incompetent as hearsay. "Evidence, oral or written [or assertive conduct], is called hearsay when its probative force depends, in whole or in part, upon the competency and credibility of some person other than the witness by whom it is sought to produce it." 1 Stansbury, North Carolina Evidence (Brandis Rev.) § 138 at 458. Such is not the case here. While the mother's conduct may raise implications of family responsibility, at no point do the State's witnesses testify to that conclusion.

"The inherent vice of hearsay testimony consists in the fact that it derives its value not from the credibility of the witness himself, but depends upon the veracity and credibility of some other person from whom the witness got his information." *State v. Lassiter*, 191 N.C. 210, 212, 131 S.E. 577, 579 (1926). The prosecutrix and her mother testified to actions in their living room. Defendant's mother's credibility was not at issue.

[2] Defendant argues further that admitting evidence about the check where the check itself was not produced was a violation of the best evidence rule. "The best evidence rule applies only where the *contents* or *terms* of a document are in question." 2 Stansbury, North Carolina Evidence (Brandis Rev.) § 191 at 103. The terms of the check were not the issue in this case; the probative value of the testimony did not turn upon the contents of the check. There was, therefore, no error in admitting this evidence.

Defendant also argues that his motion for nonsuit should have been allowed. He does not argue that the evidence was insufficient on the question of paternity. Instead, he says that there was no evidence of willful refusal to support after a demand had been made upon him for support. Even if there is merit to that argument, it is not appropriate on this appeal. The jury has found him *not guilty*, and the State could not have appealed from that verdict.

Defendant, in a trial in which we find no error, has appealed from a finding against him on the issue of paternity. This is his right by statute. G.S. 49-7. The determination of paternity will stand. G.S. 49-2 creates a continuing offense. Upon a subsequent prosecution for willful neglect or refusal to support the child, defendant will not be entitled to have the question of paternity relitigated. *State v. Ellis*, 262 N.C. 446, 137 S.E. 2d 840 (1964).

No error.

Judges BRITT and PARKER concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 2 NOVEMBER 1977

STATE v. ALLEN No. 7720SC219	Union (76CR7397)	No Error
STATE v. CALLAHAN No. 7710SC441	Wake (76CRS55846)	No Error
STATE v. CARRINGTON No. 7710SC215	Wake (76CR7652)	No Error
STATE v. CHAUFFE No. 778SC420	Wayne (75CR8579)	No Error
STATE v. CROSSEN No. 776SC522	Northampton (76CR3795)	No Error
STATE v. HANKS No. 779SC471	Vance (76CR3951)	No Error
STATE v. HARRINGTON No. 774SC377	Sampson (76CR7435)	No Error
STATE v. PARKER No. 774SC462	Sampson (76CRS5065) (76CRS5066) (76CRS8108) (76CRS8109)	No Error
STATE v. TATUM No. 774SC429	Sampson (77CRS0137)	No Error
STATE v. THOMPSON No. 775SC339	New Hanover (75CR445) (75CR446) (75CR447) (75CR448)	No Error
STATE v. WALKER No. 7710SC187	Wake (76CR47327) (76CR47328)	No Error
STATE v. WILLIAMS No. 7726SC321	Mecklenburg (76CR44055)	No Error
WILLIAMS v. WILLIAMS No. 7710DC15	Wake (73CVD10008)	Affirmed in part, Vacated in part, and Remanded

FILED 16 NOVEMBER 1977

BYRON v. BYRON No. 7626DC978	Mecklenburg (74CVD2683)	Affirmed
GALLOWAY v. GALLOWAY No. 773DC5	Craven (76CVD633)	Modified and Affirmed

STATE v. CHEATHAM No. 7727SC454	Gaston (75CR7726) (75CR7727)	No Error
STATE v. CHRISTMAS No. 7710SC508	Wake (76CR40854-D)	No Error
STATE v. EDMONDS No. 779SC425	Granville (76CRS3803)	No Error
STATE v. FREEMAN No. 7720SC460	Union (75CR5436)	No Error
STATE v. JACKSON No. 7712SC355	Hoke (75CR2664) (76CR2422)	No Error
STATE v. KORNEGAY No. 778SC336	Wayne (76CRS3756)	No Error
STATE v. LEWIS No. 7720SC442	Stanly (76CR5344)	No Error
STATE v. NESBIT No. 7726SC422	Mecklenburg (76CR6461) (76CR6462)	No Error
STATE v. PEARSON No. 7723SC384	Wilkes (75CR9202) (76CR4557)	Affirmed
STATE v. RHONE No. 7720SC443	Stanly (76CR6008) (76CR6011) (76CR6119)	No Error
STATE v. ROBERTS No. 7719SC512	Randolph (76CRS5990)	No Error
STATE v. ROBINSON No. 7726SC463	Mecklenburg (76CR47721)	No Error
STATE v. SHORT No. 7722SC466	Iredell (76CR1480) (76CR1481)	Affirmed
STATE v. SUMRELL No. 775SC491	New Hanover (76CR18802)	No Error
STATE v. WELLS No. 775SC510	New Hanover (76CR16001) (76CR14416)	No Error
STATE v. WILLIAMS No. 7714SC535	Durham (76CRS2933)	No Error
STATE v. WYATT No. 7723SC240	Wilkes (75CR6781)	No Error
STATE v. YOUNG No. 772SC496	Washington (75CR2241)	No Error

ADA G. LOVE AND JEFFREY L. LOVE v. ROBERT HARVEY PRESSLEY

No. 7626DC1005

(Filed 7 December 1977)

1. **Judges § 5— similar earlier case before judge—no bias—recusation unnecessary**

There was no showing of bias in this case which would have required recusation of the trial judge where the only evidence to support defendant's motion for the case to be heard by another judge was that the trial judge had made findings of fact adverse to defendant in an earlier case involving similar issues.

2. **Evidence § 19; Trespass § 6— "clean-up" of plaintiff's premises—questions about prior "clean-ups"—admissibility of evidence**

In an action for damages arising from alleged trespass and conversion, breach of covenant of quiet enjoyment, and mental suffering where plaintiffs alleged that they rented a house from defendant, gave notice that they were moving out of the house, after four days absence went into the house to remove the feme plaintiff's belongings, discovered they were missing, and were told that the "clean-up" man had already been to the house, the trial court did not err in allowing plaintiffs to question defendant and his "clean-up" man with respect to incidents involving defendant and tenants other than plaintiffs, since the evidence was admissible to impeach defendant's denial that he or his employee acting within the scope of his employment "cleaned-up" the personal possessions of the plaintiffs, and since the evidence which indicated the scope of "clean-up" on other occasions was competent as circumstantial evidence to indicate the scope of "clean-up" in the instant case.

3. **Rules of Civil Procedure § 50— motion for directed verdict—specific grounds—necessity for stating**

G.S. 1A-1, Rule 50(a) requires that a motion for directed verdict state specific grounds; this provision is mandatory, and, upon failure to state specific grounds, an appellant cannot question on appeal the insufficiency of the evidence to support the verdict.

4. **Trespass § 7; Landlord and Tenant § 6.2; Trover and Conversion § 2— landlord's unauthorized entry into leased premises—conversion of personal property—sufficiency of evidence**

In an action for damages arising from alleged trespass and conversion, breach of covenant of quiet enjoyment, and mental suffering, plaintiffs' evidence that they were lawfully occupying premises rented to them by defendant and that defendant or his employee removed plaintiff's personal property from the premises was sufficient to be submitted to the jury where such evidence tended to show that plaintiffs had paid a deposit and the first week's rent on the premises and had received a key; defendant did not evict plaintiffs from the premises pursuant to any court action or judicial process; defendant closely watched his rental properties and, upon determining that a unit had been vacated by a tenant, would give his maintenance man a key for the pur-

pose of cleaning up the unit so that it could be rented again; on some occasions "clean-up" had included removal of personal property belonging to tenants without their prior approval; plaintiffs returned to their rented premises after a four day absence to find that feme plaintiff's belongings were missing; and plaintiffs were told by defendant's rental agent "that the clean-up man had been there."

5. **Trial § 38— requested instructions not given verbatim—no error**

The trial court was not required to give *verbatim* defendant's requested instruction defining "the greater weight of the evidence."

6. **Appeal and Error § 45.1— failure to argue question in brief—no appellate review**

App. R. 28(a) requires that a question be presented *and argued* in the brief in order to obtain appellate review.

7. **Principal and Agent § 9— agent's actions directed by principal—respondeat superior—jury instructions proper**

Defendant's contention that the trial court erred in failing to distinguish between defendant's and his agent's alleged conversion of plaintiffs' property in the issues submitted to the jury is without merit, since there was no evidence in the record to indicate that defendant's agent had any access to the premises rented by plaintiffs other than under the directions of defendant, and the trial court properly charged the jury with respect to the doctrine of respondeat superior.

8. **Trial § 33— jury instructions—recapitulation of evidence—unequal time given to parties' evidence—no error**

Where one party presents substantially more evidence than the other, it is not error for the court's recapitulation of the first party's evidence to be longer than the recapitulation of the second party's evidence.

9. **Unfair Competition—unfair trade practices—rental of residential housing**

The rental of residential housing is "trade or commerce" within the meaning of former G.S. 75-1.1 declaring unfair trade practices unlawful.

10. **Unfair Competition—rented premises—conversion of personal property—unfair trade practices—treble damages proper**

Where the jury properly found that defendant or his agent trespassed upon premises rented to plaintiffs and converted the personal property of the feme plaintiff, the trial court properly concluded that defendant's conduct constituted unfair or deceptive acts or practices in commerce contrary to the provisions of G.S. 75-1.1 and plaintiffs were entitled to treble damages.

APPEAL by defendant from *Hicks, Judge*. Judgment entered 18 May 1976 in District Court, MECKLENBURG County. Heard in the Court of Appeals 31 August 1977.

This is an action for damages arising from alleged trespass and conversion, breach of covenant of quiet enjoyment, and men-

tal suffering. Plaintiffs also alleged that defendant's conduct constituted unfair trade practices under G.S. 75-1.1 entitling them to treble damages.

At the time this lawsuit was instituted, the defendant owned and rented to others about 76 rental units in the City of Charlotte, North Carolina. On 7 December 1974, plaintiffs paid a deposit to Mrs. Betty Soloman, defendant's rental agent, and subsequently moved into a house at 3118 Cosby Place. On 16 December 1974, the plaintiffs had a personal quarrel. The femme plaintiff returned to her mother's home in Concord; her husband returned to Cosby Place the next day (17 December), removed his personal belongings, called Mrs. Soloman, and informed her that they (plaintiffs) were moving out of Cosby Place. On 19 December, the plaintiffs returned to Cosby Place and discovered that personal property belonging to the femme plaintiff was missing. Upon calling Mrs. Soloman, plaintiffs were informed that the clean-up man had been to Cosby Place and were given defendant's telephone number. They never were able to contact the defendant, and he did not return their phone calls.

It was stipulated that defendant did not evict plaintiffs from Cosby Place pursuant to any judicial action or process.

Further pertinent facts will be brought out in the discussion of the issues.

The jury returned verdicts of guilty and awarded damages to plaintiffs for trespass, conversion, breach of the covenant of quiet enjoyment, and mental suffering. The trial judge, upon his conclusion that defendant's conduct constituted unfair trade practices under G.S. 75-1.1, proceeded to treble the damages as awarded by the jury for trespass, conversion, and mental suffering, pursuant to G.S. 75-16.

From the verdicts and judgments entered thereon, defendant appealed.

Theodore Fillette and Donald S. Gillespie, Jr., for plaintiffs.

Walker & Walker, by Frank H. Walker, for defendant.

BROCK, Chief Judge.

Defendant brings forth some 36 assignments of error in "scatter bomb" fashion. For organizational purposes, those of his

arguments which we feel merit discussion will be loosely grouped in subdivisions of this opinion.

I

[1] Defendant's first assignment of error is to the denial of his pretrial motion for the case to be heard before another judge. Defendant argues that as evidenced by an order entered by Judge Hicks in another case involving defendant and relating to practices similar to the conduct at issue in the instant case, Judge Hicks had preconceived opinions and was biased against the defendant. Defendant's argument is without merit. Although only a two-page excerpt from the order in the prior case is included in the record on appeal in this case, its contents, which defendant refers to as "statements", are in reality findings of fact, which are part of a written ruling based upon evidence received by Judge Hicks sitting without a jury in the prior proceeding.

Defendant correctly states the law in this state that litigants are entitled to a fair trial before an unbiased judge. *Ponder v. Davis*, 233 N.C. 699, 65 S.E. 2d 356 (1951). *Ponder* involved a contested election for sheriff in which one of the litigants moved that the judge recuse himself due to his having actively supported and campaigned for the adverse party in the contested election. That type of *personal interest* in the outcome of litigation was considered by the Supreme Court to be sufficient grounds for recusation. No such personal interest or bias on the part of Judge Hicks appears from the record. This Court has held that the fact that a trial judge has repeatedly ruled against a party is not grounds for disqualification of that judge absent substantial evidence to support allegations of interest or prejudice. *In re Custody of Cox*, 24 N.C. App. 99, 210 S.E. 2d 223 (1974). *C.f. Perry v. Perry*, 33 N.C. App. 139, 234 S.E. 2d 449 (1977) (judge who entered *pendente lite* order for child support payments had presided at earlier criminal trial of defendant for failure to provide adequate child support).

The only evidence to support defendant's motion was that Judge Hicks had made findings of fact adverse to defendant in an earlier case. There has been no showing of bias in this case which would have required recusation of Judge Hicks.

Defendant's first assignment of error is overruled.

II

[2] The next series of assignments of error deal with the admission of certain testimony which defendant contends was irrelevant and prejudicial.

Defendant's third and sixth assignments of error relate to questions propounded by plaintiff on direct examination of the defendant and on cross-examination of defendant's employee, Melvin Soloman, which pertained to incidents involving the defendant and tenants other than the plaintiffs. Defendant argues that the evidence apparently was allowed for the purpose of impeaching the witnesses; that in at least one instance, the evidence did not appear to contradict defendant's earlier testimony; and that the evidence pertained to collateral matters and the witnesses' testimony was not properly subject to impeachment by extrinsic evidence. We disagree.

The underlying question appears to be whether any testimony relating to incidents involving other tenants of defendant could properly be elicited either as substantive evidence or for impeachment purposes. If plaintiffs could properly inquire into these matters in the first instance, they could then properly impeach defendant as an adverse witness pursuant to Rule 43(b), North Carolina Rules of Civil Procedure, and could properly impeach Mr. Soloman on cross-examination.

If such testimony is admissible for impeachment, it would arise from the following denial by the defendant:

> "Q. Mr. Pressley, during December, 1974, did you or anyone acting under your control as an employee or agent clean out 3118 Cosby Place; the clothes, linen, dishes, or other personal effects of Ada Love or Jeffrey Love?
>
> A. Not that I know of."

Subsequent to that exchange, plaintiffs' counsel was permitted to inquire over objection into defendant's and Mr. Soloman's "clean-up" of the personal possessions of tenants at three other residences in Charlotte during 1974 and 1975; plaintiffs' counsel was allowed to impeach defendant's testimony by inquiring over objection into statements made by defendant under oath in two other lawsuits involving similar circumstances; and was allowed

to utilize interrogatories from one of these other lawsuits on cross-examination of Mr. Soloman.

The obvious purpose of the above questions was to impeach defendant's denial that he or his employee acting within the scope of his employment "cleaned-up" the personal possessions of the plaintiffs. As such, evidence that defendant had acted in a certain manner regarding other tenants at other times does not constitute direct evidence that he so acted regarding plaintiffs. Rather, it is circumstantial evidence affecting the credibility of defendant's denial that he cleaned out the plaintiffs, and also indicating a practice of cleaning out the personal property of tenants. However, if the doing of one act has no other relevancy than that it indicates a disposition to indulge in that kind of conduct, from which the probability of the second act is inferable, then the evidence of the first act is not admissible. *Holmesly v. Hogue*, 47 N.C. 391 (1855). 1 Stansbury's North Carolina Evidence, (Brandis Rev. 1973), (hereinafter, Stansbury), § 91. Nevertheless, if "the doing of the first act has a logical tendency to prove some relevant fact other than mere character or disposition . . . it may be shown by competent evidence, subject of course to the general rule excluding evidence that is too remote to be of substantial probative value." Stansbury, *id.* Thus, evidence of defendant's conduct towards other tenants, was admissible if it tended to prove any other fact relevant to the inquiry. Furthermore, plaintiffs were not bound by defendant's testimony and could discredit him by proof of prior specific statements or other conduct which related to a matter pertinent and material to the case. 1 Stansbury, § 48.

"Testimony is relevant if it reasonably tends to establish the probability or the improbability of a fact in issue. (Citations omitted.) For this reason, the relevancy of evidence in a civil action is to be tested by the pleadings, which define the facts put in issue by the parties. (Citations omitted.)" *State ex rel Freeman v. Ponder*, 234 N.C. 294, 304, 67 S.E. 2d 292, 300 (1951). The facts put in issue by the pleadings in the instant case included, *inter alia*, whether there was an unauthorized entry by defendant or his agent or employee into the premises rented to the plaintiffs; whether there was a conversion of plaintiffs' personal property by defendant or his agent or employee; if there was indeed such an entry and conversion by Mr. Soloman, defendant's employee,

whether he was acting within the scope of his employment with the defendant; and whether trespass and conversion were part of the conduct of defendant's business (see Part VI, *infra*).

Plaintiff Ada Love testified that upon returning to the house at Cosby Place and discovering that the floors had been mopped and waxed and that her belongings were missing, she called Mrs. Betty Soloman, defendant's rental agent, who said that the clean-up man had been there. Thus the definition of "clean-up" was material to an explanation of the disappearance of plaintiffs' property. The questions put to defendant and Mr. Soloman, to which defendant excepts, concerning defendant's conduct and statements relating to other tenants, were material to the definition of clean-up. Defendant was asked if he had cleaned out or removed personal property belonging to other tenants. Evidence indicated that Cosby Place had been cleaned-up, and that the "clean-up man" had been there; therefore, the scope of "clean-up" on other occasions was competent as circumstantial evidence to indicate the scope of clean-up in the instant case.

Evidence relating to clean-up by defendant or Mr. Soloman on other occasions was also competent circumstantial evidence that the removal of plaintiffs' personal property by Mr. Soloman was within the scope of his employment with the defendant; thus impeachment of Mr. Soloman on cross-examination relating to his removal of personal property during clean-up of other tenants was proper.

Because of the relevance of the evidence relating to the definition of "clean-up" to the issues in this case, assignments of error numbers 3 and 6 are overruled.

III

The next series of assignments of error deal with purported errors on the part of the trial court in limiting defendant's cross-examination of plaintiff Ada Love by sustaining objections to certain questions asked during the cross-examination. The first, assignment of error number 12, concerns the right of the trial judge to sustain an objection when none has been made by counsel. There is no merit to this assignment of error. *See Greer v. Whittington*, 251 N.C. 630, 111 S.E. 2d 912 (1960).

Defendant's thirteenth, fourteenth, fifteenth, seventeenth and nineteenth assignments of error deal with questions asked by defendant which in substance had been answered by plaintiff at some point during her testimony. The limits of cross-examination are largely within the discretion of the trial judge, *State v. McPherson*, 276 N.C. 482, 172 S.E. 2d 50 (1970), and this includes the discretion to ban unduly repetitious and argumentative questioning. 1 Stansbury, § 35. Furthermore, in no instance covered by assignments of error numbers 13-19 does the record show what the witness would have said had she been permitted to answer; nor does it appear from the record that defendant requested that a record be made of the answers the witness would have given pursuant to Rule 43(c) of the Rules of Civil Procedure. Exclusion of testimony cannot be held prejudicial on appeal unless appellant shows what the witness would have testified if permitted. *State v. Robinson*, 280 N.C. 718, 187 S.E. 2d 20 (1972).

Defendant's assignments of error numbers 12-19 are overruled.

IV

Defendant's assignments of error numbered 21, 36 and 37 relate to the trial court's denial of defendant's Rule 50(a) and (b) motions for directed verdict and judgment notwithstanding the verdict testing the sufficiency of the evidence to go to the jury. The specific grounds asserted by defendant to support his motions for a directed verdict at the close of plaintiffs' evidence and again at the close of all the evidence were that there was insufficient evidence to show that the plaintiffs were lawfully occupying the house or that the defendant removed the property. In his motion styled as a motion for judgment notwithstanding the verdict defendant sought to have the verdict set aside as against the greater weight of the evidence, and to have the verdicts as to damages for conversion of personal property and for mental suffering set aside on the grounds that they were excessive. The asserted grounds are proper grounds for a motion for a new trial under Rules 59(a)(7) and 59(a)(6) respectively; however, no such motion appears in the record. For this reason, and the reasons set out below, these questions are not properly presented for review on appeal of the denial of defendant's motion for judgment notwithstanding the verdict.

[3] Since the North Carolina and Federal Rules 50 are substantially similar, federal interpretations are instructive to supplement the North Carolina decisions. Rule 50(a) requires that a motion for directed verdict state specific grounds, and this provision is mandatory. *Anderson v. Butler*, 284 N.C. 723, 202 S.E. 2d 585 (1974); *Wheeler v. Denton*, 9 N.C. App. 167, 175 S.E. 2d 769 (1970). Upon failure to state specific grounds, an appellant cannot question on appeal the insufficiency of the evidence to support the verdict. *Wheeler v. Denton, id.* The motion for judgment notwithstanding the verdict is technically only a renewal of the motion for a directed verdict made at the close of all the evidence, and thus the movant cannot assert grounds not included in the motion for directed verdict. *House of Koscot Development Corp. v. American Line Cosmetics, Inc.*, 468 F. 2d 64 (5th Cir., 1972) (since defendant failed to assert as grounds for directed verdict the sufficiency of the evidence of damages the question was not preserved for appeal by asserting such grounds in a motion after the jury's verdict). The rationale for this rule is that otherwise, a judgment notwithstanding the verdict might be entered on grounds which could have been met with proof at trial if such grounds had been suggested in the motion for directed verdict. 2B Barron and Holtzoff, Federal Practice and Procedure (Wright ed., 1961) § 1073.

[4] Thus defendant has waived appellate review of the sufficiency of plaintiffs' evidence to support the verdicts as to damages in this case. The only questions relating to the sufficiency of the evidence which are before this Court are those raised by defendant's motions for directed verdict. Therefore we are confronted only with the question of whether plaintiffs' evidence showing (1) that plaintiffs were lawfully occupying the house at Cosby Place, and (2) that defendant removed plaintiffs' property, was sufficient to go to the jury.

It is the well-established rule that in determining the sufficiency of evidence to withstand a defendant's motions for directed verdict and for judgment notwithstanding the verdict, all the evidence which supports the plaintiffs' claim must be taken as true and considered in the light most favorable to them, giving them the benefit of every reasonable inference which may legitimately be drawn therefrom, and resolving contradictions, conflicts and inconsistencies in their favor. *Supply Co. v.*

Murphy, 13 N.C. App. 351, 185 S.E. 2d 440 (1971). Applying the above test to the facts of the instant case, it is clear that there was sufficient evidence to go to the jury and from which the jury could find (1) that the plaintiffs were lawfully occupying the house at 3118 Cosby Place, and (2) that the defendant or his employee Mr. Soloman entered the premises and removed the personal property of the plaintiffs.

On the first question, there was evidence which tended to show that at the time in question, December 1974, Mrs. Betty Soloman was the rental agent for defendant and that she was charged with renting various pieces of property for defendant, including the residence at 3118 Cosby Place; that on Saturday, 7 December 1974, the plaintiffs saw an ad in the newspaper and contacted Mrs. Soloman about the possibility of renting an apartment; that the advertised apartment was unavailable but that Mrs. Soloman suggested that the plaintiffs look at the unit at 3118 Cosby Place; that the plaintiffs looked at the unit and liked it; that they returned to Mrs. Soloman and paid her a deposit in the amount of $65.00; that they returned to Mrs. Soloman's house on the following Monday and paid the first week's rent of $40.00, and received a key to the premises; and that they signed a lease covering the premises either on Saturday, 7 December 1974, or Monday, 9 December 1974. It was stipulated by the parties that Mr. Pressley did not evict plaintiffs from 3118 Cosby Place pursuant to any court action or judicial process. This evidence, considered in the light most favorable to the plaintiffs, was clearly sufficient to go to the jury and from which the jury could find that the plaintiffs were lawfully occupying the premises at 3118 Cosby Place after 9 December 1974.

As to defendant's second purported grounds for directed verdict, *to wit*, insufficient evidence that the defendant removed the femme plaintiff's property from the house at Cosby Place, the evidence considered in the light most favorable to the plaintiffs tends to show that Melvin Soloman was, at all times pertinent to this controversy, the employee of the defendant; that Mr. Soloman was the maintenance and clean-up man for defendant's rental property; that the defendant watched his rental units closely, visiting them as many as three times a week; that defendant kept duplicate keys to his rental units and a master key to all the units; that no one except defendant had access to these duplicate

and master keys; that defendant, upon determining that a unit had been vacated by a tenant, would give his maintenance man a key to the unit for purposes of cleaning it up; that sometimes Mr. Pressley worked with his clean-up man; that "clean-up" of rental units involved restoration of units after a tenant had left so that it could be re-rented; that this entailed, among other things, cleaning and buffing floors; that "clean-up" on other occasions had included removal of personal property belonging to tenants without their prior approval; that plaintiffs returned to 3118 Cosby Place on 19 December 1974, after some four days absence, and discovered that the house had been cleaned and that the floors had been cleaned; that they also found, upon their return, that the personal belongings of plaintiff Ada Love were missing but that the furniture belonging to defendant was still there; that plaintiffs called Mrs. Soloman and were told "that the clean-up man had been there." All of the evidence, considered in the light most favorable to the plaintiffs was sufficient to allow the jury to infer that the defendant, either personally or through his employee Melvin Soloman acting within the scope of his employment with defendant, removed the personal property belonging to plaintiff Ada Love from the premises at 3118 Cosby Place.

Defendant's assignments of error numbered 21, 36 and 37 are overruled.

V

[5] Defendant's assignment of error number 22 is feckless. Defendant contends that the trial court erred in refusing to grant a request for a jury instruction pertaining to the definition of "the greater weight of the evidence." Defendant's brief argument would seem to imply that the trial judge gave no instruction on greater weight. The record discloses that the court did indeed define greater weight, using the precise language as set out in North Carolina Pattern Jury Instructions—Civil § 101.10. The court is not required to charge the jury in the precise language requested so long as the substance of the request is included. *Faeber v. E.C.T. Corp.*, 16 N.C. App. 429, 192 S.E. 2d 1 (1972). Defendant does not attempt to show any prejudice from the refusal of the court to give the instruction as requested.

[6] Defendant further contends in assignment of error number 23 that the court erred in (1) refusing to adopt issues submitted

by defendant for the jury, and (2) in failing to make any distinction between the defendant's and his agent's alleged conversion in the issues submitted to the jury. As to the first point, defendant's brief is utterly void of argument or authority. App. R. 28(a) requires that a question be presented *and argued* in the brief in order to obtain appellate review. *State v. McMorris*, 290 N.C. 286, 225 S.E. 2d 553 (1976); *State v. Brothers*, 33 N.C. App. 233, 234 S.E. 2d 652 (1977). "Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned." App. R. 28(a).

[7] Defendant's challenge to the trial court's failure to distinguish between defendant's and his agent's alleged conversion of plaintiffs' property in the issues submitted to the jury is without merit. There is absolutely no evidence in the record to indicate that defendant's agent, Melvin Soloman, had any access to the premises at 3118 Cosby Place other than under the directions of defendant. Furthermore, the trial court properly charged the jury with respect to the doctrine of *respondeat superior*. Therefore, to the extent that assignment of error number 23 presents any question for review, it is overruled.

[8] Defendant also contends in assignment of error number 33 that the court failed to give a balanced summary of the evidence. Defendant assails the court's apparent failure to recognize the defendant's contentions and to review the evidence in support of these contentions, and refers to the so-called "Preliminary Argument" at the beginning of his brief. This preliminary argument, which presents contentions to the effect that the plaintiffs surreptitiously moved into 3118 Cosby Place with the intent to defraud the defendant, is nothing more than a jury argument. A contention is not evidence. *Bodenheimer v. Bodenheimer*, 17 N.C. App. 434, 194 S.E. 2d 375 (1973). The record reveals that in the instructions on the several issues, the court gave a balanced summary of the contentions of the parties based on the evidence which had been elicited during the trial.

As to the alleged unbalanced summary of the evidence, suffice it to say that where one party presents substantially more evidence than the other, it is not error for the court's recapitulation of the first party's evidence to be longer than the recapitulation of the second party's evidence. *State v. Crutchfield*, 5 N.C. App. 586, 169 S.E. 2d 43 (1969). The plaintiffs in this case called

five witnesses; the defendant called two. Plaintiffs' evidence covered some 55 pages of the record; defendant's evidence covered approximately seven pages. Assignment of error number 33 is overruled.

We have reviewed the balance of defendant's assignments of error pertaining to the court's instructions to the jury, and find them, as to all parties, a fair and appropriate summary of the evidence and the law arising from the evidence. There is nothing in the instructions which would justify a new trial in this case. Likewise we have reviewed the balance of defendant's assignments of error, not discussed herein, pertaining to the conduct of the trial itself, and in our opinion defendant received a fair trial, free from prejudicial error.

VI

Finally, defendant's assignments of error numbered 20, 34 and 35 present the question of whether the trial court erred in holding as a matter of law that the trespass and conversion as found by the jury constituted unfair trade practices by defendant under G.S. 75-1.1, entitling plaintiffs to treble damages pursuant to G.S. 75-16.

At the time this case arose, G.S. 75-1.1 read in pertinent part as follows: "(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful. (b) The purpose of this section is to declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings between buyers and sellers at all levels of commerce be had in this State."

In *State ex rel Edmisten v. J. C. Penney Co.*, 292 N.C. 311, 233 S.E. 2d 895 (1977), our Supreme Court held that "the unfair and deceptive acts and practices forbidden by G.S. 75-1.1(a) are those involved in the bargain, sale, barter, exchange or traffic" between buyers and sellers. 292 N.C. at 316-17, 233 S.E. 2d at 899. In 1977, our Legislature rewrote the statute, (Session Laws—1977, Chapter 747), and greatly broadened its scope. However, the 1977 revisions were expressly declared inapplicable

to pending litigation. Thus we review the trial court's ruling under the pre-1977 version of G.S. 75-1.1.

[9] First we must determine whether "trade or commerce" under the statute, as interpreted in the J. C. Penney case, *supra*, encompasses the business of providing rental housing. Although we have been unable to find any North Carolina cases directly on point, our Supreme Court, in another context, has held that a lease is a chattel real and as such is a species of intangible personal property. *Investment Co. v. Cumberland County*, 245 N.C. 492, 96 S.E. 2d 341 (1957).

It is our conclusion that for purposes of G.S. 75-1.1, a lease is a sale of an interest in real estate. The Supreme Court of Pennsylvania so stated in *Commonwealth v. Monumental Properties, Inc.*, 459 Pa. 450, 329 A 2d 812 (1974). In that case, it was held that Section 3 of the Pennsylvania Consumer Protection Law, which was identical to the pre-1977 version of G.S. 75-1.1(a), covered unfair or deceptive practices in connection with the leasing of housing. As noted in the opinion:

> "Functionally viewed, the modern apartment dweller is a consumer of housing services. The contemporary leasing of residences envisions one person (landlord) exchanging for periodic payments of money (rent) a bundle of goods and services, rights and obligations." 329 A 2d at 820.

Thus we hold that the rental of residential housing is "trade or commerce" under G.S. 75-1.1. We now must determine whether the trial court properly concluded that defendant's conduct constituted "unfair or deceptive acts or practices in the conduct of" said trade or commerce.

[10] In cases under G.S. 75-1.1 and 75-16, it is ordinarily the province of the jury to find the facts, and based on the jury's findings the court must then determine as a matter of law whether the defendant's conduct violated G.S. 75-1.1. *Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975). In the instant case, the jury properly found facts that the defendant or his agent trespassed upon the premises rented to the plaintiffs and converted the personal property of the femme plaintiff. Implicit in the verdict as to conversion is the finding that defendant refused to return the property upon demand. Also, it was stipulated that defendant did not

evict plaintiffs from the premises pursuant to any judicial process.

G.S. 75-1.1(b) states that the purpose of the section is to provide means of maintaining "ethical standards of dealings . . . between persons engaged in business and the consuming public" and to promote "good faith and fair dealings between buyers and sellers . . . ." Defendant is clearly a person engaged in business—he was renting around seventy-six units at the time the lawsuit was commenced—and plaintiffs were part of the consuming public.

We hold that defendant's conduct constituted unfair or deceptive acts or practices in commerce contrary to the provisions of G.S. 75-1.1 and affirm the award of treble damages to plaintiffs pursuant to G.S. 75-16. We regard as surplusage the independent findings of fact made by the trial judge.

No error.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA ON RELATION OF JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE OF NORTH CAROLINA, REHABILITATOR v. ALL AMERICAN ASSURANCE COMPANY, RESPONDENT AND AMERICAN BANK AND TRUST COMPANY, INTERVENOR RESPONDENT.

No. 7726SC13

(Filed 7 December 1977)

1. **Insurance § 1— rehabilitation of insurance company—recognition of legal counsel—direction to continue legal representation**

In proceedings under G.S. 58-155.2 *et seq.* to rehabilitate an insurance company because of threatened insolvency, the trial court properly exercised its broad supervisory power to assure continued and stable legal representation for the insurance company during a period of discord between its officers and directors when it issued an order recognizing a law firm as counsel for the insurance company and directed that such counsel continue to represent the company in certain actions pending in other states.

2. **Insurance § 1— rehabilitation of insurance company—determination that law firm not replaced as counsel**

In proceedings to rehabilitate an insurance company, the trial court in the exercise of its supervisory power had the authority to determine that a law

firm had not been effectively replaced as counsel of record for the insurance company and that such counsel continued to represent the company during the rehabilitation.

3. **Insurance § 1— rehabilitation of insurance company—reasonable counsel fees—authority of court**

The trial court had the authority to order an insurance company undergoing rehabilitation because of threatened insolvency to pay fair and reasonable attorney's fees and expenses to its counsel of record for services rendered in the rehabilitation proceedings.

RESPONDENT appeals from *Martin, Judge.* Order filed 25 August 1976 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 27 September 1977.

Pursuant to G.S. 58-155.2 *et seq.* the State Commissioner of Insurance filed petition alleging insolvency, and the All American Assurance Company was placed in involuntary rehabilitation by order of the superior court on 4 November 1975. "AAA" is a stock company incorporated under the laws of North Carolina with its home office in Charlotte, North Carolina, and its administrative office in Baton Rouge, Louisiana. It is engaged in the writing of life, accident, and health insurance in North Carolina and other states. On 6 November 1975 the then president of "AAA" requested petitioner law firm to appear for it in the first rehabilitation hearing, not to "protest or advocate the move [rehabilitation]," but "to endeavor to clarify whether or not the Company is insolvent as alleged in the partition [*sic*]." On 7 November petitioner filed with the court its "authority" to represent "AAA," a unanimous resolution of the Board of Directors dated 30 July 1975, which resolution appointed petitioner "to advise and assist the Company at the direction of the President," particularly during the "pending examination of the Company by the North Carolina Department [of Insurance]." Petitioner asked the court to order it confirmed in continued representation of "AAA," "provided it is lawful for the Company to have legal representation." The court so ordered on 7 November 1975.

Commissioner Ingram, in a meeting with "AAA's" Board of Directors on 8 October 1975, advised against the employment of either the petitioner law firm or the Louisiana firm of one of "AAA's" Board of Directors because of factionalism, but he made no move as Rehabilitator to have petitioner removed. On 31 October 1975 petitioner wrote the President of "AAA" that it

understood there was to be a "takeover" of "AAA" and that the new executive board would probably wish its own counsel, that "it is in order to ask the Board of Directors to rescind the July 30, 1975 resolution appointing us special counsel. . . ." Formal takeover was unsuccessful, but subsequently, the Executive Committee in a meeting on 8 November 1975, attempted to appoint E. Eugene Palmer of Austin, Texas, as special counsel. On 13 November 1975 the Secretary of "AAA" alleged that a telephone conference produced a unanimous vote of the Board of Directors adopting the 8 November resolution, but both the President and Senior Vice President denied any knowledge of the conference. Peter A. Foley orally petitioned the court that he and Palmer be recognized as "AAA's" counsel replacing petitioner, but the court in its order of 14 November 1975 found that petitioner was still the duly *designated* attorney for "AAA" and, in addition, "that all fees of said attorneys shall be subject to the approval of this court." The court order of 18 November 1975 reaffirming rehabilitation continued petitioner's representation, subject to certain specified conditions. Notices of appeal from both of these orders were filed in apt time, purportedly by "AAA," but on 5 December 1975 motion was filed to withdraw the notices of appeal. By order of the same date the court allowed the motion, finding that the notices of appeal were not made by "AAA," but by Republic Securities Corporation (a holding company which apparently then owned a controlling interest in "AAA").

On 4 December 1975 petitioner requested that the court approve a statement of "services rendered and advances made on behalf of Respondent," and for "a reasonable allowance of counsel fees. . . ." The court carefully considered petitioner's work and found it "to be of extreme importance to the Company and in the best interests of the Company, its policyholders, shareholders, creditors and the public. . . ." The court then awarded $30,034.50 to petitioner to be paid by the Rehabilitator out of "AAA's" assets. No appeal was taken to this order.

On 16 April 1976 American Bank and Trust of Baton Rouge, Louisiana, a "person" interested in the proceeding, moved the court to terminate rehabilitation pursuant to G.S. 58-155.3. At hearing on 23 April 1976 the court, determining that Bank was not yet a party to the action, continued the hearing. On the same day Bank properly moved to intervene. On 26 April its motion

was reconsidered, and the Rehabilitator joined in moving that rehabilitation be terminated. Petitioner sent a letter to the Rehabilitator and to counsel of American Bank asking for more information before agreeing to intervention and termination, and on 28 April successfully petitioned the court to hold a full hearing.

At the hearing on 7 May 1976 it appears from the evidence that American Bank, holder of a note made by Republic Securities Corp., and secured by 1,011,610 shares of "AAA" stock, 64% of the outstanding stock, was now the unconditional owner of the stock. The court allowed the motion of American Bank to intervene.

Other evidence at the hearing tended to show that petitioner, assisted by an attorney in Baton Rouge, Louisiana, had recovered some $7,000,000 worth of bonds which a prospective purchaser had removed from "AAA."

Further, at the hearing, evidence (not relevant to this appeal) was offered relative to the financial condition of "AAA" and the efforts made by the rehabilitator of "AAA" to recover assets and to relieve the company of disadvantageous commitments. "AAA" had about $1,613,000 cash on hand, and had total common stock, surplus, and retained earnings of about $31,300,000.

By order dated 7 May 1976 (filed 10 June 1976) the court found that American Bank had agreed to contribute additional funds to "AAA" so as to maintain its statutory capital and surplus at no less than $2,500,000 through 31 December 1976. The court terminated rehabilitation as of 7 May 1976, but not the lawsuit, and directed that "AAA" operate subject to certain conditions set forth in the order.

By letter of 10 June 1976, petitioner wrote to "AAA" offering to continue its representation and requesting a letter confirming the appointment. "AAA" replied on 16 June that it would retain local counsel in the future and expressed its appreciation for the legal services rendered by petitioner. Thereafter, petitioner wrote "wind-up" letters on 17, 18, 21, and 30 June relating to "AAA" matters.

On 1 July 1976 petitioner applied to the court for counsel fees (total $9,889.50) for services provided from 1 May 1976 through 30 June 1976, for advances totaling $973.77, and for

authorization of payments for legal services rendered by California attorneys ($810.00 fee) and for $776.37 for expenses from 18 August 1975 to 18 June 1976, all of which services "have been required by their [petitioner's] continued representation of Respondent in rehabilitation and have been rendered pursuant to the guidance and direction of this Court. . . ." The petition was supported by a detailed statement. The Commissioner/Rehabilitator was served notice of hearing on 1 July 1976. On 15 July the court wrote to the Commissioner, sending a copy to "AAA's" new counsel, asking for objections to the request for fees. The Rehabilitator objected to the award of fees for services rendered subsequent to 7 May 1976. "AAA's" home counsel made no response, submitting no objections.

On 25 August 1976 the court filed its order finding that petitioner, and the California firm employed by petitioner, had rendered valuable legal services to "AAA," directing it to pay petitioner $9,389.50 and the California firm a fee of $810.00, and expenses of $776.37. The court concluded that the order was entered pursuant to its Order of 25 November 1975. Respondent "AAA" appealed.

Cansler, Lockhart, Parker & Young by Thomas Ashe Lockhart, Joe C. Young and Winford R. Deaton, Jr., for petitioner appellee.

Robert O. Klepfer, Jr. and Arthur A. Vreeland for respondent appellant.

CLARK, Judge.

[3] This appeal raises the single issue of whether the trial court had the authority to order respondent "AAA" to pay attorney's fees and expenses to petitioner, counsel of record for "AAA," for services rendered in rehabilitation proceedings under G.S. 58-155.2 *et seq.*

Rehabilitation for insurance companies threatened by insolvency under G.S. 58-155.2 *et seq.* is a purely statutory procedure. The statutes confer no specific power upon the superior court to appoint counsel for the insurer or to award counsel fees to an attorney for the insurer during rehabilitation. The applicable statutes are clear as to purpose, nebulous as to procedure and generally silent as to powers of the court in accomplishing

the purpose of rehabilitation. The control of the insurer company is transferred to the Commissioner as rehabilitator, but if the power of the court in rehabilitation is narrowly limited by a literal interpretation of the statutes, the objective of receiving and protecting the insurer, its creditors, the insured and the public could not be accomplished. The court must have broad supervisory power in order to deal effectively with the many and varied situations that are likely to arise in rehabilitation proceedings. 25 N.C.L.R. 429, 430 (1947). The statutory language reflects this purpose and the need for judicial supervision over the rehabilitation proceedings, and guides us in determining the authority of the court.

Statutory reorganizations are generally considered to be deliberately informal and to give to the trial court both supervisory and initiative powers of the broadest sort, while giving to the Commissioner only those powers *specified* in the statutes. It is also generally held that in a case of conflict of opinion the trial court may overrule the Commissioner. 19 Appleton, Insurance Law and Practice, § 11041, pp. 616, *et seq.*; *National Bondholders Corporation v. Joyce*, 276 N.Y. 92, 11 N.E. 2d 552 (1937); *In re Casualty Co. of America*, 244 N.Y. 443, 155 N.E. 735 (1927). North Carolina cases decided before the enactment of the statutory proceedings generally held that the commissioners appointed in court-supervised equitable reorganizations were mere ministerial officers of the court, that the court had the final discretionary authority. *Harrison v. Brown*, 222 N.C. 610, 24 S.E. 2d 470 (1943); *Blades v. Hood, Comr. of Banks*, 203 N.C. 56, 164 S.E. 828 (1932); *Charles Skinner v. D. G. Maxwell*, 66 N.C. 45 (1872). No cases on the issue of court power have been decided under the new statute.

Under the statute the Commissioner as rehabilitator has discretionary as well as ministerial powers. Clearly also the court has broad supervisory powers and must also be held to have broad initiative powers as well so as to effect the mandate of such provisions as G.S. 58-155.18 which directs the court after full hearing to deny or grant the application for rehabilitation "together with such other relief as the nature of the case and the interests of policyholders, creditors, stockholders, members, subscribers or the public may require." The court is the final protector of those interests most jeopardized by an insurance com-

pany's financial instability, and we see no reason to assume that the broad mandate above quoted does not cover the court's actions in the instant case.

[1] Though both the petitioner and respondent "AAA" argue the question of whether the court had authority to appoint counsel for "AAA," we do not find it necessary to determine this question, because it does not appear from the record on appeal that the court appointed counsel for "AAA." It is clear that petitioner was employed by "AAA" on 6 November 1975 to represent the company in the rehabilitation proceedings. By its order of 7 November the court recognized that petitioner was counsel of record and that "AAA" was entitled to have such representation. Thereafter "AAA" was in rehabilitation with much of the power of its officers and directors transferred under the statutes to the rehabilitator. Further, it is clear from the record on appeal that the financial difficulties which led to the rehabilitation were the result of a dangerously unstable power structure, complicated by a struggle to acquire control by some directors with apparent conflicts of interest. Though some effort was made by the executive committee and the directors of "AAA" to discharge petitioner in November 1975, without the knowledge or approval of its President and Senior Vice President, the legality of such effort was highly questionable. The court found, in its order of 14 November 1975, that petitioner "is the *duly designated attorney* for Respondent. . . . in this proceeding and that all fees of said attorneys shall be subject to the approval of this court." [Emphasis added.] We do not construe this finding to mean that the court was appointing petitioner as counsel for respondent; rather, we find it to be a recognition that the petitioner was not lawfully replaced but remained the attorney of record for "AAA." In its order of 18 November 1975 the court again recognized petitioner as counsel for "AAA," and directed that petitioner continue to represent "AAA" in certain actions pending in other states. In so doing, the trial court properly exercised its broad supervisory power to assure continued and stable legal representation for "AAA" during a period when there was instability and discord between its officers and directors.

[2] The trial court by order entered 4 December 1975 found that petitioner had rendered legal services for "AAA" during the period from 1 October 1975 through 18 November 1975, that

$30,034.50 was reasonable compensation for legal services and $3,411.53 for expenses advanced, and it was ordered that the rehabilitator pay these sums to petitioner. "AAA" has never excepted to this order. Both parties admit in briefs that petitioner was awarded attorney's fees on several occasions by the court, though not documented in the record, for services rendered during the period from 18 November 1975 through 30 April 1976. It does not appear that respondent excepted to and appealed from any of these orders. We conclude that the evidence and circumstances supported the finding of the trial court that petitioner had not been effectively replaced as counsel of record for "AAA," that petitioner continued so to represent "AAA" during the rehabilitation, and that the court in the exercise of its supervisory power had the authority to make this determination.

Respondents argue further that this determination had the effect of forcing "AAA" to be represented by counsel that was hostile to the Board of Directors and the Company executives and that petitioner was really representing the court and not the company. But the "Company" contemplated by the rehabilitation proceedings is far more inclusive than the Board of Directors or the executives. Concern is specifically to be given to the policyholders, creditors, stockholders, members and subscribers. "AAA" was placed under involuntary rehabilitation because of threatened insolvency, but it appears from the record that this condition, at least in part, was the result of a dangerously unstable power structure. The court's recognition of petitioner as "AAA's" legal representative throughout the proceedings required that petitioner represent the *entire* company, which requirement resulted in a conflict with some of the Board of Directors. But those directors' interests were in apparent conflict with the interests of the rest of the company.

Did the trial court have authority to order that "AAA" pay its attorney of record (petitioner) the attorney's fees and expenses for the period from 1 May through 30 June 1976? Ordinarily, attorney's fees are not recoverable as an item of damage or as part of the costs of litigation, except as provided for by statute. *Hoskins v. Hoskins*, 259 N.C. 704, 131 S.E. 2d 326 (1963); 1 Strong's N.C. Index, 3d, Attorneys at Law, § 7. North Carolina has applied a rule of equity exception in various classes of cases, *i.e.*, where a litigant at his own expense has maintained a suc-

cessful suit for the preservation, protection or increase of a common fund or of common property. *Horner v. Chamber of Commerce*, 236 N.C. 96, 72 S.E. 2d 21 (1952). In *Horner*, the court stated that the equity exception rests, not upon the theory that the allowance is for attorney's fees as such or as an element of court costs, but rather upon the principle of approval by the court, in the exercise of chancery powers, of expenditures reasonably incurred in creating or preserving the fund or property. 236 N.C. at 98, 72 S.E. 2d at 22.

The general rule against the award of attorney's fees is based on the policy that such awards would encourage attorneys to institute meritless litigation. The policy is not applicable to the case *sub judice*. Petitioner was employed by "AAA" during the rehabilitation in question and, by letter of 16 June 1976, "AAA" expressed its appreciation to petitioner for the legal services rendered. Their relationship was not adversarial, but was rather an attorney-client relationship in which petitioner was entitled to compensation for legal services rendered. In rehabilitation, the insurer's business is operated by the rehabilitator under court supervision until the threat of insolvency is removed. The settlement of an outstanding debt by the rehabilitator is clearly a step "toward removal of the causes and conditions which have made rehabilitation necessary as the court may direct." G.S. 58-155.3(a). And it seems clear that the insurer is to bear the costs of rehabilitation, which costs are to be assessed directly against it in the rehabilitation suit itself. For example, G.S. 58-155.11(f) gives to the rehabilitator the power to appoint special counsel and to collect his fees directly out of the insurer's funds, subject, of course, to the approval of the court.

[3] We conclude that the supervisory power of the court in this rehabilitation suit included the authority to order that "AAA" pay fair and reasonable compensation to petitioner for legal services rendered. There was sufficient evidence to support the court's finding that the award to petitioner and to the California firm employed by petitioner was fair and reasonable.

Affirmed.

Judges MORRIS and VAUGHN concur.

GRANT JONES, JAMES OLLISON, TROY D. POTTER, BERTHA J. POTTER, IVA M. JONES, OWEN A. LUPTON, IRIS M. LUPTON, PETER LOZICA, LOLA LOZICA, MATHEW D. SALTER, ROSA SALTER, BRYAN JONES, JOHNNY W. LEARY, SAMMIE V. LEARY, ALFRED D. JONES, LOIS JONES, MURIEL JONES, RUDOLPH JONES, WILBUR SMITH, GLADYS SMITH, E. V. RIGGS, DORIS RIGGS, A. M. LOVELL, SARAH LOVELL, MARGARET WALL, L. WALL, HERMAN TURNAGE, JEAN TURNAGE, PONCE HAM, MARY ELLEN HAM, JAMES B. STOCKS, BELA KELLUM, NEVA L. MAYO, E. R. MAYO, JOHN PYE, CHERYL P. PYE, JOHN T. MAYO, MARLENE LOZICA, ADA M. LEARY, MORTIMER S. LEARY, TROY POTTER, JR., VIOLET M. POTTER, PETER A. LOZICA, ANN J. LOZICA, ROGER VOLIVA, SALLY VOLIVA, MARION M. JONES, STANLEY STYRON, JR., SHARON J. STYRON, M. E. SALTER, MARTHA SALTER, JIMMY B. JONES, SHERRY S. JONES, GEORGE B. JONES, PEGGY D. JONES, BOBBY BRINKLEY, POLLY BRINKLEY, RICHARD E. FLOWERS, ROSE G. FLOWERS, F. A. FLOWERS, MARJORIE E. FLOWERS, JOHN DUNN, EVELON DUNN, JESSIE VOLIVA, JOHN PAUL JONES, JAMES E. WHITE, JR., JO ANN WHITE, J. B. VINCENT, GLADYS VINCENT, J. C. MOORE, LUCILLE H. MOORE, HARVEY E. JONES, PATRICIA JONES, ROBERT EDGERTON, GRACE EDGERTON, BRENDA P. HARRIS, WILLIAM B. HARRIS, FAE WHEALTON, MARILYN R. WHEALTON, LILLIAN WHEALTON, H. ARLINE CARAWAN, MELISSA C. RESPESS, ALICE MAYO, LILLIAN CAHOON WHEALTON, BENARD MALLON, SALLY MALLON, ALBERT McKINNEY, EDNA McKINNEY, KITTY C. WHORTON, ABBOTT MORRIS, MILDRED MORRIS, S. R. CARAWAN, MRS. S. R. CARAWAN, JAMES OLLISON, MALINDA OLLISON, ANDREW MORRIS, MARGARET R. MORRIS, DAL F. IPOCK, FRENCIN E. IPOCK, WILL IPOCK, DELORES J. IPOCK, NANCY J. CARAWAY, CLAUD W. CARAWAY, SR., BRUCE B. CARAWAN, F. E. CAHOON, LALA C. SADLER, W. R. KING, LUDIE B. KING, JESSE BOOTH, FRANCES BOOTH, EDGAR A. DOANE, JR., IRENE J. DOANE, REUBEN L. WILSON, CLYDE L. SMITH, MARY B. SMITH, ROY C. SMITH, IVY MORRIS, JOE MORRIS, GEORGE McGLONE, SADIE McGLONE, CELIA PERRY, HAZEL MASON, JOE BROWN JONES, DONALD H. McMILLEN, ELLEAN McMILLEN, GARY H. MAYO, RHONDA J. MAYO, HOMER CREDLE, ELNORA CREDLE, WILLIAM E. CAVENDISH, LOU J. CAVENDISH v. ELWARD JEANETTE, MAYOR, H. L. HENRIES, HOLON GIBBS, EDWARD EARL CREDLE, WARREN CREDLE, JULIUS OLLISON, COMMISSIONERS OF THE TOWN OF MESIC, C. L. OLLISON, TAX COLLECTOR OF THE TOWN OF MESIC, A MUNICIPAL CORPORATION OF THE STATE OF NORTH CAROLINA, AND THE TOWN OF MESIC, A MUNICIPAL CORPORATION OF NORTH CAROLINA

No. 773SC52

(Filed 7 December 1977)

1. Municipal Corporations §§ 1.1, 2.2— incorporation and annexation—inclusion of unsuitable land

Acts of the General Assembly incorporating a town and annexing additional territory into the town were not invalid on the ground that a large

amount of unsuitable land was included within the boundaries of the town and those lands were subjected to taxation without any benefit or possibility of benefit.

2. Municipal Corporations § 1.1— incorporation and annexation—notice and hearing

Acts of the General Assembly incorporating a town and annexing additional territory into the town were not invalid because residents of the town were not given sufficient notice of the proposed town boundaries and an opportunity to be heard before the acts were passed, since notice and an opportunity to be heard are not prerequisites to valid acts by the General Assembly.

3. Municipal Corporations § 1.1— incorporation of town—request by residents

The trial court's finding that residents of the community of Mesic had requested the incorporation of the town of Mesic was supported by evidence that residents of the community signed a petition and corresponded with their representative in the General Assembly requesting the incorporation.

4. Municipal Corporations § 39— ad valorem taxes—failure to comply with statutes—injunction

The trial court properly found that failure of officials of a newly incorporated town to comply with statutory requirements relating to the listing and appraisal of property for ad valorem taxation and the collection of such taxes did not render the tax levy invalid, and the court properly enjoined the town officials from collection of the ad valorem taxes until they comply with the statutory requirements.

5. Municipal Corporations § 39— town commissioners from one area—taxation without representation

An allegation that commissioners of a newly incorporated town were "from one small area, the populated area" of the town did not state a good cause of action for taxation of plaintiffs without representation.

6. Municipal Corporations §§ 1.1, 2.6— incorporation and annexation—no taking without compensation

The incorporation and annexation of property without rendering services to the property did not constitute a taking of the property for a public purpose without just compensation.

APPEAL by plaintiffs from *McKinnon, Judge*. Judgment rendered 23 July 1976, filed 27 September 1976, in Superior Court, PAMLICO County. Heard in the Court of Appeals 25 October 1977.

In their complaint plaintiffs, residents and property owners in the newly incorporated town of Mesic, North Carolina, allege six claims for relief against defendants, who are the town commissioners, the tax collector and the mayor and other officers of Mesic. The alleged claims are summarized as follows:

(1) The incorporation of Mesic pursuant to legislative enactment in 1971 and the subsequent annexation of additional acreage in 1974 were unconstitutional in that the boundaries of the town are unreasonable and have resulted in unfair and unconstitutional taxation which certain plaintiffs have refused to pay, causing defendants to schedule a sale of their property for back taxes, which sale will be unconstitutional and should be enjoined.

(2) The incorporation of Mesic is void because residents were not informed of the proposed boundaries when the petition for incorporation was circulated and signed by them and no notice of public hearings was posted.

(3) Defendants have failed to properly perform their duties as officers of the town, including failure to keep accurate minutes; to hold meetings at scheduled times; to adopt or publish a budget; to have its accounts audited; to have a corporate seal; to properly annex additional territory in 1974 in that no public notice was given and the land annexed is totally uninhabited and rural; failure to provide services to areas taxed; and failure to properly assess ad valorem taxes. Defendants should be enjoined from further exercising any powers of the municipality.

(4) Defendants are from one small area of Mesic, leaving the majority of the property owners without representation.

(5) Plaintiffs are entitled to $10,000,000 in damages as a result of the taking of their property for public use without compensation.

(6) Plaintiffs are entitled to $1,000,000 compensatory and $1,000,000 punitive damages as a result of defendants' misconduct in office.

In their answer defendants moved to dismiss the complaint for failure to state a claim upon which relief can be granted; moved to strike certain allegations in various claims for relief as impertinent, irrelevant and stating conclusions of law; pleaded sovereign immunity; and counterclaimed for damages as a result of plaintiffs' institution of the action.

Jury trial was waived. Before hearing evidence the court heard the various motions to dismiss and to strike portions of the pleadings. Following the hearing the court temporarily enjoined the tax sale, dismissed plaintiffs' second, fourth and fifth claims

for relief for failure to state a claim upon which relief could be granted, and struck certain paragraphs from the third and sixth claims for relief.

Plaintiffs presented evidence which tended to show:

In 1971 certain residents of the community of Mesic in Pamlico County decided that it would be beneficial to incorporate in order to receive federal revenue sharing funds. A petition was circulated among the residents and signed by most of them. The petition did not state what the boundaries of the incorporated town would be.

The petition was forwarded to a person representing Pamlico County in the General Assembly; thereafter the town was duly incorporated by legislative act in 1971 after officers had been chosen at a town meeting attended by 30 to 40 persons. The officers took oaths of office.

No one recalls how boundaries were determined, but they generally included all of the area known as Mesic at the time the incorporation was requested. The original incorporation included approximately 4800 acres; in 1974 an additional 707.3 acres were annexed by legislative act in order to "straighten up" the boundaries so that they would run with property lines instead of cutting across them. The majority of the land annexed was woodlands and marshlands but the property was not annexed merely to increase the tax base.

The annexation was accomplished by circulation of a petition to the property owners involved, discussion of it at three or four town meetings, adoption of a resolution by the town board and enactment and ratification of "An Act to Annex Territory to the Town of Mesic" by the General Assembly in March 1974.

Mesic began receiving revenue sharing funds in 1972 but the funds were cut off in 1973 because Mesic was not contributing any tax money for its operation. Mesic then levied an ad valorem tax of ten cents per $100 in value, the lowest levy permitted by law in order to qualify for federal funds. The authority to tax, and the tax rate, were adopted by the town board at a regular meeting in June 1974.

The board held regular meetings on the first Thursday of each month at 7:00 p.m. The tax roll and valuations were deter-

mined by having the town clerk examine the county listings. Tax notices were sent to property owners beginning in 1974. Several people who owned property in Mesic never received tax notices while others received notices showing incorrect valuations. Mesic's first budget was adopted for the year 1974-75. Prior to that year the town had very little revenue and few expenditures. It also had an audit in 1975 upon being advised by the government that an annual audit was necessary.

Since 1974 Mesic has expended federal funds and ad valorem taxes to provide garbage collection and streetlights to populated areas. Federal funds have also been expended to purchase a lot upon which the construction of a town hall is planned. None of the services extends to the area annexed in 1974.

Minutes were taken of all town board meetings although some of the minutes have been lost. The minutes do not reflect how individual commissioners voted on resolutions but most were adopted unanimously. The minutes do not reflect that newly elected officers took oaths of office.

Prior to 10 June 1976 the notice of sale of tax liens was published in a newspaper and on said date the town board adopted a resolution authorizing the sale.

All testimony with respect to notice plaintiffs received prior to the incorporation and annexation was excluded.

Defendants tendered the temporary injunction issued against the tax sale and rested. Plaintiffs then moved to dismiss defendants' counterclaim, and the motion was allowed.

Following the trial the court announced its ruling on the various questions arising on the pleadings and evidence. The parties stipulated that written judgment might be entered by the trial judge after the session had expired and while he was outside of the county.

The court entered judgment finding and concluding:

(1) As to the first claim for relief, that the incorporation of and annexation of territory to Mesic were valid acts of the General Assembly, that plaintiffs had failed to show any violation of the constitution with respect thereto and that the claim should be dismissed pursuant to Rule 41(b).

(2) As to the third claim for relief, that although there have been numerous deficiencies in the following of proper procedures by defendants in the maintaining and keeping of records, they were not willful but were done through ignorance and are not such as to require that defendants be enjoined from exercising any of the powers of a municipality; that it was not shown that there was a sufficient failure to comply with legal requirements to cause the levy of the ad valorem tax to be invalid, but that defendants' failure to comply with Chapter 105, Subchapter II relating to the listing, appraisal and assessment of property and collection of taxes was such that defendants should be enjoined from enforcing collection of the ad valorem taxes until those provisions are complied with.

(3) And as to the sixth claim for relief, that it has not been shown that defendants acted willfully, breached their fiduciary duty or caused harm to plaintiffs, and the claim should be denied.

Plaintiffs appealed.

McCotter & Mayo, by Charles K. McCotter, Jr., for plaintiff appellants.

James E. Ragan III and Robert G. Bowers for defendant appellees.

BRITT, Judge.

While plaintiffs attempt to bring forward and argue in their brief 31 assignments of error, we will discuss only those that we consider dispositive of the appeal.

[1] With respect to their first claim for relief, plaintiffs contend the trial court erred in finding and concluding that the acts incorporating and annexing territory into Mesic were valid actions of the General Assembly. They argue that the inclusion of a large amount of unsuitable land within the boundaries of the town, and subjecting those lands to taxation without any benefit or possibility of benefit, was an unconstitutional exercise of legislative power. We find no merit in this contention.

Article VII, Section 1, of our State Constitution authorizes the General Assembly to provide for the organization, government and "fixing of boundaries" of counties, cities and towns, and, ". . . except as otherwise prohibited by this Constitution, may

give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable."

Ordinarily, the courts have no authority to inquire into the motives of the Legislature in the incorporation of political subdivisions. *See Tobacco Co. v. Maxwell, Commissioner*, 214 N.C. 367, 199 S.E. 405 (1938). In *Starmount Co. v. Ohio Savings Bank and Trust Co.*, 55 F. 2d 649 (4th Cir. 1932), the court held that the setting up of a municipal corporation by the General Assembly at any place, under the section of the constitution above referred to, is left to legislative discretion. The fixing of boundaries of municipal corporations is a permissible legislative function. *Hunter v. Pittsburgh*, 207 U.S. 161, 52 L.Ed. 151, 28 S.Ct. 40 (1907); *Clark v. Kansas City*, 176 U.S. 114, 44 L.Ed. 392, 20 S.Ct. 284 (1900).

We hold that the trial court did not err in finding and concluding that the acts incorporating and annexing territory into Mesic were valid actions of the General Assembly.

[2] Plaintiffs contend the court erred in dismissing their second claim for relief because the allegation that insufficient notice of the proposed incorporation and annexation was given did state a claim upon which relief could be granted since notice and an opportunity to be heard are prerequisite to the validity of legislative actions. We find no merit in this contention.

Plaintiffs cite no authority, and our research discloses none, for their argument that every citizen affected by a proposed act of the Legislature is entitled to notice and an opportunity to be heard before the proposal can be lawfully enacted. Under our system of representative government the citizens of North Carolina are represented in the General Assembly by elected senators and representatives. It is incumbent on them to represent the interests of their various constituents.

The numerous cases cited by plaintiffs relating to notice required in the adoption or changing of zoning regulations, changing utility rates, condemning property, etc., are inapposite as those matters are controlled by statutes which require notice to affected persons.

It is true that the General Assembly has provided a statutory method for extending the boundaries of cities and

towns, G.S. 160A-24 et seq., but the Assembly has not surrendered its authority to alter their boundaries. G.S. 160A-21 provides: "The boundaries of each city shall be those specified in its charter with any alterations that are made from time to time in the manner provided by law or by local act of the General Assembly."

We hold that the trial court did not err in dismissing the second claim for relief.

[3] With respect to their third claim for relief, plaintiffs contend the court erred in finding that the residents of the community of Mesic had requested the incorporation of the town. They argue that this finding was not supported by the evidence. We disagree. There was abundant evidence showing that residents of the community signed a petition and corresponded with their representative in the Legislature requesting the incorporation. Being supported by competent evidence, the court's findings of fact are conclusive. 1 Strong's N.C. Index 3d, Appeal and Error § 57.2.

[4] Also with respect to their third claim for relief, plaintiffs contend that in view of the evidence showing defendants' failure to comply with statutory requirements relating to listing and appraisal of property and collection of taxes, the court erred in concluding that the ad valorem tax levy was valid. We reject this contention and agree with the trial judge that the violations referred to by plaintiffs do not affect the validity of the levy, and approve the action taken by the court to correct the violation.

[5] Plaintiffs contend the trial court erred in dismissing their fourth claim for relief. They argue that they allege a good cause of action "for taxation of plaintiffs without representation". We find no merit in this contention. Plaintiffs do not allege that defendants were improperly elected or chosen, only that the town commissioners were "from one small area, the populated area" of the town.

[6] Plaintiffs contend the trial court erred in dismissing their fifth claim for relief seeking compensation for the taking of their property through incorporation and annexation without just compensation in that no benefits were rendered to the property as a result of said incorporation and annexation. We find plaintiffs' argument in support of this contention unpersuasive.

While the State and its subdivisions have the power to take private property upon the payment of just compensation, there must be a *taking* for a *public purpose*. 5 Strong's N.C. Index 3d, Eminent Domain § 1. Assuming, *arguendo*, that plaintiffs alleged a taking of their property, they did not allege that it was taken for a public purpose.

With respect to their sixth claim for relief, plaintiffs contend that the court's finding that defendants had not acted willfully, maliciously or in breach of their fiduciary duties is not supported by the evidence. We disagree with this contention and conclude that there was more than ample evidence to support the finding.

We have considered the other contentions argued in defendants' brief but conclude that they too have no merit.

The judgment appealed from is

Affirmed.

Judges HEDRICK and MARTIN concur.

STATE OF NORTH CAROLINA v. ROBERT ERSKINE THOMAS

No. 7726SC552

(Filed 7 December 1977)

1. **Criminal Law § 76.4— confession—voir dire—evidence rules relaxed**

In a hearing before a judge on a preliminary motion, the ordinary rules as to the competency of evidence applied in a trial before a jury are to some extent relaxed, for the reason that the judge with knowledge of the law is able to eliminate from the testimony he hears that which is immaterial and incompetent and to consider only that which tends properly to prove the facts to be found; however, a judge's findings of fact will be reversed where it affirmatively appears that they are based in whole or in part upon incompetent evidence.

2. **Criminal Law § 76.7— confession—voir dire—hearsay testimony—findings based on competent testimony**

Defendant's contention that the trial court erred in admitting hearsay statements into evidence during the voir dire hearing on admissibility of defendant's statement to officers and in basing its order in part on such incompetent evidence is without merit, since defendant's own testimony on voir dire was competent and sufficient evidence, unaided by the hearsay in question, to sustain the court's findings of fact and conclusions of law.

3. Criminal Law § 76.1— voir dire—judge's extensive participation—no error

A trial judge's extensive participation in a voir dire hearing produces no judicial error provided the questions propounded are pertinent and necessary to the inquiry at hand.

4. Indictment and Warrant § 6.2— arrest warrant—probable cause—sufficiency of evidence

Evidence was sufficient to support the trial court's conclusion of law that, after talking with defendant, an officer had probable cause to obtain a warrant for defendant's arrest on charges of breaking and entering where such evidence, excluding accounts by two neighbors which defendant contended were unreliable, tended to show that defendant knew the victim; he admitted being in the area of the victim's residence at the time of the break-in; defendant called his girl friend the morning after the crime and asked if police were looking for him; and an automobile registered to defendant was seen "suspiciously" circling the area of the break-in.

5. Criminal Law § 75.2— statements by officer to defendant—confession not induced by hope of leniency

Defendant's contention that the trial court erred in denying the motion to suppress his confession for the reason that such confession was induced by a suggestion of hope from the investigating officer is without merit where the evidence tended to show that defendant initiated the conversation with the officer; defendant indicated that he wanted a "deal" but the officer responded that he could make no deal; defendant indicated a willingness to testify about the break-in in court; the officer then stated that "the Court will give some consideration to people if they testify or turn State's evidence, but there is no way I can tell you what a judge is going to give you"; and defendant then confessed.

6. Criminal Law § 75.10— confession—crime of which defendant is unaware—waiver of privilege against self-incrimination unaffected

The fact that a statement contains evidence inculpating defendant in an offense of which he is unaware in no way invalidates a prior, voluntary waiver of the privilege against self-incrimination.

APPEAL by defendant from *Howell, Judge*. Judgment entered 9 February 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 26 October 1977.

Defendant was charged in a warrant with feloniously breaking and entering the residence of Julia Fincher Haskin with intent to commit larceny on 7 October 1976. An indictment charging the same was returned against defendant on 8 November 1976. Subsequently, on 17 January 1977, an indictment was returned against defendant charging him with second degree burglary of the Haskin residence.

On 4 February 1977, defendant filed a motion to suppress evidence of a statement made by him relating to the offense charged. A *voir dire* hearing was conducted by the trial court on 7 February to determine the admissibility of defendant's statement.

The State's evidence on *voir dire* tended to show the following:

On the evening of 7 October 1976, Karen Futchell, a neighbor of Julia Haskin, observed a 1966 or 1967 off-white Chevrolet automobile in the vicinity of the Haskin's residence. The car disappeared, but later returned stopping at an intersection where a tall, thin man got out and walked up the Haskin's driveway. The car again drove off and when it returned, a man walked down from the Haskin's driveway, talked to the driver momentarily and then proceeded back up the driveway. Shortly thereafter, a man emerged from the front of the Haskin's house and disappeared down a deadend street. Mrs. Futchell awoke her husband and they went outside where they met another neighbor, Dennis Price. They could see a man standing at the end of the street and decided to call and inform Mr. and Mrs. Haskin of the incident.

About the same time that the Futchells were aroused by these occurrences, R. B. Collins—another neighbor—became suspicious of a white Chevelle which he observed cruising around the neighborhood. He got into his automobile and followed the Chevelle, obtaining its license plate number. Collins then gave the license plate number to Officer John Maness of the Matthews Police Department who radioed in the tag number and learned that the car was registered to defendant. As Officer Maness was traveling towards the Haskin neighborhood to investigate the car, he received a report of the break-in at the Haskin residence and proceeded directly to the house. At the scene, Officer Maness received the heretofore mentioned information from the Futchells and Mr. Price.

Officer Broadus Crabtree of the Matthews Police Department reported for duty at 12:00 midnight on 8 October 1976 and relieved Officer Maness at the Haskin residence. After Officer Maness related the information he had obtained, Officer Crabtree went to a local business and talked with Vickie Parker who told him that Robby Thomas (defendant) could usually be found with

Horace Bass. He related this information to the Mecklenburg County Police Department who then obtained Bass's address. Upon completing his investigation at the Haskin residence, Officer Crabtree went to see Ms. Robbie Johnson, a person with whom defendant supposedly lived. She told Crabtree that defendant had just called and asked if the police had been there looking for him.

At 6:30 a.m. on 8 October 1976, Detective R. M. Crowell of the Mecklenburg County Police Department was called in to assist in the investigation of the subject break-in. After reviewing the information gathered by Officers Maness and Crabtree, Detective Crowell proceeded to question defendant who had been taken into custody earlier that morning under an outstanding warrant for assault on a female. Defendant told Crowell that he had been driving his car in the Haskin neighborhood, looking for a girl he used to date. Defendant stated that he knew the Haskins, but denied any knowledge of the break-in. Upon this information, Crowell obtained a warrant against defendant for felonious breaking and entering.

At 6:30 p.m. on the same day, Crowell was advised that defendant wanted to talk with him. Defendant told Crowell he wanted to make a deal. After stating that he could not offer any kind of deal, Crowell informed defendant that the court generally would give some consideration to persons who testified. At this point, defendant admitted that he participated in the break-in. Crowell then advised defendant of his constitutional rights and procured defendant's signature on a waiver of rights form. A written statement was subsequently executed.

Defendant's evidence at *voir dire* tended to show that he had a conversation with Detective R. M. Crowell during which Crowell informed defendant that his car had been seen in the vicinity of the Haskin residence and a person resembling defendant had been seen coming out of the house. At a subsequent conversation with Crowell, defendant indicated he wanted to make a deal. Crowell responded that he could offer no deals, but that judges would generally take into consideration the extent of a person's cooperation.

Defendant stated that he would never have made any statement if (1) he had not been arrested; (2) Crowell had not told him

his car had been seen; and if (3) he had known he would be subject to prosecution for *burglary.*

Upon denial of his motion to suppress, defendant entered a plea of guilty as charged pursuant to G.S. 15A-979(c), thereby preserving his right to appeal the trial court's ruling. From a sentence of twenty (20) years imprisonment, defendant appealed to this Court.

Attorney General Edmisten, by Associate Attorney Thomas H. Davis, Jr., for the State.

Hicks and Harris, by Tate K. Sterrett, for the defendant.

MARTIN, Judge.

In the record on appeal defendant lists 27 assignments of error. Of these he brings forward 25, correlating them within 11 contentions. Upon review of the record and briefs, we have concluded that the assignments grouped under contentions 3, 4, 5, 6, 7 and 8 are without merit. We now consider seriatim contentions 1, 2, 9, 10 and 11.

In his first contention, defendant argues that the trial court erred in admitting hearsay statements into evidence during the *voir dire* hearing and in basing its order in part on such incompetent evidence. Specifically, defendant asserts that the findings of fact relative to the matter of to whom the suspicious 1966 Chevelle automobile was registered and to the out of court statements of Vickie Parker and Robbie Johnson, and the conclusion of law thereon, were based on incompetent testimony.

[1, 2] It is a well established rule that in a hearing before the judge on a preliminary motion, the ordinary rules as to the competency of evidence applied in a trial before a jury are to some extent relaxed, for the reason that the judge with knowledge of the law is able to eliminate from the testimony he hears that which is immaterial and incompetent, and consider only that which tends properly to prove the facts to be found. *Cameron v. Cameron,* 232 N.C. 686, 61 S.E. 2d 913 (1950). However, our Supreme Court has also emphasized that a judge's findings of fact will be reversed where it affirmatively appears they are based in whole or in part upon incompetent evidence. *State v. Davis,* 290 N.C. 511, 227 S.E. 2d 97 (1976). Guided by these rules, we find in

the instant case that defendant's testimony that he owned the automobile in question and did in fact call Robbie Johnson on 7 October 1976 in the early morning was competent and sufficient evidence, unaided by the hearsay relative thereto, to sustain the subject findings of fact and conclusion of law. Defendant's contention No. 1 is overruled.

Defendant next contends that the trial court's extensive questioning of witnesses at the *voir dire* was error in that it went beyond the purpose of obtaining clarification and understanding of the testimony and in effect, assumed the role of the prosecution. We find no merit in this contention.

[3] We recognize the general rule regarding the questioning of witnesses *in the presence of the jury* that while a trial judge is permitted to question witnesses for the purpose of clarifying and understanding their testimony, he may not engage in frequent interruptions or prolonged questioning. *State v. Steele*, 23 N.C. App. 524, 209 S.E. 2d 322 (1974). This rule is grounded on the belief that such persistence on the part of the trial judge conveys to the jury the "impression of judicial leaning" and thus, violates the duty of absolute impartiality imposed upon a trial judge by G.S. 1-180. *State v. Steele, supra.* However, in the instant case, the trial judge's questioning, concededly extensive, occurred in the absence of the jury. While this Court has neither the purpose nor the intent to encourage such practices among trial judges, we are of the opinion, and defendant has presented no persuasive authority to the contrary, that a trial judge's extensive participation in a *voir dire* hearing produces no judicial error provided the questions propounded are pertinent and necessary to the inquiry at hand. We are supported in this view by *State v. Segarra*, 26 N.C. App. 399, 216 S.E. 2d 399 (1975), a decision in which this Court underscored the distinction between the questioning of witnesses at a *voir dire* hearing and such questioning at a jury trial in holding that:

> "Since the very purpose of [a voir dire] hearing is to enable the judge to determine [the question at hand] . . . , we think the trial judge is and should be at liberty to make such inquiries as he deems necessary to enable him to make a fair and independent determination of the question." *State v. Segarra*, 26 N.C. App. at 401, 216 S.E. 2d at 402.

[4] By his next contention, defendant challenges the trial court's conclusion of law that, after talking with defendant on the morning of 8 October 1976, Detective Crowell had probable cause to obtain a warrant for defendant's arrest on charges of breaking and entering. Defendant argues that the information in Crowell's possession—the investigating officer's report and the initial conversation with defendant—was insufficient to support a conclusion that probable cause existed and therefore, the arrest was illegal; in consequence, he contends, the subject confession made by defendant was the product of an unlawful detention and hence, inadmissible. Specifically, defendant points to inaccuracies in the investigating officers' report relative to the accounts given by two of the eye witnesses—Dennie Price and Karen Futchell—and contends that probable cause cannot be based upon information proven to be unreliable. *See State v. Roberts*, 276 N.C. 98, 171 S.E. 2d 440 (1970).

Upon careful review of the relevant portions of the record, we find that even without the information provided by Price and Futchell, Detective Crowell had information before him sufficiently strong to establish probable cause. Probable cause has been defined by our Supreme Court to be "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty." *State v. Shore*, 285 N.C. 328, 204 S.E. 2d 682 (1974); *State v. Harris*, 279 N.C. 307, 182 S.E. 2d 364 (1971). In the case at bar, the information gathered by the investigation—excluding the accounts of Price and Futchell—established that defendant knew the Haskins; that he admitted being in the area of the Haskin's residence at the time of the break-in; that he had called Robbie Johnson and asked if the police were looking for him; and that an automobile registered to defendant was seen "suspiciously" circling the area of the break-in. These facts and circumstances would warrant a prudent man in believing that defendant committed the breaking and entering. *State v. Shore, supra.* Accordingly, this contention is overruled.

[5] Defendant further contends that the trial court erred in denying the motion to suppress his confession for the reason that such confession was induced by a suggestion of hope from Detective Crowell. This contention is without merit.

The ultimate test of the admissibility of a confession is whether the statement made by the accused was in fact voluntarily and understandingly made. *State v. Pruitt*, 286 N.C. 442, 212 S.E. 2d 92 (1975); *State v. Bishop*, 272 N.C. 283, 158 S.E. 2d 511 (1968). When the circumstances reveal that the challenged confession was induced by conduct and language of an investigating officer amounting to suggestions of hope or fear, such confession is involuntary in law and incompetent as evidence. *State v. Pruitt, supra; State v. Roberts*, 12 N.C. 259 (1827); *State v. Raines*, 30 N.C. App. 176, 226 S.E. 2d 546 (1976). The decision of the trial court on this matter is reviewable upon appeal. *State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492 (1968).

In the instant case, the subject confession was made during Detective Crowell's second conversation with defendant—a conversation initiated by defendant. Defendant indicated that he wanted a "deal" and Crowell responded that he was unable to offer defendant any kind of deal. At this point, defendant said, "[w]hat if I tell you about what happened down there last night in Matthews?" Crowell then inquired as to defendant's willingness to testify in court to which defendant replied affirmatively. Only after this exchange did Crowell indicate to defendant that generally "the Court will give some consideration to people if they testify or turn State's evidence, but there is no way I can tell you what a judge is going to give you." On these facts, we are unable to find that defendant's confession was *induced* by any suggestion of hope or fear arising out of Crowell's statements. While we recognize the apparent similarity of these facts to cases reaching a contrary result, *see State v. Pruitt, supra* (cases cited therein), we are persuaded in this case, by the extent of defendant's initiative and eagerness to come forward, that defendant was not induced to confess, but rather sought from the outset to wield his confession as a bargaining tool. In this pursuit defendant was unsuccessful, eliciting only an innocuous acknowledgment from Crowell that courts generally gave some consideration to those who testified.

[6] Defendant finally contends that, assuming his confession was admissible, its admissibility should have been restricted to the *breaking and entering* charge and thus, the trial court erred in admitting the confession on the *burglary* charge. Defendant argues that he did not make a voluntary, knowing and intelligent

waiver of his constitutional rights as to the burglary charge as he was never informed of a potential burglary charge against him. We find no merit in this novel contention. The fact that a statement contains evidence inculpating a defendant in an offense of which he was unaware, in no way invalidates a prior, voluntary waiver of the privilege against self-incrimination.

We conclude that defendant's confession was voluntarily and understandingly made without suggestion of hope or fear. The trial court's denial of defendant's motion to suppress is affirmed.

Accordingly, the judgment appealed from is affirmed.

Chief Judge BROCK and Judge CLARK concur.

Utilities Comm. v. Tank Lines and Utilities Comm. v. Transport Co.

DOCKET NO. T-1287, SUB. 28 STATE OF NORTH CAROLINA, EX REL UTILITIES COMMISSION AND EASTERN OIL TRANSPORT, INC., COMPLAINANT, (AND KENAN TRANSPORT COMPANY, O'BOYLE TANK LINES, INC., M & M TANK LINES, INC., BLACK'S MOTOR EXPRESS, INC., PETROLEUM TRANSPORTATION, INC., TERMINAL CITY TRANSPORT, INC., A. C. WIDENHOUSE, INC. AND EAST COAST TRANSPORT, INC.) (COMPLAINANTS) APPELLEES v. UNITED TANK LINES, INC. AND S. H. MITCHELL AND SON (DEFENDANTS) APPELLANTS

DOCKET NO. T-1673, SUB. 1 STATE OF NORTH CAROLINA, EX REL UTILITIES COMMISSION, SHOW CAUSE PROCEEDING BY COMMISSION, APPELLEE v. UNITED TANK LINES, INC. APPELLANT

DOCKET NO. T-1673, SUB. 2 STATE OF NORTH CAROLINA, EX REL UTILITIES COMMISSION, PETITION FOR AUTHORITY TO SELL AND TRANSFER CONTROLLING OUTSTANDING AND ISSUED CAPITAL STOCK OF UNITED TANK LINES, INC. FROM ROY C. HARRISON TO S. H. MITCHELL AND W. N. MITCHELL (APPLICANTS) APPELLANTS v. KENAN TRANSPORT COMPANY, O'BOYLE TANK LINES, INC.; M & M TANK LINES, INC., BLACK'S MOTOR EXPRESS, INC.; PETROLEUM TRANSPORTATION, INC., TERMINAL CITY TRANSPORT, INC.; A. C. WIDENHOUSE, INC.; EAST COAST TRANSPORT, INC. AND EASTERN OIL TRANSPORT, INC. (PROTESTANTS) APPELLEE

No. 7710UC74

(Filed 7 December 1977)

Carriers §§ 2.10, 3— transfer of control of common carrier without approval—obtaining franchise for transfer to another—revocation of operating authority

The Utilities Commission properly denied an application for approval of a transfer of control of a common carrier and properly revoked the carrier's operating authority on grounds that the common carrier franchise was obtained by the proposed transferor for the purpose of transferring it to another in violation of G.S. 62-111(d) and that control of the carrier had been transferred without prior application to and approval by the Utilities Commission in violation of G.S. 62-111(a). G.S. 62-112(b).

APPEAL by respondents from order of the North Carolina Utilities Commission entered 21 October 1976. Heard in the Court of Appeals 26 October 1977.

This cause was before the North Carolina Utilities Commission (Commission) to determine if the operating authority of respondent United Tank Lines, Inc. (United), should be revoked. The various proceedings before and by the Commission are summarized in pertinent part as follows:

On 19 February 1975 a complaint was filed by E. C. Brooks, III, attorney for Eastern Oil Transport, Inc. (Eastern), alleging that United is operating illegally, or that W. N. Mitchell and son (S. H. Mitchell) are operating illegally under the rights of United, and asking for a hearing on the complaint.

On 7 March 1975 Kenan Transport Company filed a motion asking that it be allowed to intervene. On 4 April 1975 O'Boyle Tank Lines, Inc., M & M Tank Lines, Inc., Black's Motor Express, Inc., Petroleum Transportation, Inc., Terminal City Transport, Inc., A. C. Widenhouse, Inc., and East Coast Transport, Inc., filed motions asking that they be allowed to intervene.

On 15 April 1975 respondents filed a motion asking that United's complaint be dismissed. On 10 July 1975 the Commission denied the motion.

On 17 April 1975 the Commission entered an order requiring United, S. H. Mitchell and W. N. Mitchell (sometimes herein referred to as respondents) to appear and show cause why United's operating authority should not be revoked for failure to apply for and obtain approval of the Commission of change of control of United, pursuant to G.S. 62-111; also, why the Commission should not seek the penalty provided by G.S. 62-310 against respondents Mitchell for violation of Article 62 of the General Statutes.

Also on 17 April 1975 the Commission entered an order consolidating Docket No. T-1673, Sub. 1, and Docket No. T-1287, Sub. 28, for investigation, further hearing and decision.

On 11 June 1975 R. C. Harrison, as owner of 76 shares of United stock, and respondents Mitchell, as the owners of the other 74 of the 150 shares of United, filed a petition asking that the Commission approve the transfer of Harrison's 76 shares to respondents Mitchell.

On 27 June 1975 the firms named above, except United, filed a joint "PROTEST AND MOTION TO INTERVENE" protesting the transfer of United's stock and asking that they be allowed to intervene as party protestants.

A hearing was conducted by Hearing Examiner Robert F. Page on 10 July 1975 and on certain dates thereafter. Documentary evidence and testimony were presented after which, on 9

June 1976, Examiner Page filed a recommended order summarized in pertinent part as follows:

The order recites a history of the two dockets consolidated for hearing and determination. It recites that Docket No. T-1673 was a joint application, filed with the Commission on 31 August 1973, by which one F. T. Loftin and United sought authority to transfer the ownership of Common Carrier Certificate No. C-253 from Loftin to United. The present protestants were protestants in that docket. In a hearing on 31 January 1974 Roy C. Harrison alleged that he and his wife were the sole owners of all of United's stock and that they intended to operate United as their family business if the Commission approved the transfer of authority. On 8 April 1974 a final order was entered approving the transfer. During a hearing on 9 October 1974 in Docket No. T-825, Sub. 185, there was evidence tending to show that Harrison and wife were no longer operating United as a family business, but that United was owned and operated by respondents Mitchell. No application for approval for a change of control of United had been filed with the Commission as required by G.S. 62-111(a).

The hearing examiner found facts summarized in pertinent part as follows:

United is the holder of Common Carrier Certificate No. C-253 which was obtained from the previous holder, Loftin, pursuant to an order of the Commission which became effective on 8 April 1974. The original controlling interest in United was held by Roy C. Harrison by virtue of his ownership of all of the 150 shares issued by United on or about 17 September 1973. However, said shares were not lawfully issued in that the certificate was not properly signed by the corporation's officers as required by G.S. 55-57(b).

On 11 June 1974, without notice or application to the Commission, Harrison entered into a contract with respondents Mitchell by the terms of which 74 of the 150 shares of United were sold by Harrison to respondents Mitchell and they were given an option for one year within which to purchase the remaining 76 shares of United. On 14 June 1974 the original certificate for 150 shares issued to Harrison was cancelled and new certificates were issued whereby Harrison received 76 shares and respondents

Mitchell jointly received 74 shares. As was true with the original certificate, these certificates failed to comply with the provisions of G.S. 55-57(b).

On 11 June 1974 Mrs. Harrison and Ben O'Dell resigned as directors of United and respondents Mitchell were elected to replace them; respondents Mitchell thereupon became a majority of United's three-man board, with Roy Harrison as the third member.

The original bank account for United was opened on or about 15 March 1974 in the amount of $10,000; said funds were obtained from the depository bank by means of a note signed by defendant S. H. Mitchell. Neither Roy C. Harrison nor his wife has ever signed any of United's checks; many of the checks were signed by respondent S. H. Mitchell despite the fact that he was never properly authorized by the corporation so to do. Many more were signed by W. N. Mitchell despite the fact that he was not authorized to do so until 11 June 1974.

Between 1 April 1974 and 21 April 1975 respondent S. H. Mitchell wrote checks from his own personal account payable to United in the amount of $128,450; respondent W. N. Mitchell wrote checks from his personal account payable to United in the amount of $5,475. Respondent S. H. Mitchell holds title to all of the revenue equipment used by United despite the fact that the equipment is listed on the books of United. United makes some of the monthly payments on the financing of the equipment and respondent S. H. Mitchell is personally liable on the notes securing the balance due on the equipment.

Respondent S. H. Mitchell owns the lands and buildings used by United as a terminal. United continues to make monthly payments on the building despite the fact that the land and buildings have been removed from the books of United.

As of 31 May 1975 respondent S. H. Mitchell had made contributions of $209,115.77 to the capital of United. Harrison personally paid $15,000 for the rights being used by United but said funds were never paid into the corporation. Harrison has made no other contributions to United although the corporation suffered losses in excess of $100,000 between March of 1974 and May of 1975.

The $20,000 which Harrison testified in Docket No. T-1673 represented cash paid for stock of United was never paid into the corporation; instead, $15,000 was paid directly to Loftin by Harrison and the other $5,000 has never been traced to the corporation. The price agreed to be paid to Harrison by respondents Mitchell for his shares of United is $15,000, the same amount which Harrison paid to Loftin for the operating rights of United. Harrison never sought purchase offers from anyone other than respondents Mitchell.

Harrison has never played an active role in the operation of United; the corporation employs drivers, a dispatcher, a secretary and an accountant all hired by respondents Mitchell; the Mitchells have been controlling and managing the corporation from its beginning. Respondent W. N. Mitchell supervises the dispatcher and mechanics and S. H. Mitchell makes the policies and determines the overall conduct of operations.

Substantial intermingling of funds has taken place between respondents Mitchell and United. (The order sets forth nine specific instances.)

If only the monies in the S. H. Mitchell contributed capital account were treated as equity of United, said Mitchell would thereby control in excess of 90 percent of the common equity of the corporation. The authority represented by Certificate No. C-253 has been operated continuously since its transfer from Loftin to United.

The proposed transferees (respondents Mitchell) are not fit, willing and able to perform service to the public under Common Carrier Certificate C-253. The proposed transfer is not in the public interest. The franchise was obtained by Harrison for the purpose of transferring it to respondents Mitchell.

Based upon the findings of fact the hearing examiner concluded that control of United was transferred from Harrison to respondents Mitchell on or before 11 June 1974 without prior application to and approval by the Commission as required by G.S. 62-111(a); that Harrison obtained said Common Carrier certificate from Loftin for the purpose of transferring the franchise to respondents Mitchell; and that, for willful failure to comply with the provisions of G.S. 62-111(a), Certificate No. C-253 should be revoked.

The hearing examiner ordered that the application for approval of the transfer of control of United from Harrison to respondents Mitchell be denied and that the authority previously granted under Common Carrier Certificate C-253 be revoked.

Respondents filed exceptions to the recommended order. On 21 October 1976, following a hearing on the exceptions conducted on 10 August 1976, the Commission entered an order overruling the exceptions and adopting as its final order the recommended order issued by Hearing Examiner Page.

Respondents appealed.

Commission Attorney Edward B. Hipp and Assistant Commission Attorney Theodore C. Brown, for North Carolina Utilities Commission, appellee.

Allen, Steed, and Allen, by Thomas W. Steed, Jr., and Arch T. Allen III, for Kenan Transport Company, O'Boyle Tank Lines, Inc., Black's Motor Express, Inc., Petroleum Transportation, Inc., Terminal City Transport, Inc., A. C. Widenhouse, Inc., and East Coast Transport, Inc., appellees.

Eugene C. Brooks III, for Eastern Oil Transport, Inc., appellee.

Vaughan S. Winborne for appellants.

BRITT, Judge.

While respondent-appellants argue 12 questions in their brief, we think the disposition of this appeal rests on the answers to two questions: (1) Did the Utilities Commission err in its findings of fact? (2) Was the action taken by the Commission pursuant to the findings authorized? We answer the first question in the negative and the second question in the affirmative.

It is settled in this jurisdiction that findings of fact by the Utilities Commission are conclusive and binding on appeal when supported by competent, material and substantial evidence in view of the entire record. *State ex rel. Utilities Commission v. City of Durham*, 282 N.C. 308, 193 S.E. 2d 95 (1972); *State ex rel. Utilities Commission v. Petroleum Transportation, Inc.*, 2 N.C. App. 566, 163 S.E. 2d 526 (1968). It suffices to say that we have carefully reviewed the record and conclude that the findings of

fact made by the Commission are supported by competent, material and substantial evidence. Thus, we hold that the Commission did not err in its findings.

G.S. 62-111(a) provides:

> "No franchise now existing or hereafter issued under the provisions of this Chapter other than a franchise for motor carriers of passengers shall be sold, assigned, pledged or transferred, *nor shall control thereof be changed through stock transfer or otherwise*, or any rights thereunder leased, nor shall any merger or combination affecting any public utility be made through acquisition or control by stock purchase or otherwise, *except after application to and written approval by the Commission*, which approval shall be given if justified by the public convenience and necessity. Provided, that the above provisions shall not apply to regular trading in listed securities on recognized markets." (Emphasis ours.)

The Commission's findings and conclusions that *control* of United was transferred from Harrison to respondents Mitchell on or before 11 June 1974, without prior application to and approval by the Commission, are fully supported by the evidence and the findings of fact. Transfer of control of United was tantamount to transfer of control of the franchise represented by Common Carrier Certificate No. C-253.

G.S. 62-111(d) provides: "No person shall obtain a franchise for the purpose of transferring the same to another, and an offer of such transfer within one year after the same was obtained shall be prima facie evidence that such certificate or permit was obtained for the purpose of sale."

The Commission's conclusion that Certificate C-253 was acquired by Harrison for purpose of transferring the same to another is fully supported by the evidence and findings of fact.

G.S. 62-112(b) provides in pertinent part: "Any franchise . . . , after notice and hearing, may be suspended or revoked, in whole or in part, upon complaint, or upon the Commission's own initiative, for wilful failure to comply with any provision of this Chapter . . . ."

We hold that the Commission was fully authorized to deny the application of Harrison and respondents Mitchell for approval

of the transfer of control of United, and to revoke Common Carrier Certificate C-253.

For the reasons stated, the order appealed from is

Affirmed.

Judges PARKER and VAUGHN concur.

W. ROY POOLE AND WIFE, MARY R. POOLE, WALTER R. POOLE, JR. AND WIFE, ANN H. POOLE; ANNE P. WORTHINGTON AND HUSBAND, BOBBY DEAN WORTHINGTON v. HANOVER BROOK, INC.

No. 777SC87

(Filed 7 December 1977)

1. **Rules of Civil Procedure § 4— service of process on foreign corporation—registered mail—service on proper person**

In an action against a foreign corporation, plaintiff made a prima facie showing that service of process by registered mail, return receipt requested, was made on a proper person where the return receipt included in the record showed that the summons, which was directed to the corporate defendant and addressed to defendant's president, was received by an "authorized agent," and an affidavit of plaintiff's attorney averred that the corporate defendant did not have an authorized agent for service of process in this State, that he had sent a copy of the summons and complaint to defendant by registered mail, return receipt requested, and that process had been received by an authorized agent. G.S. 1A-1, Rule 4(j)(9)(b).

2. **Rules of Civil Procedure § 4— service of process by registered mail—initiation by sheriff not necessary**

There is no requirement that service of process by registered or certified mail be initiated by the sheriff of the county in which the process is issued.

3. **Rules of Civil Procedure § 4— service of process by registered mail—showing of proper addressee**

Plaintiff made a prima facie showing that the summons and complaint in an action against a foreign corporation were mailed to the proper addressee—the president of the corporate defendant.

4. **Rules of Civil Procedure § 4— service of process by registered mail—due process**

The corporate defendant was not denied due process by service of process on it by registered letter addressed to its president where the return receipt discloses that the summons and complaint were actually delivered to an authorized agent of defendant.

Poole v. Hanover Brook, Inc.

APPEAL by defendant from *Fountain, Judge.* Judgment entered 8 November 1976 in Superior Court, NASH County. Heard in the Court of Appeals 15 November 1977.

Plaintiffs instituted this action against defendant, an Illinois corporation, on 7 July 1976 to have an option contract for the purchase of real property in Nash County declared void for the reason that defendant had not complied with the terms of the contract. Summons was issued on 7 July 1976 in the following form:

Defendant	Address
HANOVER BROOK, INC.	c/o Jack Jacobs & Co. 6160 N. Cicero Avenue Chicago, Illinois 60646

Service of process was had on the defendant in Chicago, Illinois, on 9 July 1976 pursuant to the provisions of G.S. 1A-1, Rule 4(j)(9)(b). The summons and complaint were mailed to defendant by registered mail, return receipt requested. The return receipt provides the following information:

"2. ARTICLE ADDRESSED TO:

Mr. Donald A. Kahan, President
Hanover Brook, Inc.
c/o Jack Jacobs & Company
6160 N. Cicero Av., Chicago, Ill 60646

3. ARTICLE DESCRIPTION

REGISTERED NO. 3254
(Always obtain signature of addressee or agent)
I have received that article described above.

SIGNATURE by Authorized Agent, M. McCartin

4. DATE OF DELIVERY JUL 9 1976"

Following the delivery of the summons and complaint, the following events took place:

(1) On 5 August 1976 defendant, through its original attorneys, obtained an order giving them a 30-day extension of time within which to answer or otherwise plead.

(2) On 13 September 1976 defendant's original attorneys obtained an order permitting them to withdraw as counsel and

enlarging the time for defendant to answer or otherwise plead until 13 October 1976.

(3) On 27 September 1976 present counsel entered the case and on 28 September 1976 notified counsel for plaintiffs that they had been retained by defendant.

(4) On 28 September 1976 plaintiffs filed a motion for summary judgment with hearing date set for 11 October 1976.

(5) On 5 October 1976 defendant served interrogatories on the various plaintiffs.

(6) On 7 October 1976 defendant filed a motion to obtain a further extension of time to answer or otherwise plead and to have the summary judgment hearing delayed.

(7) On 11 October 1976 defendant was granted an extension until 18 October 1976 to plead and the requested delay for the summary judgment hearing until 8 November 1976.

(8) On 13 October 1976 defendant filed a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b), based on the insufficiency of service of process, lack of jurisdiction over the person of defendant, and failure to join a necessary party to the action.

(9) On 20 October 1976 plaintiffs answered defendant's Rule 12(b) motion to dismiss. On 21 October 1976 plaintiffs' attorney filed an affidavit stating that defendant was an Illinois corporation without an agent in North Carolina authorized by the corporation to be served or to accept service of process; that on 7 July 1976 a copy of the summons and complaint was sent by registered mail, return receipt requested to:

Mr. Donald A. Kahan, President
Hanover Brook, Inc.
c/o Jack Jacobs and Company
6160 N. Cicero Av, Chicago, Ill 60646;

and that based on the information contained in the return receipt which was attached to the affidavit, the addressee had received the complaint and summons on 9 July 1976.

(10) On 8 November 1976, a hearing was held on defendant's motion to dismiss and it was denied.

Defendant appeals.

Thomas B. Griffin, attorney for plaintiff appellees.

Purrington, Hatch & McNamara, by Thomas P. McNamara and W. Russell Hamilton III, for defendant appellant.

BRITT, Judge.

Defendant contends first that the service of process was insufficient in that the requirements of Rule 4(j) for service of process were not strictly followed in three respects: (1) the record does not contain sufficient information to meet plaintiffs' burden of proof to show that service was made on a proper person; (2) the summons was not served by the Sheriff as required by Rule 4(a); and (3) the summons was not addressed in the manner required by Rule 4. We do not find any of these reasons persuasive.

G.S. 1A-1, Rule 4(j)(9)(b) provides:

> (9) Alternative Method of Service on Party That Cannot Otherwise Be Served or Is Not Inhabitant of or Found Within State. — Any party that cannot after due diligence be served within this State in the manner heretofore prescribed in this section (j), or that is not an inhabitant of or found within this State, or is concealing his person or whereabouts to avoid service of process, or is a transient person, or one whose residence is unknown, or is a corporation incorporated under the laws of any other state or foreign country and has no agent authorized by appointment or by law to be served or to accept service of process, service upon the defendant may be made in the following manner:
>
> * * *
>
> b. Registered or Certified Mail. — Any party subject to service of process under this subsection (9) may be served by mailing a copy of the summons and complaint, registered or certified mail, return receipt requested, addressed to the party to be served. Service shall be complete on the day the summons and complaint are delivered to the addressee, but the court in which the action is pending shall, upon motion of the party served, allow such additional time as may be necessary to afford the defendant reasonable opportunity to defend the action. Before judgment by default may be had on such

service, the serving party shall file an affidavit with the court showing the circumstances warranting the use of the service by registered or certified mail and averring (i) that a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested, (ii) that it was in fact received as evidenced by the attached registered or certified receipt or other evidence satisfactory to the court of delivery to the addressee and (iii) that the genuine receipt or other evidence of delivery is attached. This affidavit shall be prima facie evidence that service was made on the date disclosed therein in accordance with the requirements of this paragraph, and shall also constitute the method of proof of service of process when the party appears in the action and challenges such service upon him.

G.S. 1A-1, Rule 4(j)(6)(c) provides:

(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 shall be as follows:

* * *

(6) Domestic or Foreign Corporation. — Upon a domestic or foreign corporation:

* * *

c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the officer, director or agent to be served as specified in paragraphs a and b.

[1] Due to the specific language of Rule 4(j)(9) and Rule 4(j)(6)(c), we find no merit in defendant's argument that service was insufficient because the record does not show that it was made on a proper person. The record includes the return receipt which shows that the summons which was directed to the defendant, HANOVER BROOK, INC., and addressed to Mr. Donald A. Kahan, President, was received on 9 July 1976 by M. McCartin, authorized agent.

In the recent case of *Lewis Clarke Associates v. Tobler*, 32 N.C. App. 435, 438, 232 S.E. 2d 458, 459, *cert. denied* 292 N.C. 641, 235 S.E. 2d 60 (1977), this court stated:

> [T]he provision in Rule 4(j)(9)(b) providing that service of process will be complete when the copies of the summons and complaint are "delivered to the addressee," contemplates merely that the registered or certified mail be delivered to the address of the party to be served and that a person of reasonable age and discretion receive the mail and sign the return receipt on behalf of the addressee.
>
> A showing on the face of the record of compliance with the statute providing for service of process raises a rebuttable presumption of valid service. *Finance Co. v. Leonard*, 263 N.C. 167, 139 S.E. 2d 356 (1964); *Harrington v. Rice*, 245 N.C. 640, 97 S.E. 2d 239 (1957).

In the present case, it is a reasonable inference from the return receipt that the summons and complaint were delivered to a person, M. McCartin, at defendant's address, and that M. McCartin received the summons and complaint on behalf of Donald A. Kahan, president of defendant. The summons itself was properly directed to defendant corporation, G.S. 1A-1, Rule 4(b), and the mailing was properly addressed to an officer of the corporation, G.S. 1A-1, Rule 4(j)(6)(c). It can be assumed that M. McCartin was a person of reasonable age and discretion authorized to receive registered mail and sign the receipt for the addressee.

The return receipt and the affidavit of plaintiffs' attorney averring that defendant did not have an authorized agent for service of process within this state, and that he had sent a copy of the summons and complaint to defendant by registered mail, return receipt requested, and that the process had been received by an authorized agent, shows sufficient compliance with Rule 4(j)(9)(b) to raise a rebuttable presumption of valid service. Defendant did not attempt to rebut this presumption by showing that he did not receive copies of the summons and complaint. Consequently, defendant has failed to show that service of process was insufficient because a delivery was not made to a proper person.

[2] We find no merit in defendant's argument that the service was not proper for the reason that it should have been mailed by the sheriff of Nash County.

G.S. 1A-1, Rule 4(a), provides for the traditional method of service of process "by the sheriff of the county where service is to be made or some other person duly authorized by law to serve summons." Rule 4(j)(9), quoted in pertinent part above, provides for *alternative* methods of service on a party that cannot otherwise be served or is not an inhabitant of or found within this state. Three alternative methods are set forth: (1) Personal service outside the state by one of the persons authorized in Rule 4(a); (2) registered or certified mail; or (3) service by publication. We find nothing in Rule 4(j)(9)(b) or elsewhere that requires that service by registered or certified mail be initiated by the sheriff of the county in which process is issued.

[3] We find no merit in defendant's argument that the service was improper because the summons was not addressed in the manner prescribed by Rule 4. The summons was directed to defendant, Hanover Brook, Inc. as required by Rule 4(b). *Philpott v. Kerns*, 285 N.C. 225, 203 S.E. 2d 778 (1974). The mailing address was completed in compliance with Rule 4(j)(6)(c) which requires that a copy of the summons and complaint be addressed to the officer, director or agent to be served and mailed by registered or certified mail, return receipt requested. The mailing address was as follows:

Mr. Donald A. Kahan, President
Hanover Brook, Inc.
c/o Jack Jacobs & Company
6160 N. Cicero Av, Chicago, Ill 60646

The logical inference from the form of the address and from the return receipt is that Mr. Donald A. Kahan is the president of Hanover Brook, Inc. We hold that plaintiff made a prima facie showing that the summons and complaint were mailed to the proper addressee, the President of Hanover Brook, Inc., Mr. Donald A. Kahan. Defendant offered nothing to rebut that showing.

[4] Defendant contends next that even if the service of process is found to be proper under the applicable rules and statutes of North Carolina, it has been denied due process in violation of Article I, Section 19, of the North Carolina Constitution and the Fourteenth Amendment to the United States Constitution. We find no merit in this contention. The registered receipt discloses

that the summons and complaint were actually delivered to an authorized agent of the defendant. "Such service by registered mail is 'reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections,' and therefore, complies with due process requirements. (Citations)" *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 707, 208 S.E. 2d 676, 680 (1974).

Since the service of process was proper, and placed the defendant within the jurisdiction of the court, we do not find it necessary to reach defendant's contention that it did not waive defective service of process.

For the reasons stated the judgment appealed from is

Affirmed.

Judges PARKER and VAUGHN concur.

LONNIE D. TADLOCK v. C. L. SNIPES MOTORS, INC. AND FORD MOTOR COMPANY, INC.

No. 778DC97

(Filed 7 December 1977)

1. **Uniform Commercial Code § 15— automobile—express warranty of parts—replacement or repair allowed—directed verdict for dealer proper**

In an action to recover for fire damages to plaintiff's automobile, the trial court did not err in allowing defendant Ford's motion for directed verdict, since the warranty given by Ford limited its liability to repair or replacement of defective parts; plaintiff's evidence with respect to defective parts at most tended to show a defective junction box; and plaintiff presented no evidence tending to show the cost of repair to, or replacement of, that part.

2. **Fires § 3— fire damages to automobile—defendant's negligent repairs as cause—sufficiency of evidence**

In an action to recover for fire damages to plaintiff's automobile, the trial court erred in granting a directed verdict for defendant who sold plaintiff the automobile where the evidence tended to show that plaintiff's automobile caught fire; the fire emanated from behind the dashboard; there was no fire damage under the hood, but the insulation on the wires under the dash was destroyed and the wires were melted together; and some twelve days prior to the fire an employee of defendant altered the electrical system on the car by splicing the wires leading to and from a junction box, thereby passing said box.

APPEAL by plaintiff from *Nowell, Judge*. Judgment entered 29 September 1976 in District Court, WAYNE County. Heard in the Court of Appeals 17 November 1977.

Plaintiff instituted this action to recover for fire damages to his automobile. In his complaint he alleged that the damages resulted from negligence of defendant Snipes and a breach of warranty on the part of defendant Ford. In their answers, defendants denied liability.

Plaintiff presented evidence summarized as follows:

Around 1 August 1974 he purchased a 1974 Ford Mustang, with 7,000 miles showing on the odometer, from defendant Snipes. He returned the car to defendant Snipes four times because of electrical problems including misfunctioning gauges, a misfunctioning radio and a burned box under the hood. The last time the car was returned was on 11 November 1974 when, among other things, defendant Snipes removed and kept the radio for repairs.

While driving the car on 12 November 1974 plaintiff observed smoke coming from under the dashboard. He stopped the car and found fire coming from under the speedometer, gear stick and dash. The car had been driven less than 12,000 miles at the time of the fire and no one other than personnel of defendant Snipes had worked on the car. Two mechanic friends of plaintiff had examined the car but they did not work on it.

After plaintiff discovered the fire he called the Goldsboro Fire Department. The responding fireman stated that to the best of his knowledge the fire was coming from the middle of the dash; that after extinguishing the fire, he found no fire damage under the hood but found the insulation on the wires under the dash melted off and the wires melted together.

One of plaintiff's mechanic friends, who qualified as an expert on motor vehicle electrical systems, testified that he examined the car several times; that he determined that something was wrong with it but did not determine just what it was; that the amp gauge worked incorrectly and there was a junction box on the fender that was burned out; that he observed the car in early November after it had been worked on by defendant Snipes; at that time he determined that defendant Snipes had bypassed the junction box on the fender by joining two wires together; and

that it was "very possible" that a fire in an automobile could be caused by bypassing a safety junction box and joining two wires.

Plaintiff introduced into evidence the written warranty provided by defendant Ford.

At the close of plaintiff's evidence the court allowed defendant Ford's motion for a directed verdict but overruled a similar motion by defendant Snipes.

Defendant Snipes offered evidence which tended to show:

Its records disclose that plaintiff returned the car for repairs on three occasions. On 25 September 1974 he returned it to have a broken rearview mirror repaired. On 1 November 1974 he returned it to have burned wires under the hood checked. On 11 November 1974 he returned the car for repairs to the radio, to the charging system and some air vents.

William Wilkins, an employee of defendant Snipes, who qualified as an expert in automobile electrical systems, testified that he worked on plaintiff's vehicle; that the junction box referred to by plaintiff's witness is simply a connection for two wires; that no safety hazard is caused by splicing the wires; that the junction box is not a safety feature; that he spliced the wires around the junction box on or about 1 November 1974; that on 11 November 1974 he removed the radio and that the charging system was working properly; that he did not smell smoke and did not find any problem with the electrical wiring system.

At the conclusion of all the evidence, the court allowed defendant Snipes' motion for directed verdict. From judgments dismissing his actions, plaintiff appeals.

Barnes, Braswell & Haithcock, by W. Timothy Haithcock, for plaintiff appellant.

Langston & Langston, by W. Dortch Langston, Jr., for defendant appellee C. L. Snipes Motors, Inc.

Taylor, Allen, Warren & Kerr, by Robert D. Walker, Jr., and Gordon C. Woodruff for defendant appellee Ford Motor Company.

BRITT, Judge.

Plaintiff contends first that the court erred in allowing defendant Ford's motion for a directed verdict. We find no merit in this contention.

It will be noted that plaintiff's claim against defendant Ford is based solely on breach of an express warranty. The warranty made by defendant Ford and which plaintiff introduced into evidence and relies upon, provides in pertinent part:

WARRANTY

FACTS BOOKLET

1974 Model Capri, Comet,
Courier, Maverick, Mustang II
and Pinto Warranty

Ford and the Selling Dealer jointly warrant for each 1974 model passenger car or light truck (P400 or lower series) sold by Ford that for the earliest of 12 months or 12,000 miles, from either first use or retail delivery, the Selling Dealer will repair or replace free of charge any part except tires that is found to be defective in factory materials or workmanship under normal use in the United States or Canada.

All Ford and the Selling Dealer require is that you properly operate, maintain and care for your vehicle, and that you return for warranty service to your Selling Dealer's place of business or to any authorized Ford or Lincoln-Mercury dealer if you are traveling, have moved a long distance or need emergency repairs. Warranty repairs will be made with Ford Authorized Service or Remanufactured Parts.

To the extent allowed by law, this WARRANTY IS IN PLACE OF all other warranties, express or implied, including ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS. Under this warranty, repair or replacement of parts is the only remedy.

* * *

Under this warranty, repair or replacement of parts is the only remedy, and loss of use of the vehicle, loss of time,

inconvenience, commercial loss or consequential damages are not covered.

In addition, damage from accidents, fire or other casualty, misuse, overloading, negligence, or racing, or failures caused by parts not supplied by Ford or by modification of any part of the vehicle are not covered by the warranty.

We construe said warranty strictly within the context of the pleadings and evidence in the instant case. We note again that plaintiff pled the warranty and relies upon it in his claim against defendant Ford. Since he does not attack the validity of the warranty, we do not consider that question but, for the purposes of this case, proceed on the assumption that the warranty is valid. See Rule 10, Rules of Appellate Procedure, 287 N.C. 671, 698.

[1] The warranty limits Ford's liability to repair or replacement of "any part except tires that is found to be defective in factory materials or workmanship under normal use in the United States or Canada. *** Under this warranty, repair or replacement of parts is the only remedy". With respect to defective parts, plaintiff's evidence at most tended to show a defective junction box but he presented no evidence tending to show the cost of repair to, or replacement of, that part. We hold that the court did not err in allowing defendant Ford's motion for directed verdict.

[2] Plaintiff contends next that the court erred in granting the motion of defendant Snipes for a directed verdict. We think this contention has merit and hold that the evidence was sufficient to take the case against defendant Snipes to the jury.

The evidence clearly showed that plaintiff's automobile caught fire; that the fire emanated from behind the dashboard; that there was no fire damage under the hood but the insulation on the wires under the dash was destroyed and the wires were melted together; and that some twelve days prior to the fire an employee of defendant Snipes altered the electrical system on the car by splicing the wires leading to and from a junction box, thereby bypassing said box.

Plaintiff's witness Cartrette, who qualified as an expert on motor vehicle electrical systems, testified that he examined the car prior to 1 November 1974 and found that the junction box had "burned up one time"; that he advised plaintiff to return the car

to defendant Snipes; that thereafter he examined the car again and saw where the junction box had been bypassed; and that in his opinion it was "very possible" that bypassing the junction box as was done on plaintiff's car could cause a fire in the automobile.

We think the court properly permitted witness Cartrette to state his opinion aforesaid. In *Teague v. Power Co.*, 258 N.C. 759, 129 S.E. 2d 507 (1963), a case involving a fire allegedly caused by electrical wiring, Justice (now Chief Justice) Sharp said (page 763): ". . . However, an expert in a particular field may give his opinion, based on personal observation or in answer to a properly framed hypothetical question, that a particular event or situation could or could not have produced the result in question. Stansbury, Evidence, Section 137." *See also Mann v. Transportation Company*, 283 N.C. 734, 198 S.E. 2d 558 (1975), and *Lawrence v. Insurance Co.*, 32 N.C. App. 414, 232 S.E. 2d 462 (1977).

It is true that defendant's witness Wilkins, who also qualified as an expert in automobile electrical systems, stated an opinion contrary to that given by plaintiff's witness Cartrette. But it was the province of the jury to resolve this conflict in the testimony and not that of the court.

Finally, plaintiff contends the court erred in not allowing the witness Daughetry to state in the presence of the jury that he determined that the cause of the fire was a shortage in the wiring. We find no merit in this contention for the reason that plaintiff did not lay a proper foundation for the witness to state the cause of the fire. See Stansbury's N.C. Evidence (Brandis Rev.), § 133.

As to defendant Ford, the judgment is affirmed.

As to defendant Snipes, the judgment is reversed and the cause will be remanded for further proceedings.

Judges PARKER and VAUGHN concur.

Parker v. Williams and Hall v. Williams

WILLIAM A. PARKER, ADMINISTRATOR OF THE ESTATE OF KATHY DENISE CRAWFORD v. JAMES EARL WILLIAMS, JAMES WEAVER WILLIAMS, MAXINE MARIE HALL AND BRENDA COLE HALL AND MARIE MAXINE HALL AND GLENDAL COLE HALL v. JAMES WEAVER WILLIAMS AND JAMES EARL WILLIAMS

No. 7728SC7

(Filed 7 December 1977)

1. **Automobiles § 94.8— passenger's contributory negligence—failure to protest manner of operation**

The trial court erred in submitting an issue of a jeep passenger's contributory negligence in failing to protest or remonstrate against the manner of operation of the jeep where there was evidence that the jeep traveled at an excessive speed for only a maximum distance of 200 yards and that it passed traffic while in the turning lane and reentered the passing lane during that time, since the circumstance of time precluded remonstrance.

2. **Automobiles § 94.4— passenger's contributory negligence—distraction of driver of another vehicle**

The trial court erred in submitting an issue of a jeep passenger's contributory negligence in distracting the driver of an automobile with which the jeep collided where there was evidence tending to show only that the passenger recognized the automobile driver, the passenger asked the jeep driver to blow the horn, and the jeep driver blew the horn as the jeep pulled abreast of the automobile and the passenger waved to the automobile driver.

3. **Appeal and Error § 31; Rules of Civil Procedure § 10— failure to instruct—appellee's contention—absence of cross-assignment of error**

Defendant appellee's contention that the trial court should have instructed the jury to determine whether a vehicle passenger was contributorily negligent as a participant in the vehicle driver's negligence by encouraging the driver to drive in a fast and reckless fashion was not before the appellate court where defendant failed to take exception and cross-assign as error the failure of the court to instruct on this contention and failed to request such an instruction at trial. G.S. 1A-1, Rule 10(d).

APPEAL by plaintiffs from *Judge Harry C. Martin.* Judgment entered 11 February 1976 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 27 September 1977.

These cases arose from a 31 July 1974 traffic accident which occurred on U.S. Highway 19-23 just west of the city limits of Asheville. At the time of the collision, plaintiff Marie Maxine Hall (Hall) was driving a jeep owned by her mother, Glendal Cole Hall. Kathy Denise Crawford (Crawford), who was killed in the accident, was a passenger in the jeep, occupying the right front seat.

Defendant James Weaver Williams (Williams) was operating a Volkswagen automobile owned by his father, co-defendant James Earl Williams. Both vehicles were travelling in an easterly direction and, at the place where the collision occurred, the highway was a 5-lane highway. The evidence is uncontradicted that Hall had been in the turning lane apparently intending to make a left turn, but had passed traffic while in the turning lane and had gotten back into the passing lane just prior to the collision. The evidence is quite contradictory as to whether the Volkswagen swerved into the jeep or the jeep swerved in front of the Volkswagen.

Plaintiff administrator took a voluntary dismissal as to Hall. The cases were submitted to the jury on the question of negligence and contributory negligence. The jury found defendant Williams negligent in each case and found that each plaintiff was contributorily negligent. Plaintiffs appealed.

Gudger, McLean, Leake, Talman & Stevenson, by Joel B. Stevenson and William A. Parker, for plaintiff appellant William A. Parker, Administrator of the Estate of Kathy Denise Crawford, Deceased.

Robert S. Swain for plaintiff appellant Marie Maxine Hall.

Uzzell & Dumont, by Harry Dumont and Larry Leake, for defendant appellees James Weaver Williams and James Earl Williams.

MORRIS, Judge.

Plaintiff administrator asserts that the court erred in submitting an issue of contributory negligence to the jury for that there was no evidence to support a finding of contributory negligence and, alternatively, that the court failed to instruct the jury fully and properly on the law of contributory negligence. In his brief, the appellant does not argue the second portion of the question raised by his first assignment of error nor is any authority cited. We, therefore, deem this portion of the assignment of error abandoned. *Equipment, Inc. v. Lipscomb*, 15 N.C. App. 120, 189 S.E. 2d 498 (1972); Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

The allegations of negligence on the part of Crawford, plaintiff's intestate, were "failing to protest or remonstrate against the manner of operation of said vehicle, continuing as a passenger in said vehicle and assuming an unsafe position in said vehicle."

[1] The court properly did not charge the jury on the allegation of "assuming an unsafe position in said vehicle." However, the court did instruct the jury on the contention that Crawford was negligent in failing to remonstrate or protest the manner in which Marie Hall was driving the jeep and also on the contentions that Crawford was negligent in distracting the attention of Weaver Williams while he was driving the Volkswagen and properly placed the burden of proof as to these contentions on Williams.

The evidence is uncontradicted that Crawford did not protest or remonstrate. The question then becomes: Was there a duty to remonstrate under the facts and circumstances of this case? The rule is clearly delineated by Justice Devin in *Samuels v. Bowers*, 232 N.C. 149, 59 S.E. 2d 787 (1950):

> "The principle is generally recognized that when a gratuitous passenger becomes aware that the automobile in which he is riding is being persistently driven at an excessive and dangerous speed, the duty devolves upon him in the exercise of due care for his own safety to caution the driver, and, if his warning is disregarded and speed unaltered, to request that the automobile be stopped and he be permitted to leave the car. (Citations omitted.) He may not acquiesce in a continued course of negligent conduct on the part of the driver and then claim damages . . . for injury proximately resulting therefrom. But this duty is not absolute and is dependent on circumstances." (Citations omitted.) 232 N.C. at 153, 59 S.E. 2d at 790.

Our examination of the evidence in light of these principles convinces us that the court erred in charging on this contention of defendant. Williams' evidence was that the jeep stopped behind him at the intersection of Acton Circle and U.S. Highway 19-23. The distance from that point to the point where the collision occurred was, according to Williams 5/10 of a mile, and according to the investigating patrolman 3/10 of a mile. Williams further testified that he did not again see the jeep until the accident occurred. His speed from the time he saw the jeep stopped behind him to the time of the accident was estimated, without contradic-

tion, at from 45 to 50 miles per hour. Assuming that 45 miles per hour is the accurate speed and that 5/10 of a mile the accurate distance, the time elapsing from the first sight of the jeep to the accident would be less than a minute. There was evidence for defendant that the jeep was observed for a distance of approximately 200 yards travelling at a speed of approximately 70 miles per hour. There was evidence that the jeep went from the passing lane into the turning lane and back into the passing lane, having passed some traffic in the doing so. The greatest distance the jeep travelled at excessive speed was placed at 200 yards by defendant's evidence. It is obvious that the circumstance of time precluded remonstrance, even assuming negligent operation of the jeep by Hall.

[2] The uncontradicted evidence is that as the jeep drew near the Volkswagen, Crawford recognized Weaver Williams as the driver. She asked Hall to blow the horn. This Hall did as she came almost abreast of Williams and Crawford waved. We fail to see any actionable negligence in these two incidents. They are the only incidents which the evidence reveals as any possible basis for a charge of distraction of Williams, and they are the bases for the court's instructions to the jury. Again we agree with plaintiff appellant that there is insufficient evidence of distraction in this record to submit to the jury on a charge of contributory negligence. We agree with plaintiff that the court erred in submitting this issue to the jury on failure to remonstrate and distraction.

[3] Defendant urges that not only was the contention as submitted fully supported by the evidence. The submission was favorable to plaintiff because the evidence would have supported a charge, and the court should have charged that the jury should determine whether Crawford was a participant in Hall's negligence; i.e., she encouraged Hall to drive in a fast and reckless fashion. Assuming arguendo that defendant's position has merit, it is not before us. Rule 10(d), North Carolina Rules of Appellate Procedure, provides:

> "Without taking an appeal an appellee may set out exceptions to and cross-assign as error any action or omission of the trial court to which an exception was duly taken or as to which an exception was deemed by rule or law to have been

taken, and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken."

Defendant failed to take exception and cross-assign as error the failure of the court to instruct on this contention, nor did he request such an instruction at trial.

The jury returned as its verdict that defendant Weaver Williams was guilty of negligence. The record discloses no motion by defendants for directed verdict nor is there any exception by defendants to the judgment. Nevertheless, we cannot say what effect the submission of an issue of plaintiff's contributory negligence had or might have had upon the jury's determination of the issue of defendant's negligence. We think the circumstances of this case require a

New trial.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. DOCK McCOY, JR.

No. 7720SC445

(Filed 7 December 1977)

1. **Criminal Law § 89.3— witness's prior statements—admissibility for corroboration**

Prior consistent statements of a witness are admissible to corroborate his testimony.

2. **Criminal Law §§ 113.9, 114— jury instructions—expression of opinion—misstatement of evidence**

The defendant has the burden of proving an improper expression of opinion by the trial court during jury instructions and that such an expression was prejudicial; defendant must also call a misstatement of the evidence to the attention of the trial judge, or such misstatement may not be the basis for a proper assignment of error.

3. **Assault and Battery § 15.3; Weapons and Firearms— jury instructions—facts constituting assault—shotgun as deadly weapon—intent to kill not defined**

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury and discharging a firearm into an occupied dwelling, the trial court properly described the facts constituting the assault for which

defendant was charged, properly instructed the jury that a shotgun is a deadly weapon and that the term firearm is self-explanatory, and did not err by failing to define intent to kill, since that phrase is also self-explanatory.

4. Assault and Battery § 15.6— self-defense—jury instructions

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury and discharging a firearm into an occupied dwelling, the trial court's instruction properly placed the burden of disproving self-defense upon the State, and the instruction also informed the jury that self-defense need be only apparently necessary.

APPEAL by defendant from *Barbee, Special Judge.* Judgment entered 17 February 1977 in Superior Court, RICHMOND County. Heard in the Court of Appeals 19 October 1977.

Defendant was indicted for four counts of assault with a deadly weapon with intent to kill inflicting serious injury and one count of discharging a firearm into an occupied dwelling. It was stipulated that the charges would be consolidated for trial. Defendant entered a plea of not guilty to all five indictments and the jury returned a verdict of guilty to four counts of misdemeanor assault with a deadly weapon and guilty to discharging a firearm into an occupied dwelling. From a judgment sentencing him to imprisonment for a term of 8 to 10 years for discharging a firearm and 2 years to run concurrently on the four consolidated assault charges, defendant appealed.

The State presented evidence tending to show: that on 26 December 1976 around 10:00 p.m. a number of people were gathered in Allred's Grocery in Rockingham; that defendant was seen outside the front window of the grocery with a shotgun; that defendant pointed the gun toward the window and discharged a shot through the plate glass window wounding four people; that after firing the shot defendant walked into the store and threatened to kill all the "son of a bitches" present. Police officers testified that a 12 gauge shotgun shell was found on the sidewalk outside the store, that there was a hole in the left glass window of the store, and that a 12 gauge shotgun was found inside defendant's apartment.

The defendant claimed self-defense and testified that on 26 December around 7:00 or 8:00 p.m. the four men wounded by the shotgun blast jumped defendant, beat him up, and took his money; that defendant then ran to his room and got a shotgun;

that the four men chased the defendant to his apartment; that when they saw his shotgun they began to retreat; that defendant fired one shot into the air; that the four men, thinking the shotgun to be single barrelled, turned again and began to come at the defendant; that defendant managed to reload and fire again before the four victims of the blast could get close enough to disarm him and that it was this second blast which wounded the four assailants. Defendant testified that he shot the four men because he was afraid they would harm him.

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

Webb, Lee, Davis, Gibson and Gunter, by Hugh A. Lee, for defendant appellant.

MORRIS, Judge.

[1] The defendant's first assignment of error is directed to the admission of testimony of prior consistent statements to corroborate the testimony of witness Bostick. The defendant concedes that present law allows such corroborating testimony but argues that this rule of law should be changed. Recently, our Supreme Court quoting 1 Stansbury's N.C. Evidence, § 51 (Brandis Rev. 1973) with approval stated that "[t]he admissibility of prior consistent statements of the witness to strengthen his credibility has been challenged by counsel and reaffirmed by the Court in scores of cases." *State v. Patterson*, 288 N.C. 553, 571, 220 S.E. 2d 600 (1975), *modified on other grounds* 428 U.S. 904, 49 L.Ed. 2d 1211, 96 S.Ct. 3211. The rule has endured and we are not at liberty to change it.

[2] By assignments of error Nos. 4 and 5, the defendant contends that the trial judge erred in his charge to the jury by relating the evidence in such a way as to convey an opinion that he favored the State. The defendant does not illustrate his contention that the judge favored the State in his summation of the evidence and we have reviewed the charge to the jury and conclude that the trial judge fairly and accurately summarized the contentions of the defendant and the State to the jury. The defendant has the burden of proving an improper expression of opinion and that such an expression was prejudicial. *State v. Green*, 268 N.C. 690, 151 S.E. 2d 606 (1966). This the defendant has failed to do. The

defendant does contend that at one point the trial judge misstated the evidence in his summary but he did not call this to the attention of the judge. A misstatement of the evidence, which is not called to the attention of the trial judge, may not be the basis for a proper assignment of error. *State v. Baldwin*, 276 N.C. 690, 174 S.E. 2d 526 (1970); *State v. Littlejohn*, 19 N.C. App. 73, 198 S.E. 2d 11, *cert. denied* 284 N.C. 123, 199 S.E. 2d 661 (1973).

[3] By his next assignment of error the defendant contends that the trial judge erred in his charge to the jury on the indictments for assault with a deadly weapon with intent to kill by: (1) not describing the assault; (2) not defining the term "firearm" or instructing the jury that a shotgun is a deadly weapon; and (3) not explaining what constitutes an "intent to kill". This assignment of error is without merit. First, the charge to the jury must be construed as a whole and in his summary of the evidence the trial judge included an adequate description of the facts constituting the assault for which the defendant was charged. *State v. Tomblin*, 276 N.C. 273, 171 S.E. 2d 901 (1970). It was not necessary to repeat the evidence as it related to each charge on five counts of assault with a deadly weapon with intent to kill. Furthermore, if the defendant objected to the court's summary of the evidence regarding the assault, or preferred fuller instructions as to the evidence or contentions, he should have so requested and failure to do so precludes him from assigning this as error. *State v. Littlejohn, supra.* Second, the record reveals that the judge did, in fact, instruct the jury that a shotgun is a deadly weapon, and the term firearm is self-explanatory and requires no definition. It is not error for the court to fail to explain words of common usage in the absence of a request for special instruction. *State v. Jennings*, 276 N.C. 157, 171 S.E. 2d 447 (1969). At any rate, the indictments were for assault with a deadly weapon, not assault with a firearm. The judge properly defined what constitutes a deadly weapon and instructed the jury that a shotgun met this criterion. The use of the word "firearm" would not confuse the jury on this point and did not constitute prejudicial error. Third, it has been held that the phrase "intent to kill" is self-explanatory and the trial judge is not required to define the term in his charge. *State v. Plemmons*, 230 N.C. 56, 52 S.E. 2d 10 (1949).

[4] The defendant's next assignment of error is directed to the trial judge's charge on self-defense. He contends that the charge

was vague, confusing to the jury, and that the judge failed to instruct the jury that self-defense need be only apparently necessary. We disagree. The language regarding self-defense to which defendant excepted is as follows:

> "On the other hand, and so I charge you further, that the assault by the defendant would be justified on the ground of self-defense, and it would be your duty to return a verdict of not guilty if under the circumstances as they existed at the time of the assault, the State has failed to satisfy you beyond a reasonable doubt of the absence on the part of the defendant, of a reasonable belief that he the defendant, was about to suffer death or great bodily harm at the hands of Mark Leonard Bostick, Jackie Nicholson, Russell Brandy and William James Everett, or that the defendant used more force than reasonably appeared to him the defendant, to be necessary, or that the defendant was the aggressor."

The portion of the charge relating to self-defense, while certainly not a model, was adquate as it placed the burden of disproving the elements of self-defense upon the State in compliance with *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975); and *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), *rev. on other grounds*, 432 U.S. 233, 53 L.Ed. 2d 306, 97 S.Ct. 2339. This charge placing the burden of disproving self-defense upon the State was repeated to the jury on eight occasions. There can be no doubt that the jury was adequately informed regarding the law on this issue. The contested language also preserved the benefit of "apparent necessity" in self-defense. This assignment of error is overruled.

The defendant's last assignment of error is directed to the charge to the jury on the offense of discharging a firearm into an occupied dwelling. The defendant contends that the judge failed to instruct the jury that discharging of the firearm must be without legal justification or excuse. This contention is without merit. In instructing the jury as to the elements of the crime, the judge charged that the State must prove that the defendant "wilfully or wantonly and intentionally discharged a shotgun into the building of Grady Allred". Immediately thereafter he defined wilfully as meaning "intentionally and without just cause or excuse. . .". This assignment of error is overruled.

The defendant also assigns as error the entry of judgment and the failure of the trial court to set aside the verdict and grant a new trial. Defendant's motions to set aside the verdict and to grant a new trial are addressed to the discretion of the trial judge and refusal to grant them is not reviewable in the absence of an abuse of discretion. *State v. Lindley*, 286 N.C. 255, 210 S.E. 2d 207 (1974). We have concluded that there was no prejudicial error in the trial, and this assignment of error is without merit.

No error.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. BILLY RAY MENSCH

No. 7719SC514

(Filed 7 December 1977)

1. **Arrest and Bail § 5.1; Assault and Battery § 15.7— assault on law officer—refusal to instruct on self-defense**

In this prosecution for assault on a law officer while he was discharging a duty of his office, the trial court did not err in refusing to instruct the jury on self-defense where the court did instruct the jury that defendant had a right to assault the officer if the officer used excessive force in effecting an arrest of defendant, since the court's instruction was more favorable to defendant than a general charge on self-defense which would have restricted defendant to the use of reasonable force under the circumstances.

2. **Arrest and Bail § 5.1; Assault and Battery § 11.3— assault on law officer—excessive force by officer**

In all cases where the charge is assault on a law officer in violation of G.S. 14-33(b)(4) or assault on a law officer with a firearm in violation of G.S. 14-34.2, the use of excessive force, whether deadly or non-deadly, in making an arrest or preventing escape from custody does not take the officer outside the performance of his duties, nor does it make the arrest unlawful.

3. **Assault and Battery § 15.4— use of excessive force by officer—right to repel excessive force**

In prosecutions for assault on a law officer, it is not incumbent upon the State to prove that the officer did not use excessive force, but where there is evidence tending to show the use of excessive force by the officer, the trial court should instruct the jury that the assault by the defendant upon the officer was justified or excused if the assault was limited to the use of reasonable force by the defendant in defending himself from that excessive force.

State v. Mensch

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 27 January 1977, Superior Court, RANDOLPH County. Heard in the Court of Appeals 24 October 1977.

Defendant pled not guilty to the charge of assaulting Ronnie Morgan, a law officer, while he was discharging a duty of his office, in violation of G.S. 14-33(b)(4).

Officer Morgan, for the State, testified that after arresting defendant for driving a motor vehicle on a public highway while under the influence of intoxicating liquor, he, at defendant's request, drove to the home of defendant's friend for the purpose of getting the friend to drive defendant's vehicle to his home. Morgan got out of the patrol vehicle, took two or three steps, and was struck in the back of the head. Defendant then knocked Morgan to the ground, jumped on his chest with his knees and began choking him. Morgan blacked out briefly, but managed to get up and pull his gun. A highway patrolman drove up. Morgan fell to the ground and lost consciousness until revived in the hospital.

Defendant testified that he got out of the patrol car to go to the front door but Officer Morgan grabbed him by the arm, which "got me sort of mad, and I went toward him." Morgan struck him on the side of the head with a flashlight and "that is when I assaulted him."

Defendant was convicted of the offense charged and appealed from judgment imposing imprisonment.

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

Bell and Ogburn by Chas. T. Browne and William H. Heafner for defendant appellant.

CLARK, Judge.

The trial court denied the request of the defendant to instruct the jury on self-defense.

Officer Morgan had the right to arrest the defendant without a warrant if he had probable cause to believe that defendant committed a criminal offense in his presence. G.S. 15A-401(b)(1). See *State v. Harris*, 279 N.C. 307, 182 S.E. 2d 364 (1971). The arrest

was made after the officer observed defendant's erratic driving on a public highway and after smelling the odor of alcohol on his breath. Defendant does not contend that the arrest was unlawful.

In making the lawful arrest Officer Morgan had the right to use such force as was reasonably necessary to effect the arrest. G.S. 15A-401(d)(1). *State v. McCaskill*, 270 N.C. 788, 154 S.E. 2d 907 (1967); *State v. Fain*, 229 N.C. 644, 50 S.E. 2d 904 (1948).

The trial court instructed the jury it was incumbent on the State to prove the elements of assault, without justification or excuse, that Morgan was a law officer, that he was attempting to discharge the duty of arrest, that the arrest was lawful, and, finally, that Morgan did not use more force than was reasonably necessary to effect the arrest.

[1] The defendant had no right to defend himself against a lawful arrest if the officer did not use excessive force. And the trial court instructed the jury in substance that if Officer Morgan used excessive force in making the arrest, it was the duty of the jury to find defendant not guilty. These instructions, in effect, informed the jury that if the officer used excessive force in effecting the arrest, the defendant had the right to assault the officer. These instructions were favorable to defendant, even more so than a general charge on self-defense which would have restricted defendant to the use of reasonable force under the circumstances.

In *State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977), it was held that while the use of excessive force in a lawful arrest may subject a law officer to civil or criminal liability, it does not take the officer outside the performance of his duties.

Irick involved the use of firearms and deadly force (G.S. 14-34.2), which a law officer may use in making a lawful arrest if the deadly force is, or reasonably appears, necessary from the viewpoint of the officer. G.S. 15A-401(d)(2). There is a further provision that the statute neither authorizes the use of willful, malicious or criminally negligent conduct which injures or endangers any person or property, nor justifies the use of unreasonable or excessive force. "It makes explicit, in the negative, the positive implications of the authorizing statute's statement that it must be or appear to be 'reasonably necessary' to use deadly force." Corbett, Criminal Process and Arrest Under

the North Carolina Pretrial Criminal Procedure Act of 1974, 10 Wake Forest L. Rev. 377, 401 (1974).

[2, 3] In the case *sub judice* the force used, if any, in making the arrest, or preventing the escape, of the defendant was not deadly; but the statutory provision against the use of excessive force, referred to above, applies to the use of both non-deadly [G.S. 15A-401(d)(1)] and deadly force [G.S. 15A-401(d)(2)]. The rule of law in *Irick* applies in cases involving the use of both non-deadly and deadly force by the law officer in making an arrest. In all cases where the charge is assault on a law officer in violation of G.S. 14-33(b)(4), or assault of a law officer with a firearm (G.S. 14-34.2), the use of excessive force by the law officer in making an arrest or preventing escape from custody does not take the officer outside the performance of his duties, nor does it make the arrest unlawful. It is not incumbent upon the State to prove that the law officer did not use excessive force, but where there is evidence tending to show the use of such excessive force by the law officer, the trial court should instruct the jury that the assault by the defendant upon the law officer was justified or excused if the assault was limited to the use of reasonable force by the defendant in defending himself from that excessive force.

[1] In the case before us it appears from the evidence that defendant (age 25, height 6 feet 2 inches, weight 240 pounds) brutally and viciously assaulted Officer Morgan at a time when the officer was attempting to do a favor for him. The able trial judge exercised an abundance of caution and gave the benefit of any doubt in applying the law to the evidence. The instructions to the jury were favorable to the defendant, and there was no error in the denial of defendant's request to instruct on self-defense.

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

No error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. DAVID LEN FOX

No. 7725SC378

(Filed 7 December 1977)

1. **Criminal Law § 18.4— guilty plea in district court—trial de novo in superior court**

A criminal defendant has a right to appeal from the district court to the superior court for a trial *de novo* even though he entered a plea of guilty in the district court. G.S. 7A-290.

2. **Criminal Law § 18— appeal to superior court—authority to remand for compliance with district court judgment**

Where a defendant has appealed for trial *de novo* in superior court, a superior court judge has no authority, absent satisfactory cause shown or without the consent of the defendant, to dismiss the appeal and remand the case for compliance with the judgment of the district court.

3. **Criminal Law §§ 18.4, 23.4— plea bargain in district court—appeal to superior court—trial on original charges**

Where a defendant originally charged in warrants with felonies entered pleas of guilty of misdemeanors in the district court pursuant to a plea bargaining agreement with the State and then appealed to the superior court for a trial *de novo*, the State was not bound by its agreement to forego the greater felony charges and could properly try defendant on the original felony charges in the superior court.

APPEAL by defendant from *Snepp, Judge*. Judgment entered 22 March 1977 in Superior Court, CATAWBA County. Heard in the Court of Appeals 28 September 1977.

Defendant was charged in two warrants with felonious breaking and entering and larceny. On 15 September 1976, defendant was arrested on the warrants; on 16 September, counsel was appointed for defendant upon his having filed an affidavit of indigency.

Defendant appeared in district court on 20 October 1977 for a probable cause hearing. At that time defendant, through counsel and with the consent of the assistant district attorney, entered into a plea agreement whereby the defendant agreed to plead guilty to two counts of misdemeanor breaking or entering and the State agreed not to prosecute the larceny counts. The district court questioned the defendant, and found that there was a factual basis for the entry of the pleas, that the defendant was satisfied with his counsel, and that the plea was the informed choice of

the defendant made freely, voluntarily, and understandingly. The district court accepted defendant's plea and thereupon entered judgment, the cases being consolidated, sentencing the defendant to imprisonment for 2 years. The defendant, in open court, gave notice of appeal for trial *de novo* in superior court.

On 21 February 1977, the defendant waived arraignment in superior court and entered pleas of not guilty to the two counts of misdemeanor breaking or entering. On 22 March 1977, the superior court found facts substantially as set out above and concluded as a matter of law that the defendant had waived his right to appeal to the superior court for trial *de novo* by virtue of his having entered into a plea agreement and having accepted the benefits thereof, and was estopped from repudiating the plea agreement. From the order of the superior court remanding the cases for commitment in accordance with the judgment of the district court, defendant appeals.

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

Harris and Bumgardner, by Tim L. Harris, for defendant.

BROCK, Chief Judge.

[1] Defendant argues that G.S. 7A-290 gives him the right to appeal to superior court for trial *de novo* in spite of his guilty plea in district court. In light of the decisions interpreting G.S. 7A-290 and former G.S. 15-177.1, we agree.

G.S. 15-177.1 was enacted in 1947 and read as follows:

> "In all cases of appeal to the superior court in a criminal action from a justice of the peace or other inferior court, the defendant shall be entitled to a trial anew and *de novo* by a jury, without prejudice from the former proceedings of the court below, irrespective of the plea entered or the judgment pronounced thereon."

G.S. 7A-290, enacted as part of the Judicial Department Act of 1965 which created the district court division of the General Court of Justice, reads in pertinent part as follows:

> "Any defendant convicted in district court before the judge may appeal to the superior court for trial *de novo*."

These statutes entitle an accused in a criminal case to a trial *de novo* as a matter of right on appeal to the superior court from an inferior court, even when the accused entered a guilty plea in the inferior court. *State v. Meadows*, 234 N.C. 657, 68 S.E. 2d 406 (1951); *State v. Broome*, 269 N.C. 661, 153 S.E. 2d 384 (1967); *State v. Sparrow*, 276 N.C. 499, 173 S.E. 2d 897 (1970); *State v. Bryant*, 11 N.C. App. 423, 181 S.E. 2d 211 (1971). The repeal of G.S. 15-177.1 by a technical changes act (Session Laws—1973, Chapter 1141) should not alter this rule. This conclusion is buttressed by the fact that there is no statute pertaining to appeal to superior court for trial *de novo* from a guilty plea in district court which parallels G.S. 15-180.2 (providing that there is no right of appeal to the appellate division of a plea of guilty or *nolo contendere* to a charge pending in the superior court).

[2] Thus, where a defendant has appealed for trial *de novo* in superior court, a judge of that court has no authority, absent satisfactory cause shown or without the consent of the defendant, to dismiss the appeal and remand the case for compliance with the judgment of the district court. *State v. Bryant, supra.* The record in this case discloses no consent on the part of the defendant and the trial judge erred in remanding the case to the district court. Defendant is entitled to trial in the superior court.

[3] The State strenously argues that should this Court determine that the defendant is entitled to trial *de novo* in superior court, then the State should not be bound by its portion of the plea agreement and should be permitted to try the defendant on the original felony charges. This argument raises issues relating to due process and double jeopardy which are not squarely before this Court at this time. However, several points should be noted. The district court proceeding at which defendant entered his guilty pleas was a probable cause hearing, not a trial; indeed, the district court had no jurisdiction to try the original felony charges. Admittedly, a plea of guilty, if accepted and entered by the court, is equivalent to a conviction. *State v. Neas*, 278 N.C. 506, 180 S.E. 2d 12 (1971). It is also the rule that

> "[w]hen an appeal of right is taken to the Superior Court, in contemplation of law it is as if the case had been brought there originally and there had been no previous trial. The judgment appealed from is completely annulled and is not

thereafter available for any purpose." *State v. Sparrow*, *supra*, 276 N.C. at 507, 173 S.E. 2d at 902.

The State argues persuasively that plea bargaining, legitimized in North Carolina by G.S. 15A-1021 *et seq.* would be seriously hampered if a defendant originally charged with a felony could avoid prosecution by pleading guilty to reduced charges in district court and then appeal and receive a trial *de novo* only on the reduced charges. Where a defendant elects not to stand by his portion of a plea agreement, the State is not bound by its agreement to forego the greater charge. *See U. S. v. Anderson*, 514 F. 2d 583 (7th Cir. 1975); *U. S. v. Williams*, 534 F. 2d 119 (8th Cir. 1976), *cert. den.*, --- U. S. ---, 50 L.Ed. 2d 177 (1976); *Harris v. Anderson*, 364 F. Supp. 465 (W.D.N.C. 1973). This Court's decisions in *State v. Urban*, 31 N.C. App. 531, 230 S.E. 2d 210 (1976) and *State v. Mayes*, 31 N.C. App. 694, 230 S.E. 2d 563 (1976) are factually distinguishable from the case at hand.

For the reasons stated, the order of the trial judge remanding the case to the district court is reversed and the cause is remanded to the superior court for trial.

If the State elects to do so, the district attorney may send bills of indictment to the Grand Jury charging defendant with felonious breakings and enterings and felonious larcenies, as were charged in the two original arrest warrants. If one or more true bills are returned, the State may try defendant upon the felony charges or any included lesser offenses.

Reversed and remanded.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. FRED DOUGLAS TRUESDALE

No. 7726SC595

(Filed 7 December 1977)

Narcotics § 4— accessory before fact to possession of heroin—fingerprints on packets

The State's evidence was sufficient for the jury on the issue of defendant's guilt of two charges of accessory before the fact to possession of heroin

with intent to sell where it tended to show that the person with whom defendant lived was apprehended on two occasions, seven days apart, with a large number of foil packets containing heroin in his possession, defendant's fingerprints were found both inside and outside four of the packets discovered on the first occasion and five of the packets discovered on the second occasion, and defendant left the State after his roommate's arrest and presented false identification when apprehended in South Carolina, the evidence being sufficient to raise an inference that defendant participated in preparing and packaging the heroin on two separate occasions.

APPEAL by defendant from *Howell, Judge.* Judgments entered 3 February 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 17 November 1977.

By two indictments, proper in form, defendant was charged with possession of heroin with intent to manufacture, sell and deliver, on 20 and 27 June 1975. Prior to trial, defendant moved to quash the indictments as being duplicative, but the motion was denied. He pleaded not guilty.

Evidence presented by the State tended to show:

One Charles Ward was arrested twice in June of 1975 for possession of heroin with intent to sell. The first arrest occurred on 20 June 1975 when Ward was found in a car, with two other men, in which a brown paper bag containing 322 aluminum foil packets was found. The second arrest occurred on 27 June 1975 when Ward was seen emerging from some woods with a brown paper bag in his hand which was found to contain numerous aluminum foil packets. After the contents of each group of packets were analyzed and found to be heroin, the aluminum foil packets were dusted for fingerprints. Of the packets seized on 20 June 1975 and examined, four were found to have defendant's fingerprints on them, inside and out, and no other person's prints were identified. Of the packets seized on 27 June 1975 and examined, five were found to have defendant's prints on them, inside and out, and prints belonging to Ward were also found.

Defendant testified that he had lived with Charles Ward in May and June of 1975 but had nothing to do with packaging or selling heroin and did not observe Ward doing those things; that while living with Ward he often used aluminum foil to line the grill and wrap food; that he moved to South Carolina in late June but not for purpose of avoiding prosecution on these charges; that

he has three prior convictions for driving without a license; that while in South Carolina he obtained a driver's license by using false identification; and when he was arrested in South Carolina on these charges he presented false identification because it was the only identification that he had in his possession.

At the close of the evidence the court ruled that the case should be submitted to the jury on the charges of accessory before the fact to possession of heroin with intent to sell but not on charges of possession with intent to sell.

The jury found defendant guilty of the charges submitted, and from judgments imposing two consecutive eight-year prison sentences, he appealed.

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

Public Defender Michael S. Scofield, by Assistant Public Defender Fritz Y. Mercer, for defendant appellant.

BRITT, Judge.

Defendant contends first that the court erred in denying his motions to dismiss the charges at the close of all the evidence. We find no merit in this contention.

Defendant argues that the evidence failed to show that the packets upon which his fingerprints were found contained heroin; that even if they did, the mere evidence of his prints, standing alone, was insufficient to support the verdicts returned when there was no evidence showing when the prints were made and his evidence showed that he came in contact with the aluminum foil in a legitimate way.

We do not find defendant's arguments persuasive. Not only did the evidence disclose defendant's fingerprints on the packets, inside and outside, but it showed that he was living with Charles Ward, the principal offender, during May and June of 1975; that he left the State after Ward's arrest and presented false identification when apprehended in South Carolina.

We recognize the rule that when the State relies on evidence of fingerprints, it must show not only the presence of the prints but additional circumstances which reasonably tend to show that

the prints could only have been impressed at the time of the commission of the crime. *State v. Reynolds*, 18 N.C. App. 10, 195 S.E. 2d 581 (1973). We think sufficient additional circumstances were shown in this case.

Defendant contends next that the court erred in failing, *ex mero motu*, to correct certain inaccurate and improper statements made by the district attorney in his argument to the jury. This contention has no merit.

The prosecutor's closing argument to the jury is included in the record on appeal. Defendant has filed exceptions to some 12 portions of the argument but only one exception is supported by an objection. We decline to consider the portions to which there was no objection. Rule 10, Rules of Appellate Procedure, 287 N.C. 671, 698-9.

As to the statement that was objected to, we fail to perceive how it was prejudicial to defendant.

Finally, defendant contends the court erred in sentencing him "on two charges where the evidence reflected at best only one offense". We find no merit in this contention.

Defendant argues that the theory of the State's case against him was that he participated in "cutting" and packaging the heroin and that there was no evidence tending to show that he did that on separate occasions. We are not impressed with this argument. The evidence showed that Ward was apprehended with a large quantity of heroin on two separate occasions, seven days apart; that defendant was living with Ward for some seven or eight weeks prior to the date of Ward's last arrest; and that defendant's fingerprints were found on packets of heroin seized on both occasions. We think this evidence was sufficient to raise an inference that the heroin was prepared and packaged on at least two occasions, thereby posing a question for jury determination.

In defendant's trial and the judgments appealed from, we find

No error.

Judges PARKER and VAUGHN concur.

CLINTON W. SEARL v. JUDY SEARL

No. 7710DC33

(Filed 7 December 1977)

1. **Divorce and Alimony § 26.1— Texas custody decree—full faith and credit properly given**

The trial court did not err in giving full faith and credit to a Texas decree which placed custody of three children of the parties' marriage in defendant, since the Texas court did not lose jurisdiction over the parties and the children by virtue of the removal of the children from Texas to N. C. subsequent to the filing of action which led to the custody decree; finding by the Texas court that the best interests of the children would be served by awarding custody to defendant, though that was the only finding by the court, was sufficient to support the decree; and the decree was not interlocutory, though it provided that plaintiff should deliver the children to defendant on demand.

2. **Divorce and Alimony § 26.2— Texas custody decree—no changed circumstances—no findings of fact required**

The trial court did not err in denying plaintiff's prayer to modify or supersede a Texas child custody award based on changed circumstances and in failing to make findings of fact to support such denial, since there was in fact no evidence of changed circumstances presented to the court, and since the court was not required to make negative findings of fact justifying a holding that plaintiff failed to meet his burden of proof on that issue.

3. **Divorce and Alimony § 26.1— foreign custody order—modification—best interests of child—when findings are required**

When the court gives full faith and credit to a foreign custody decree, the court is required to make findings as to the best interests of the child only if the foreign action is pending but not if a custody order has already been entered in another state. G.S. 50-13.5(c)(5); G.S. 50-13.7(b).

APPEAL by plaintiff from *Barnette, Judge*. Judgment entered 7 October 1976 in District Court, WAKE County. Heard in the Court of Appeals 29 September 1977.

This is an action by plaintiff seeking an order awarding to him custody of the three minor children born of his marriage to defendant, or in the alternative, a modification of a prior Texas court custody decree on the grounds of changed circumstances. Defendant, a resident of the State of Texas, filed an answer and asserted the provisions of the Texas court decree granting custody of the three minor children to her.

In 1974 and 1975 plaintiff (husband) and defendant (wife) were residents of the State of Texas. An action for divorce was in-

stituted by wife in July 1974 in the Domestic Relations Court, Taylor County, Texas. On 25 July 1974 an order was entered in the Texas court awarding temporary custody of the children to wife and restraining husband, among other things, from interfering in any way with wife's "possession of the minor children of the parties by taking or attempting to take the children either directly or through an agent from home, school, or any other place." Husband, wife, and children were present in Texas and subject to the jurisdiction of the Texas court.

In April 1975, wife went into the hospital where she remained for three months for psychiatric treatment. During the wife's hospitalization, husband took the three children to his home. No change in the Texas court custody order was sought. In September or October of 1975, husband moved from Texas to North Carolina, bringing the children with him. He did not notify wife of his and the children's whereabouts. Husband maintained an unlisted telephone number in North Carolina. He notified his attorney in Texas of his North Carolina address and telephone number.

The divorce action instituted by wife in Texas was scheduled for trial on more than one occasion. It was continued once upon request of husband's Texas attorney. The divorce action was finally scheduled for trial and was tried on 8 December 1975 in the Domestic Relations Court, Taylor County, Texas. The motion by husband's Texas attorney for a continuance of the 8 December 1975 trial date was denied. Following the trial on 8 December 1975, at which neither husband nor his attorney appeared, a final decree was entered on 23 December 1975. The Texas decree awarded primary custody of the three children to wife, and granted husband generous visitation privileges. The decree further directed husband to deliver said children, upon demand, to wife.

On 23 December 1975, wife called husband's parents in the State of Delaware trying to determine the whereabouts of the children. She was advised that husband and the children were living in North Carolina, and was given husband's unlisted telephone number. Thereafter wife contacted the children by telephone, but did not see them until the day of the trial of this case in North Carolina.

The North Carolina court awarded full faith and credit to the Texas Decree and ordered the enforcement of the Texas Decree.

Plaintiff (husband) appealed.

Carter G. Mackie for plaintiff.

Boyce, Mitchell, Burns & Smith, by G. Eugene Boyce and Lacy Presnell III, for defendant.

BROCK, Chief Judge.

The plaintiff (husband) has made 35 assignments of error in the record on appeal, and purports to argue 31 of them in his brief. It is impossible to address these separately because they overlap in theory and subject matter. We have determined that this appeal presents two basic questions for resolution.

I. Did the District Court err in affording full faith and credit to the Texas Decree and in ordering its enforcement?

II. Did the District Court err in denying plaintiff's prayer to modify or supersede the Texas custody award based on changed circumstances, and in failing to make findings of fact to support such denial?

I

[1] It is well-established that our courts will accord full faith and credit to the custody decree of a sister state which had jurisdiction over the parties and the cause so long as the circumstances of its rendition remain unchanged. *Spence v. Durham*, 283 N.C. 671, 198 S.E. 2d 537 (1973), *cert. den.* 415 U.S. 918 (1974). Husband asserts that the Texas court had lost its jurisdiction over the minor children at the time of the entry of its decree due to their absence from Texas.

The validity and effect of a foreign judgment must be determined by the laws of the state wherein the judgment was rendered. *Marketing Systems v. Realty Co.*, 277 N.C. 230, 176 S.E. 2d 775 (1970). Under Texas law, the Texas Domestic Relations Court did not lose jurisdiction over the parties and the children by virtue of the removal of the children from the State of Texas *subsequent* to the filing of action which led to the custody decree. *Smith v. Ansley*, 257 S.W. 2d 156 (Tex. Civ. App.

1953). Husband admits that the Texas court acquired jurisdiction over him and the children at some stage of the proceedings which were commenced by wife on 25 July 1974. He argues however that the Texas court lost its jurisdiction when he moved with the children to North Carolina in October or November 1975, and thus did not have jurisdiction when the custody decree was entered on December 23, 1975. This argument is without merit.

Husband also asserts that the Texas decree is void on its face, for lack of findings of fact, and thus not entitled to full faith and credit. Again, we look to Texas law. Vernon's Texas Family Code Annotated § 11.16 provides that "[t]he decree in a suit affecting the parent-child relationship shall recite . . . relevant facts on which the findings and orders are based." The Texas court in the instant case found merely that the best interests of the children would be served by awarding custody to their mother, the appellee. There were no other factual findings to support the finding.

In *Adams v. Adams*, 519 S.W. 2d 502 (Tex. Civ. App. 1975), the trial court, as in the instant case, had merely recited the best interests language in making the custody award. On appeal, in the face of an argument that the judgment was void on its face for failure to state facts upon which the custody award was based, it was held, in interpreting the above cited statute, that although the best practice is to recite certain basic facts, where the evidence supports the findings, the failure to find facts is harmless error. Under Texas law, where there is a specific finding that it is in the best interests of children for their custody to be in a party, the judgment awarding custody establishes a finding that that party was at the time a suitable person to have custody. *Thomason v. Thomason*, 332 S.W. 2d 148 (Tex. Civ. App. 1959). Thus the Texas decree awarding custody of the children to appellee is not void on its face, and is *res judicata* as to the issues determined.

Finally, husband contends that the Texas decree is not entitled to full faith and credit because it is not a final judgment. He argues that the language in the decree requiring him to deliver the children to wife *on demand* renders the decree interlocutory. This argument is feckless. The custody award clearly contains no language which would render it interlocutory. The on demand language merely refers to the execution of the custody decree.

II

In determining questions of child custody, wide discretion is vested in the trial judge who has the opportunity to see and hear the witnesses; absent abuse of this discretion, the judge's decision will not be upset. *In re Custody of Mason*, 13 N.C. App. 334, 185 S.E. 2d 433 (1971). G.S. 50-13.7(b) authorizes a court of this state, upon gaining jurisdiction and upon a showing of changed circumstances, to modify or supersede the custody order entered by a court of another state. The party moving for modification assumes the burden of proving a substantial change of circumstances affecting the welfare of the child. *Blackley v. Blackley*, 285 N.C. 358, 204 S.E. 2d 678 (1974). It must be shown that the circumstances have so changed that the welfare of the child will be adversely affected unless the custody provision is modified; more must be shown than the removal by one parent of a child from a jurisdiction which might enter a decision adverse to the removing parent. *Rothman v. Rothman*, 6 N.C. App. 401, 170 S.E. 2d 140 (1969).

[2] In this case, the district court concluded as a matter of law that there had been "no material changes of circumstances with respect to the custody and welfare of the minor children since December 23, 1975 . . . ." Although the district court made no underlying findings of fact specifically relating to circumstances, which may or may not have changed, affecting the welfare of the children or the fitness of the parents, it has been held that the trial court is not required to make negative findings of fact justifying a holding that a party has not met his or her burden of proof on an issue. *In re Custody of Mason, supra.* Assuming that the above conclusion of law is based upon an implicit finding of fact to the same effect, a finding by the district court that there has been no sufficient change of circumstances to justify modification of a custody order is conclusive and binding on this court if supported by competent evidence. *In re Harrell*, 11 N.C. App. 351, 181 S.E. 2d 188 (1971).

The evidence before the district court and the findings of fact in this case show that indeed no circumstances had changed regarding the welfare of the children since the entry of the Texas decree on December 23, 1975. On that date, the children were living with husband in North Carolina and continued to do so through the proceedings in district court below. As discussed in

Part I, under Texas law, the judgment awarding custody to wife established that she was a suitable person to have custody. Husband presented no evidence to show any change in that circumstance.

[3] Husband argues that the district court's judgment erroneously awarded custody without supporting findings or conclusions. The district court purported to exercise jurisdiction to determine custody in its discretion under G.S 50-13.5(c)(5). A trial court, proceeding under this section either in exercising or refusing to exercise jurisdiction, must make findings of fact regarding the best interests of the child. *Mathews v. Mathews*, 24 N.C. App. 551, 211 S.E. 2d 513 (1975). However, G.S. 50-13.5(c)(5) should be read to apply only when a custody proceeding is *pending* in another state. G.S. 50-13.7(b) applies when a custody order *has been entered* in another state. This section allows modification of the foreign decree upon a showing of changed circumstances. Although purporting to act under G.S. 50-13.5(c)(5), the district court found that husband had not shown changed circumstances which would warrant modification under G.S. 50-13.7(b). As noted earlier, the court is not required to make negative findings of fact. The Texas court ruled on the best interests of the children, and husband failed to show any change in circumstances. To the extent that *Maihews v. Mathews*, *supra* indicates that upon according full faith and credit to a foreign custody decree and ordering its enforcement the trial court must make findings of fact as to the best interests of the child, that case is distinguishable from the instant case in that it dealt with an application of G.S. 50-13.5(c)(5) when a custody action was *pending* in South Carolina, and the North Carolina court was ordering the return of the child to the jurisdiction of the South Carolina court for determination of custody.

The judgment of the District Court, Wake County is

Affirmed.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. LARRY BULLIN

No. 7722SC559

(Filed 7 December 1977)

1. **Constitutional Law § 34; Criminal Law § 26.5— misdemeanor larceny—case dismissed—larceny from employer—no double jeopardy**

Where defendant was originally placed on trial for misdemeanor larceny, which requires that a trespass be shown, but the case was dismissed, and defendant was subsequently charged with felonious larceny from his employer, which requires that a larceny be committed in violation of a trust relationship between the employee and employer, defendant was not subjected to double jeopardy, since a former jeopardy plea cannot be sustained if proof of an additional fact is required in one prosecution which is not required in the other.

2. **Criminal Law § 162— testimony given over objection—objection waived**

In a prosecution for felonious larceny from defendant's employer, the trial court did not err in allowing evidence concerning a note which defendant signed to reimburse the company for which he worked for money which disappeared while he was on duty on an earlier occasion where defendant was questioned about the note; his counsel objected to the question; defendant stated that he would like to answer; and defendant proceeded to testify about the matter without further objection.

3. **Criminal Law § 89.2— inventory sheet—admissibility to corroborate witness**

In a prosecution of defendant for felonious larceny from his employer, the trial court did not err in allowing into evidence an inventory sheet on which defendant's employer had calculated the amount of money which was missing, since the evidence was admissible to corroborate the employer's testimony concerning the missing money.

4. **Larceny § 7— larceny from employer—defendant as employee—sufficiency of evidence**

In a prosecution of defendant for felonious larceny from his employer, evidence was sufficient to show that defendant was an employee of the service station in question where it tended to show that defendant was entrusted with company money; he placed money in a towel dispenser before leaving his work; and he telephoned the station manager later that day to notify him that he was quitting. G.S. 14-74.

APPEAL by defendant from *Long, Judge*. Judgment entered 11 February 1977 in Superior Court, IREDELL County. Heard in the Court of Appeals 26 October 1977.

Defendant was originally placed on trial in district court for misdemeanor larceny of the same money involved in this case but that action was dismissed on 16 September 1976. On 23

September 1976 a warrant was issued charging defendant with felonious larceny from his employer in violation of G.S. 14-74 and on 31 January 1977 an indictment on the same charge was returned.

When this case was called for trial, defendant moved to dismiss on the ground that he was placed in jeopardy when he was tried in district court for misdemeanor larceny, and the dismissal of that action prevented a subsequent prosecution. The court denied the motion, defendant pled not guilty and was tried before a jury.

Evidence for the State tended to show:

About one month prior to 26 August 1976, defendant was employed as a service station attendant by Richard Overcash, the manager of a Service Distributing Company station. As a service station attendant, defendant was entrusted with company money. On the morning of 26 August 1976, the manager gave defendant $100 in silver and paper money with which to make change. In accordance with the business practice of the station, the manager conducted an inventory of the merchandise, including gas, oil, cigarettes and candy, at the beginning of the shift.

During the early part of the morning, the manager talked with defendant about a missing hose pipe which had disappeared during one of defendant's shifts and defendant indicated that he would not pay for it. Defendant received his paycheck that morning and about 10:30 or 10:45 the manager noticed that defendant was not at the station.

A little while later defendant telephoned to tell the manager that he had quit because he was not going to pay for the missing hose pipe, and that he had left the station's money in a towel dispenser over the gas pumps. The manager found some money in the towel dispenser but noticed that some was missing. He immediately closed the station, took an inventory and determined that $171.73 was missing.

At the close of the State's evidence defendant moved for a directed verdict but the motion was denied. He then testified in his own behalf that he quit work on 26 August 1976 after the manager told him that he would probably have to pay for the missing hose pipe; that he did not steal any money; that he placed

the station's money in the towel rack because he felt that was the safest place since there were people around and there was not an open drawer in the station in which the money changer would fit; and that he called the manager after he had left work because he was afraid to face him.

On cross-examination defendant explained the circumstances pertaining to a $360.40 note which he owed to Service Distributing Company. He stated that he signed the note in order to reimburse the company for $360.40 which had disappeared while he was on duty on or about 31 July 1976; and that $20 a week was to be withdrawn from his paycheck until the note was paid. He further testified that he had been convicted of breaking and entering, larceny, assault and nonsupport.

At the close of all the evidence defendant renewed his motion for a directed verdict and it was denied.

The jury found defendant guilty of larceny by an employee and from judgment imposing a prison sentence of eighteen months and a fine of $171.73, he appeals.

Attorney General Edmisten, by Associate Attorney Thomas H. Davis, Jr., for the State.

McElwee, Hall and McElwee, by E. Bedford Cannon, for the defendant appellant.

BRITT, Judge.

[1] Defendant contends first that the court erred in denying his motion to dismiss the indictment on the ground of double jeopardy. We find no merit in this contention.

Defendant argues that the misdemeanor larceny action under G.S. 14-72, which was dismissed by the district court, was a lesser included offense of the felony charge of larceny by an employee under G.S. 14-74, and that the dismissal of the lesser offense should bar prosecution on the greater offense. In support of his argument, he cites *State v. Birckhead*, 256 N.C. 494, 124 S.E. 2d 838, 6 A.L.R. 3d 888 (1962). We think the *Birckhead* lesser degree rule is inapplicable to the present case.

It is a well settled rule in North Carolina that "the two prosecutions must be for the same offense—*the same both in law and*

in fact—to sustain the plea of former conviction." *State v. Malpass*, 189 N.C. 349, 355, 127 S.E. 248 (1925) (cited with approval in *State v. Birckhead, supra.*) "[I]f proof of an additional fact is required in the one prosecution, which is not required in the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same, and the plea of former jeopardy cannot be sustained." 4 Strong's N.C. Index 3d, Criminal Law § 26.3, p. 113.

Applying these principles to the present case, it is noted that the misdemeanor larceny case in which defendant received a dismissal was based on G.S. 14-72. A conviction under that statute requires that either an actual or constructive trespass be shown. *State v. Bowers*, 273 N.C. 652, 161 S.E. 2d 11 (1968). In the case at hand defendant was charged with larceny by an employee under G.S. 14-74 which requires by its express terms that the larceny be committed in violation of a trust relationship between the employee and the employer. *State v. Wilson*, 101 N.C. 730, 7 S.E. 872 (1898). Since the element of trespass required in G.S. 14-72 is not required for prosecution under G.S. 14-74, and the element of trust required under G.S. 14-74 is not required in G.S. 14-72, the dismissal of the charge under G.S. 14-72 cannot be considered a prior adjudication which would bar prosecution under G.S. 14-74.

[2] Defendant's second contention is that the court committed reversible error by failing to exclude irrelevant evidence in the nature of alleged prior acts of misconduct. He argues that such evidence created a substantial likelihood that it would be considered by the jury as substantive evidence of the guilt of the offense for which he was on trial. This contention relates to evidence concerning the $360.40 note which defendant signed to reimburse the company for money which disappeared while he was on duty on 31 July 1976. We find no merit in this contention.

The record reveals that defendant was asked on cross-examination about the 31 July 1976 incident; his counsel objected to the question but defendant stated that he would like to answer. He then proceeded to answer questions about the matter without further objection. Thereafter, testimony was given without objection by the station manager about the matter.

Clearly, defendant waived his objection to the testimony. Furthermore, it is well settled that the admission of testimony

over objection is harmless when other testimony of the same import is theretofore or thereafter admitted without objection. 4 Strong's N.C. Index 3d, Criminal Law § 169.3.

[3] Defendant next contends that the court erred in admitting into evidence the inventory sheet on which the station manager had calculated the amount of money which was missing. He argues that the sheet was not admissible as corroborative evidence and that sufficient foundation was not laid to establish the hearsay rule exception for business records or to establish past recollection recorded. We find no merit in this contention.

The trial judge properly allowed the inventory sheet to be introduced to corroborate the station manager's testimony concerning the missing money. "In most jurisdictions evidence in support of a witness's credibility will not be received unless he has been directly impeached, and then only under more or less severe restrictions. In North Carolina, however, the utmost latitude is allowed. . . . Indeed, the more recent cases tend to ignore the requirement of impeachment altogether." 2 Stansbury's N.C. Evidence § 50 (Brandis rev. 1973). *See Chesson v. Insurance Co.*, 268 N.C. 98, 150 S.E. 2d 40 (1966). In *State v. Rose*, 251 N.C. 281, 111 S.E. 2d 311 (1959), the court allowed affidavits of police officers to corroborate their testimony and noted that the application of the rule regarding the admission or exclusion of corroborative evidence was a subject which necessarily rested in large measure as a discretionary matter with the trial judge. We perceive no abuse of discretion.

[4] Finally, defendant contends that the trial court erred in denying his motions for nonsuit because the evidence failed to show that he was an employee of Service Distributing Company at the time he placed the billfold and the coin changer in the towel dispenser. We find no merit in this contention.

The evidence that defendant was entrusted with company money as an employee on the morning of 26 August 1977, that he placed money in the towel dispenser before leaving his work, and that he then telephoned the manager later that morning to notify him that he was quitting, was sufficient to establish defendant's status as a company employee at the time he placed the money in the towel dispenser, and to overcome his motions for nonsuit.

For the reasons stated, we conclude that the defendant received a fair trial free from prejudicial error.

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. ANTHONY THOMAS

No. 7720SC513

(Filed 7 December 1977)

1. **Criminal Law § 46— refusal of defendant to flee—evidence inadmissible**

The trial court in an armed robbery prosecution did not err in refusing to allow defendant to show that he was not arrested for several days after he was questioned by an officer and that during that time he did not attempt to flee.

2. **Criminal Law § 128— motion to set verdict aside—denied—no error**

The trial court did not abuse its discretion in denying defendant's motion to set aside the verdict where the jury requested additional evidence; the court told them that they would have to decide the case on the evidence presented; after the jury returned to the jury room, defendant requested that the jury be given additional instructions concerning the burden of proof; the court declined; and no objection was made and no exception taken.

APPEAL by defendant from *Gavin, Judge*. Judgment entered 1 March 1977, Superior Court, MOORE County. Heard in the Court of Appeals 24 October 1977.

Defendant was indicted for and convicted of armed robbery. From judgment of imprisonment for not less than 30 nor more than 35 years, defendant appealed.

The State presented one witness, J. Ayres Ricker, who was employed at the Pinehurst Motor Lodge on the 12th of November, 1976, as a desk clerk. He testified that on that date, between six and six-thirty p.m., he was robbed at gun point by defendant, whom he identified and pointed out in the courtroom. The witness stated that there were six overhead lights in the area where he and defendant were standing; that defendant had on a dark colored woolen cap, a black leather jacket, and dark trousers. Defendant's face was not covered. The defendant and Mr. Ricker had

a conversation of about two minutes duration. Defendant asked for change for a dollar, then pulled a gun out and demanded the rest of the money in the cash drawer. Mr. Ricker handed the money to him. The witness later identified defendant's photograph from a series of photographs furnished by an officer. Defendant was in the presence of Mr. Ricker for five to six minutes, and Mr. Ricker was positive about the identification.

Defendant testified in his own behalf. He said that he left the Aberdeen Grill about six o'clock, having been shooting pool with three others, whom he named, since about one o'clock that afternoon. Headed toward his sister's house, he walked about half way and caught a ride with Jimmy Campbell. His sister's house is about a mile from the Aberdeen Grill. At his sister's house, he ate and took a bath. About seven o'clock he left to go to the Fox Club, a distance of about one-half mile. When he was almost there, he met Ann and Robina Reeves and the three of them walked together to the Club. He stayed there until it closed and went from there to the Country Kitchen, arriving home about two-thirty or three a.m. On 13 November Officer Frye picked him up and asked him some questions but did not arrest him. A few days before 12 November he had checked in the Pinehurst Motor Lodge and stayed for about two nights with some friends playing cards. The pool hall is about a mile and one-half from the Pinehurst Motor Lodge.

One Albert Singletary testified that he saw defendant at the Aberdeen Grill at six o'clock on Friday, 12 November, and Ann and Robina Reeves both testified that about seven or seven-thirty they walked with defendant to the Fox Club.

Other facts necessary for decision are set out below.

Attorney General Edmisten, by Associate Attorney Jo Anne Sanford Routh, for the State.

Seawell, Pollock, Fullenwider, Robbins and May, by Bruce T. Cunningham, Jr., for defendant appellant.

MORRIS, Judge.

[1] By this appeal, defendant brings forward two assignments of error. The first one is directed to the court's excluding evidence concerning the date of arrest. It is obvious from the record that

defendant wanted to be allowed to show that he was not arrested for several days after he was questioned by Officer Frye on 13 November and that he remained in Aberdeen.

> "The general rule is that the defendant in a criminal case is not, for the purpose of showing his innocence, allowed to prove that he refused to take to flight before his arrest or to escape from jail after his arrest, even though offered the opportunity to do so, at least in the absence of any testimony that he had attempted to flee or escape." 29 Am. Jur. 2d, 334, Evidence § 287. Refusal to flee or escape; voluntary surrender.

In *State v. Wilcox*, 132 N.C. 1120, 44 S.E. 625 (1903), defendant, at his second trial, sought to introduce testimony that since his incarceration, he had had numerous opportunities to escape but refused to do so. Justice Connor, writing for a unanimous Court, said:

> "The exact question has been decided by this Court in *S. v. Taylor*, 61 N.C., 508, *Battle, J.*, saying: 'The argument in favor of the exception is that as the flight of an alleged criminal is admissible as evidence against him, his refusal to flee in the first instance and his declining to escape after having been admitted to jail ought to be admitted as evidence in his favor. The argument is plausible, but it would be permitting prisoners to make evidence for themselves by their subsequent acts.' ", p. 1136,

and upheld the trial court's exclusion of the evidence. For the same reason, we overrule defendant's assignment of error.

[2] By his remaining assignment of error defendant contends that the court committed prejudicial error in denying his motion to set aside the verdict. He properly concedes that this motion is addressed to the court's discretion but he urges that to let the verdict stand in this case would work an injustice. Defendant relies on *Selph v. Selph*, 267 N.C. 635, 148 S.E. 2d 574 (1966), for his position. We do not so interpret Chief Justice Sharp's words. She said:

> "The trial judge has the discretionary power to set aside a verdict when, in his opinion, it would work injustice to let it stand; and, if no question of law or legal inference is involved

> in the motion, his action in so doing is not subject to review on appeal in the absence of a clear abuse of discretion." (Citations omitted.) *Selph v. Selph*, at 637.

It is obvious that the trial court did not have the opinion that to let the verdict stand would result in injustice. No question of law or legal inference is involved in the motion. We are, therefore, obliged to determine whether the record reveals "a clear abuse of discretion". There is none. After the jury had deliberated for an hour and twenty-five minutes, they returned to the courtroom and, through the foreman, asked if they could hear from the person driving the car with whom defendant got a ride to his sister's house. The court quite properly told them that they would have to decide the case on the evidence presented. This was, according to the facts dictated into the record by the court, after the court, defense counsel, and the district attorney had agreed that this would be the only instruction to be given the jury in response to their inquiry. The jury returned to the jury room. After the jury had returned to the jury room, defendant requested that additional instructions be given the jury; *i.e.*, that the State had the burden of proof. The court declined. No objection was made and no exception taken. The defendant moved to set aside the verdict on the grounds that the jury disregarded the court's instructions as to the burden of proof. The charge of the court is not made a part of the record. We assume, therefore, that it contained no error and that the defendant was satisfied with the court's instructions with respect to the burden of proof. In any event, it appears clear that the record is totally void of any words or actions on the part of the trial court which would amount to abuse of discretion.

In the trial of this case we find

No error.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. JIMMY WILSON WARD

No. 775SC439

(Filed 7 December 1977)

1. **Homicide § 20.1— photographs of deceased—admissibility**

The trial court in a homicide prosecution did not err in allowing into evidence three photographs of the deceased who had been shot numerous times in the chest, head and back, since the photographs were competent to illustrate the testimony of the State's witness.

2. **Criminal Law § 102.8— district attorney's jury argument—comment on failure of defendant's wife to testify—error**

Statements by the district attorney during his jury argument as to where defendant's wife was at the time of the shooting could have been received by the jury as a criticism of the failure of defendant's wife to testify, and defendant is therefore entitled to a new trial. G.S. 8-57.

3. **Homicide § 28— self-defense—jury instructions—incorrect summary of evidence—error**

In a homicide prosecution where defendant's entire defense was that he shot deceased in self-defense, the trial court erred in incorrectly summarizing the evidence with respect to deceased's behavior and possession of a knife just prior to the shooting.

APPEAL by defendant from *Rouse, Judge.* Judgment entered 11 January 1977 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 18 October 1977.

Defendant was charged in an indictment, proper in form, with the first degree murder of William Herman Bordeaux.

At trial, the State presented evidence tending to show, *inter alia*, that on 17 October 1976, defendant, the deceased, one Mary Shepherd, and a woman who has since become defendant's wife, were together at defendant's place of residence; that they had been drinking for a period of time; and that defendant, without provocation, shot and killed Bordeaux with a .22 rifle.

Defendant offered evidence tending to show that the deceased had a reputation of being dangerously violent and that the shooting was in self-defense.

Other evidence necessary to an understanding of the errors assigned will be reviewed with the discussion of the assignments.

The jury returned a verdict of guilty of voluntary manslaughter. Judgment was rendered imposing a prison sentence of not less than sixteen nor more than eighteen years.

Attorney General Edmisten, by Associate Attorney Amos Dawson, for the State.

E. Hilton Newman, for defendant.

BROCK, Chief Judge.

[1] Defendant's assignment of error to the admission into evidence of three photographs of deceased on the ground that they only tend to inflame the jury is without merit. Deceased was shot numerous times in the chest, head, and back. The photographs were clearly competent to illustrate the testimony of the State's witness. "The fact that a photograph depicts a horrible, gruesome, and revolting scene, indicating a vicious, calculated act of cruelty, malice or lust, does not render the photograph incompetent in evidence, when properly authenticated as a correct portrayal of conditions observed by and related by the witness who uses the photograph to illustrate his testimony." *State v. Atkinson*, 275 N.C. 288, 311, 167 S.E. 2d 241, 255 (1969), *rev'd on other grounds*, 403 U.S. 948, 29 L.Ed. 2d 859, 91 S.Ct. 2283 (1971).

The State's evidence tends to show that at the time of the fatal shooting, the defendant, the deceased, Mrs. Shepherd, and Mrs. Ward were present in defendant's living room. Defendant and Mrs. Ward were married after he was released on bond pending trial of this case. Defendant's evidence tended to show that neither Mrs. Shepherd nor his wife was in the room at the time of the fatal shooting.

[2] During his closing argument to the jury the district attorney argued in part as follows: "Ladies and gentlemen, I, The State of North Carolina, we have tried to present this case to you and give you all of the evidence we have in this case. The defendant's wife was—she didn't say she was there or not there—I don't know where she was. She didn't say she was there or not there. From the evidence Mr. Ward [the defendant] gave you, he and Mrs. Shepherd and these two children in the bedroom, plus his wife now—she wasn't his wife then, but he said he had a rifle there in his home with his wife and children. That's not the true situation as it was at that time. Everybody who was there except

those two children has told you what they know. I don't know what she knows."

"The husband or wife of the defendant, in all criminal actions or proceedings, shall be a competent witness for the defendant, but *the failure of such witness to be examined shall not be used to the prejudice of the defense.*" (Emphasis added.) G.S. 8-57.

Whether intended or not, it seems to us that the district attorney's argument to the jury probably was received by the jury as a criticism of the failure of defendant's wife to testify. This is the very thing which is proscribed by G.S. 8-57, *supra.*

[3] The State's witness, Mrs. Shepherd, testified that she was in defendant's living room at the time of the fatal shooting. She further testified that deceased was standing in the living room in front of defendant at the time of the shooting, and that deceased did not have a knife. She further denied telling defendant's witness, Rosa Morgan, that deceased had a knife and was going after defendant with it.

The defendant's witness, Rosa Morgan, testified that Mrs. Shepherd, on the day after the fatal shooting, stated to her that deceased had a knife and threatened to cut off defendant's head. Defendant's entire defense was that he shot deceased in self-defense.

In his instructions to the jury the trial judge stated: "The defendant has offered evidence which in substance tends to show that Mrs. Shepherd had made some statement to the effect that Bordeaux [deceased] had called Ward [defendant] some names and had threatened to cut Mr. Ward [defendant]; however, that in making the statement to one Rosa Morgan, that Mrs. Shepherd said she did not see a knife."

We recognize that the trial judge has the burden of instructing extemporaneously and that exactness cannot be required. However, in this instance the able trial judge's mistaken summary of defendant's evidence constituted a fundamental misconstruction of evidence which was vital to defendant's claim of self-defense.

Defendant's remaining assignments of error have been reviewed. In view of the foregoing we deem it unnecessary to discuss them. For prejudicial error in the district attorney's argu-

ment to the jury and for prejudicial error in the trial judge's instructions to the jury defendant is entitled to a

New trial.

Judges PARKER and ARNOLD concur.

MYRTLE ELIZABETH BUGHER v. JOHN BRITTON BUGHER

No. 7717DC70

(Filed 7 December 1977)

1. **Divorce and Alimony § 16.9— alimony under court order—unilateral declaration reducing amount**

A paper writing signed by defendant in which he unilaterally declared that he would pay a certain amount to his former wife until she began receiving Social Security payments and would then pay the difference between that amount and the amount of the Social Security check did not operate to reduce defendant's obligation to pay alimony as required by a court order.

2. **Divorce and Alimony § 16.9— Social Security payments to divorced wife—no credit on husband's alimony payments**

Social Security payments to a divorced wife which were based on her former husband's contributions but were paid to her without her former husband's consent or direction under statutes providing benefits for divorced wives who have no adequate contribution records of their own and who are eligible for old-age benefits were not sums paid by or on behalf of the former husband; therefore, the former husband was not entitled to have such payments credited toward the amount of alimony he was required to pay pursuant to a court order. 42 U.S.C.A. §§ 402, 416.

APPEAL by defendant from *Clark, Judge.* Order filed 24 November 1976 in District Court, ROCKINGHAM County. Heard in the Court of Appeals 26 October 1977.

On motion of plaintiff, defendant was required to appear and show cause why he should not be held in contempt of court for failing to pay alimony as required by an earlier court order. The essential facts are not in dispute and were stipulated. Defendant complied with the order until plaintiff became eligible for and began to receive Social Security payments. He then reduced his payments by an amount equal to the Social Security payments plaintiff was receiving.

The Social Security payments that plaintiff receives are based on contributions defendant made to the system. Plaintiff and defendant had been married for more than 20 years before their divorce. Plaintiff is entitled to receive the Social Security payments as a matter of right, without the consent of defendant.

At some unspecified time the parties had signed the following:

"DEFENDANT'S EXHIBIT NO. 1

I, John Bugher agree to pay $150.00 a month to Myrtle E. Bugher until the first Social Security check arrives and agree to pay the difference between the amount of the Social Security payment to make up the difference between that amount and $150.00 until the Social Security payment reaches $150.00.

Signed: J. B. Bugher

Witness:

I, Myrtle E. Bugher agree to pay back the amount of Social Security check for the months that $150.00 was paid until the first Social Security check arrives if there is a lump sum paid for back months. If there is no lump sum no payment will be paid.

Signed: Myrtle E. Bugher"

The judge, in summary, made conclusions of law to the effect that neither the paper writing nor plaintiff's receipt of the Social Security funds reduced defendant's obligations under the court order.

The judge ordered defendant to pay the arrearage, to resume payments according to the terms of the order and to pay plaintiff's counsel attorney fees. He declined to find defendant in contempt.

Bethea, Robinson, Moore & Sands, by Alexander P. Sands, for plaintiff appellee.

Robert M. Bryant, for defendant appellant.

VAUGHN, Judge.

[1] Defendant first argues that the paper writing labeled Exhibit No. 1 should operate to reduce his obligations under the court order. The argument is without merit for several reasons. The most obvious reason is that the paper writing amounts to no more than his unilateral declaration that he will pay less than the court had previously ordered him to pay. There was no agreement by plaintiff that she would accept the lesser sum. Even if the second part of the exhibit, the only part signed by plaintiff, had been supported by valuable consideration, there is nothing to indicate that a "lump sum" was paid.

[2] Defendant next argues, in effect, that the Social Security payments plaintiff receives are payments by him or on his behalf and should be so credited. From the stipulated facts, it appears that plaintiff draws Social Security benefits under the provisions of 42 U.S.C.A. §§ 402 and 416. These sections create a category of special recipients, divorced wives without their own adequate contribution records, who are eligible for old-age benefits. Payments are made to them by virtue of that statute, their husbands having no right to consent to or direct payment to them. Moreover, in 1972, Congress struck out the requirements that had once limited the divorced wife's benefits to cases where she received one-half her support or substantial court ordered contributions from the insured husband. Pub. L. 92-603 § 114(a). Congress thus appears to have separated divorced wives' benefits under old-age programs from the husband's duty to support her. We hold, therefore, that the Social Security benefits received by plaintiff are not sums paid by or on behalf of defendant.

If defendant is inclined to believe that the receipt of these funds by plaintiff is sufficient to show a change in the circumstances of the parties, he is at liberty to proceed by proper motions in the case under G.S. 50-16.9.

For the reasons stated, the order is affirmed.

Affirmed.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. DARRELL LYNN HOLLIS

No. 7719SC411

(Filed 7 December 1977)

Burglary and Unlawful Breakings § 5.5— breaking and entering school— sufficiency of evidence

Evidence was sufficient for the jury in a prosecution for breaking and entering a high school where it tended to show that someone broke a window and entered the school with the intent to take money from vending machines; defendant was seen running away from the school at about the same time the breaking was discovered; and defendant was carrying fifteen quarters in his hat when he was apprehended.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 6 January 1977 in Superior Court, CABARRUS County. Heard in the Court of Appeals 17 October 1977.

Darrell Hollis was indicted for breaking and entering A. L. Brown High School with intent to commit larceny and for larceny of $4.00 belonging to the Kannapolis City Schools.

Witnesses testified that the silent alarm system at the school went off at 12:42 a.m., 19 November 1976, for the second time that evening. An assistant principal and several Kannapolis Police officers were summoned to the school where they found 3 broken windows, one of which was large enough for a person to crawl through. They found that two vending machines had been forcibly entered and the coins removed. The damage to the machines occurred sometime after 11:45 p.m. that night when the officers had answered the earlier alarm.

Sgt. Armstrong of the Cabarrus County Sheriff's Department testified that he returned to his home across the street from the high school at about 12:30 a.m. to find guests there. A few minutes later as he stood on his porch to see them off, he saw the police cars responding to the alarm. As he watched, he saw a small figure run away from the shrubbery around the school building, across the street, and into the woods. This individual was wearing a hooded sweat shirt and light blue dungarees. The officer telephoned the Kannapolis Police Department and reported what he had seen. Two officers were sent to the other side of the woods where they apprehended Hollis who was wearing

a hooded sweat shirt and blue jeans. He had 15 quarters inside a ski cap, and a crowbar was found near him in the woods.

The defendant's evidence showed that he had won about $3.00 in coins playing cards early that afternoon and that he had gotten 4 quarters from his mother as change about 3:00 p.m. Between 11:00 p.m. and midnight he left with another man to go to the Eagle Lounge in Rowan County. The defendant testified that he stayed at the Eagle 40-50 minutes and decided to walk to another club which lay on the other side of the high school. He still had over $4.00 in change in his pockets.

The defendant was convicted of breaking and entering and felonious larceny. The verdict of guilty of larceny was set aside, and the charges were dismissed. He was sentenced to 7 years for the breaking and entering conviction.

Attorney General Edmisten, by Associate Attorney Leigh Emerson Koman, for the State.

Spence & Harris, by Larry E. Harris, for defendant appellant.

VAUGHN, Judge.

Defendant comes before us with a single assignment of error, alleging that there was not sufficient evidence to raise a jury question on the charge of breaking and entering. The test for sufficiency of evidence, whether circumstantial or direct, is whether a reasonable inference of defendant's guilt may be drawn from the circumstances viewed most favorably to the State. If such an inference may be drawn, the weight of that inference is for the jury to consider. *State v. McNeil*, 280 N.C. 159, 185 S.E. 2d 156 (1971).

There is evidence in the case which tends to show that someone broke a window and entered A. L. Brown High School with the intent to take money from the vending machines on the third floor. There is also evidence from which a jury could find that Hollis did so. Sgt. Armstrong's testimony placed him running away from the school at about the same time the breaking was discovered. This evidence raises an inference that he was involved in the breaking. In a per curiam opinion, the Supreme Court held in *State v. Lakey*, 270 N.C. 786, 154 S.E. 2d 900 (1967),

that identification of defendants as the men seen running from the vicinity of a business in which a safe had been tampered with was sufficient to take the case to the jury on breaking and entering.

There is, in addition, the uncontradicted evidence that Hollis was carrying fifteen quarters in his hat when he was apprehended. When coupled with the evidence that vending machines were broken into inside the school, this testimony also supports the inference that Hollis broke into the building. The evidence was sufficient to go to the jury on a breaking and entering in *State v. Solomon*, 24 N.C. App. 527, 211 S.E. 2d 478 (1975), where the defendant was found about 2 miles away on the afternoon of the breaking. When accosted, he attempted to hide $9.02 in coins including a penny with file marks. Coins including a penny with file marks had been stolen from the house.

While no case should go to the jury when there is only a conjecture as to the defendant's identification as the perpetrator of the offense, *State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977), there is adequate evidence here to support the verdict. Contradictions in the evidence were properly resolved by the jury as it weighed the evidence and assessed its credibility.

Affirmed.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. BOBBY GENE BLACK

No. 7727SC489

(Filed 7 December 1977)

1. Narcotics § 4— sale of marijuana to agent alleged—proof of sale to agent sufficient

In a prosecution for possession of marijuana with intent to sell and sale of marijuana, there was no variance between the indictment and proof where the indictment alleged that defendant sold marijuana to one Hill, and the evidence showed that defendant sold the marijuana to one Hill in the presence of an intermediary who had arranged the sale and who aided in the exchange of the drugs and money while defendant, Hill and the intermediary were all in the presence of one another.

2. Criminal Law § 117.4; Narcotics § 4.5— testimony by undercover agent and accomplice—failure to instruct on agent's testimony—error

In a prosecution for possession with intent to sell and sale of marijuana where defendant allegedly sold marijuana to an undercover agent with the help of an intermediary, the trial court erred in failing to instruct the jury as to how they should examine the testimony of the undercover agent, since defendant requested such an instruction, and the giving of an instruction as to the intermediary and refusing to give it as to the undercover agent could have bolstered the agent's testimony in the minds of the jurors.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 10 February 1977 in Superior Court, GASTON County. Heard in the Court of Appeals 20 October 1977.

Defendant was indicted on two bills charging him with (1) the possession or marijuana with intent to sell and (2) the sale of marijuana.

Evidence for the State, viewed in the light most favorable to it, tends to show the following. Vernon Hill was a Deputy Sheriff in Gaston County. At the request of narcotics officers for the City of Gastonia, he agreed to act as an informant and attempt to buy illegal drugs at various places in the city. While so engaged he met a prostitute, Vanda Beheler, who agreed to help him get some marijuana. She took him to defendant's residence. Hill waited at the rear of his vehicle while Beheler went to the door of defendant's residence. She told defendant she had someone out there who wanted to buy marijuana. Defendant then came out of the house and walked over to a truck-camper. Beheler returned to where Hill was standing. Defendant handed Beheler a plastic bag of marijuana. Hill then gave Beheler a $20.00 bill, and she, in turn, handed the money to defendant and the marijuana to Hill. Hill was about eight feet away from defendant when he handed the drugs to Beheler.

Defendant's evidence tended to show that he did not see either Hill or Beheler at his home and that he had never sold drugs to them or anyone else.

The jury returned a verdict of guilty of both charges. Judgment was entered imposing a two-year sentence of imprisonment.

Attorney General Edmisten, by Associate Attorney George W. Lennon, for the State.

Frank Patton Cooke and Rob Wilder, for defendant appellant.

VAUGHN, Judge.

[1] Defendant first argues that his motion for nonsuit should have been allowed. He contends that there is a variance between the allegations in the indictment and the evidence at trial. The indictment alleges a sale to Vernon Hill. Defendant contends that the evidence shows only a sale to Vanda Beheler. Defendant relies on the well-established principle that "where the bill of indictment alleges a sale to one person and the proof tends to show only a sale to a different person, the variance is fatal." *State v. Ingram*, 20 N.C. App. 464, 466, 201 S.E. 2d 532, 534 (1974).

On motion for nonsuit, however, the evidence must be taken in the light most favorable to the State. Hill's testimony tends to show that defendant sold the marijuana to him in the presence of Beheler, that Beheler arranged for the sale and, while all were in the presence of one another, aided in the exchange of the drugs and money. Defendant argues that Beheler's testimony was to the effect that she was given the money by Hill; that she went inside where she received the drugs from defendant, and that defendant did not come out of the house. It is fundamental, however, that on motion to dismiss contradictions in the State's evidence will be disregarded and only the favorable evidence will be considered. Moreover, even Beheler's testimony discloses that she told defendant that someone outside wanted to buy the drugs, thus supporting the inference that defendant knew that she was only an intermediary to the transaction. The motion for nonsuit was properly denied.

[2] In apt time defendant requested a special instruction on the testimony of the undercover agent, Hill, and the prostitute, Beheler, who participated in the sale and purchase of the marijuana. The specific instructions, as requested, were not correct in all respects. Nevertheless, the trial judge is not relieved of his duty to give a correct instruction merely because defendant's request was not altogether correct. *State v. White*, 288 N.C. 44, 215 S.E. 2d 557 (1975).

The court properly instructed the jury as to how they should examine the testimony of the alleged accomplice, Beheler. The court declined, however, to give any special instructions as to how they should consider the testimony of Hill, the deputy who was acting as an informant for the Gastonia Police Department.

> "The general rule is that [upon proper request] the jury should be directed to scrutinize the evidence of a paid detective and make proper allowances for the bias likely to exist in one having such an interest in the outcome of the prosecution . . . ." *State v. Boynton*, 155 N.C. 456, 464, 71 S.E. 341, 344 (1911); *State v. Love*, 229 N.C. 99, 47 S.E. 2d 712 (1948).

We cannot say that the failure to give the appropriate instruction as to the testimony of the informant Hill was harmless. Hill did not know the defendant prior to their brief encounter on the night of the alleged sale. His identification testimony was, nevertheless, unequivocable. Beheler's testimony, on the other hand, was somewhat less persuasive. Defendant and his witnesses not only offered evidence tending to show that he was not present when the alleged sale took place but offered some testimony that could suggest that the seller of the drugs was some other member of his family who had a history of familiarity with the drug traffic. The giving of the instruction as to Beheler and refusing to give it as to Hill could have bolstered Hill's testimony in the minds of the jurors.

After defendant requested the instruction, the court should have instructed the jury in general accordance with the following:

> "You may find from the evidence that State's witness, (*name witness*), is interested in the outcome of this case because of his activities as an [informer] [undercover agent]. If so, you should examine his testimony with care and caution in light of that interest. If, after doing so, you believe his testimony in whole or in part, you should treat what you believe the same as any other believable evidence." N.C.P.I. — Crim. § 104.30 (June 1970).

For the reasons stated, defendant will be awarded a new trial.

New trial.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. BILLIE RAY VESTAL

No. 7721SC457

(Filed 7 December 1977)

Criminal Law §§ 18, 150.1— compliance with district court judgment—waiver of right to appeal

A defendant who voluntarily appeared without counsel in the district court waived his statutory right of appeal to the superior court when he complied with the judgment of the district court by paying a fine and court costs. G.S. 7A-290.

APPEAL by defendant from *Albright, Judge.* Judgment entered on 28 April 1977 in Superior Court, FORSYTH County. Heard in the Court of Appeals on 19 October 1977.

Defendant was charged with operating a motor vehicle on a public vehicular area at a speed of 67 m.p.h. in a 55 m.p.h. zone. Defendant, who was not represented by counsel, pled not guilty and the case was tried in district court. The court found defendant guilty and ordered him to pay a fine of $10.00 plus costs. Defendant immediately complied with the order. Within 10 days after the entry of judgment, defendant gave notice of appeal to the superior court.

In the superior court the state moved to dismiss the appeal on the ground that defendant had waived his right to appeal by complying with the judgment of the district court. From an order dismissing the appeal, defendant appealed to this Court.

Attorney General Edmisten by Assistant Attorney James Peeler Smith for the State.

Michael R. Greeson, Jr., for the defendant appellant.

HEDRICK, Judge.

Defendant contends that his compliance with the judgment of the district court did not constitute a knowledgeable waiver of his right of appeal.

A defendant's right to appeal from an adverse ruling in the district court is provided in G.S. 7A-290 as follows: "Any defendant convicted in district court before the judge may appeal to the superior court for trial de novo. Notice of appeal may be given

orally in open court, or to the clerk in writing within 10 days of entry of judgment."

In *State v. Cooke*, 268 N.C. 201, 150 S.E. 2d 226 (1966), the defendant was tried and convicted in Recorder's Court for failure to support his illegitimate child. Judgment was entered and a six month prison sentence imposed which was suspended upon certain conditions. Defendant, who was represented by counsel, paid the costs of court and made a payment to the clerk for the support of the child pursuant to one of the conditions. Subsequently, within the statutory time limit, defendant gave notice of appeal to the superior court. After a hearing in the superior court, the judge dismissed the appeal on the ground that the defendant had waived his right to appeal. The Supreme Court affirmed, citing several cases as authority for the proposition that "where defendant evidences his consent to a suspended sentence by making payments in the court in accordance with the terms of the suspension, he waives his right of appeal." *State v. Cooke, supra* at 203, 150 S.E. 2d at 228.

Defendant argues that *Cooke* is distinguishable in that the defendant in that case was represented by counsel throughout the proceedings. In the present case the defendant admits that he could have afforded to hire an attorney to represent him in the district court but thought it unnecessary. When a defendant makes a voluntary and knowledgeable decision to represent himself he must be deemed to know the law which will govern the trial of his case and he must be expected to conduct himself in accordance with the rules established by the courts and legislature of this state. To accept his later claim of ignorance of the law would frustrate the policies of the rules of procedure which are so important to the orderly administration of justice. Thus, in our opinion, the defendant in the present case, who undertook to represent himself, was governed by the same law as the defendant represented by counsel in *Cooke*; and by acquiescing in the terms of the judgment of the district court, he waived his statutory right of appeal to the superior court. In fact when the defendant complied with the judgment of the district court by paying the fine and costs, there was nothing left from which an appeal could be taken.

Affirmed.

Judges BRITT and MARTIN concur.

BETTY L. PHILLIPS v. NOLAND C. PHILLIPS, JR. AND UNITED STATES OF AMERICA

No. 7613DC1061

(Filed 7 December 1977)

Garnishment § 1— military retirement pay—no garnishment for alimony

Military retirement pay is the equivalent of active duty pay for purposes of garnishment, and active duty pay constitutes wages not subject to garnishment for alimony under N. C. law.

APPEAL by plaintiff from *Sauls, Judge.* Judgment entered 5 August 1976 in District Court, COLUMBUS County. Heard in the Court of Appeals 26 September 1977.

The facts giving rise to this appeal are not controverted. The plaintiff instituted an action against her husband, Noland C. Phillips, Jr., the defendant, seeking alimony, child custody, and child support. Plaintiff summoned the United States of America, garnishee. The garnishee filed an answer admitting that it would become indebted to the defendant for monthly pay in the amount of $374.03 as long as the defendant was entitled to that amount according to laws governing military pay; that twenty (20) percent of that monthly amount was subject to garnishment for child support pursuant to North Carolina G.S. 110-136; and denying any liability as garnishee for alimony or other support payments. The defendant was receiving military retirement pay pursuant to his retirement from the United States Air Force.

At trial, the district court made findings of fact and concluded as a matter of law that income to the defendant under the Military Retirement Act was equivalent to future wages and thus not subject to garnishment for alimony under North Carolina law.

Plaintiff appealed.

James C. Eubanks III, for plaintiff appellant.

United States Attorney Carl L. Tilghman, by Assistant United States Attorney, Chief, Civil Section, Joseph W. Dean, for garnishee.

No counsel for defendant.

BROCK, Chief Judge.

Plaintiff concedes that prospective wages are not subject to garnishment for alimony under North Carolina law; however, plaintiff contends that defendant's military retirement pay does not constitute wages or the equivalent of wages, but instead is an annuity and a vested property right of the defendant, or a debt owed the defendant by the United States, and therefore is subject to garnishment. We disagree.

At issue is the nature of military retirement pay. Plaintiff correctly argues that whether such pay constitutes wages not subject to garnishment, or a debt or vested right clearly subject to garnishment, is a question for the North Carolina courts. However, any decision on this question must necessarily be based upon an analysis of the federal retirement pay scheme and its incidents.

Military retirement pay is provided by federal statute and not common law. There is no vested or contractual right to retired pay. *Goodley v. U.S.*, 441 F. 2d 1175 (Ct. Cl. 1971). The precise question before this Court was recently addressed by Federal District Judge Hemphill sitting by designation in *Watson v. Watson*, 424 F. Supp. 866 (E.D.N.C. 1976), wherein it was held that garnishment of military retirement pay for alimony was not permissible under North Carolina law. In discussing the nature of military retirement pay, Judge Hemphill noted that there is no pre-existing retirement fund earmarked for the use and benefit of the retiree; that the retiree earns his retirement pay by staying alive, obeying military discipline, and being subject to recall to active duty; that he continues to hold the same office (rank) he held while on active duty; that a retiree's pay is subject to increase, decrease, or stop for various reasons; that retirement pay is not inheritable and does not pass to the retiree's heirs upon his death; that no right to retirement pay arises except on a day-to-

day basis; and that active duty pay and retirement pay are considered procedurally to be the same by the Department of Defense.

In light of the above factors, Judge Hemphill found military retirement pay to be the equivalent of active duty pay for purposes of garnishment. We agree with Judge Hemphill and so hold. Our Legislature has recently authorized garnishment of wages for child support. G.S. 110-136. This exception to the long-standing prohibition against garnishment of wages has not been extended to allow garnishment of wages for alimony. Since we hold that military retirement pay is the equivalent of active duty pay for purposes of garnishment, and active duty pay clearly constitutes wages not subject to garnishment for alimony under North Carolina law, the ruling of the court below is

Affirmed.

Judges PARKER and ARNOLD concur.

IN THE MATTER OF RANDOLPH BUNN, JUVENILE

No. 778DC494

(Filed 7 December 1977)

Courts § 15; Infants § 11— armed robbery charge against juvenile—transfer for trial as adult

A district court judge did not abuse his discretion in transferring an armed robbery charge against a fifteen-year-old male to the superior court for trial as in the case of an adult where the judge found that the best interest of the State would thereby be served because of the deadly nature of the assault involved in the armed robbery, defendant's history of delinquency, and the interest of the State in protecting its citizens from those who have demonstrated that they will threaten human life in order to deprive others unlawfully of their property. G.S. 7A-280.

APPEAL by defendant from *Ellis, Judge.* Order entered 2 February 1977 in District Court, WAYNE County. Heard in the Court of Appeals 20 October 1977.

Defendant, a fifteen-year-old male, appeals from an order transferring his case to the Superior Court for trial as an adult on an armed robbery charge.

Defendant had previously been placed on juvenile probation. A hearing on a motion to review in that proceeding was heard at the same time the probable cause hearing on the felony charge was conducted. The judge, after making appropriate findings based on the evidence, ordered that he be committed to the appropriate facility for juveniles. Defendant does not appeal from that order.

The State's evidence tended to show, among other things, that defendant and a companion, armed with a rifle, entered a food store at about 11:45 p.m. They forced the manager into a restroom and attempted to open the cash register. The register was locked. They, then, forced the manager at gunpoint to open the register. As defendant and his accomplice were removing the money from the register, they were frightened by an approaching car. The pair fled through the rear of the store. They were later arrested and admitted the robbery.

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

Kornegay, Bruce & Rice, by R. Michael Bruce, for respondent appellant.

VAUGHN, Judge.

Defendant brings forward numerous assignments of error directed at the order transferring the case to the Superior Court division.

G.S. 7A-280 provides, in appropriate part, that where probable cause is found in a felony case against a child who has reached his 14th birthday, the judge "*may* proceed to hear the case . . . , or if the judge finds that the needs of the child *or* the best interest of the State will be served, the judge *may* transfer the case to the superior court division for trial as in the case of adults. The child's attorney shall have a right to examine any court or probation records considered by the court in exercising its *discretion* to transfer the case, and the order of transfer shall specify the reasons for transfer." (Emphasis added.)

Neither the defendant nor the State has the *right* to have this case disposed of in a particular trial division of the General Court of Justice. The statute leaves the decision on whether the

case will be transferred to the Superior Court solely within the sound discretion of the District Court judge who conducts the probable cause hearing. The exercise of that discretion is not subject to review in the absence of a showing of gross abuse.

The judge is not required to make findings of fact to support his conclusion that the needs of the juvenile *or* that the best interest of the State would be served by transferring the case to the Superior Court division. It is only required that if he elects to order the transfer, he must state his reasons therefor. Here the judge specified as his reason for the transfer that the best interest of the State would thereby be served. He then gave some explanation of his reason. The explanation included his consideration of the deadly nature of the assault involved in the armed robbery, defendant's history of delinquency, and the interest of the State in protecting its citizens from those who have demonstrated that they will threaten human life in order to deprive others unlawfully of their property.

The foregoing considerations make it manifest that the judge did not abuse his discretion in ordering the transfer. *See In re Smith*, 24 N.C. App. 321, 210 S.E. 2d 453 (1974); *In re Bullard*, 22 N.C. App. 245, 206 S.E. 2d 305 (1974), dismissed 285 N.C. 758, 209 S.E. 2d 279. All of defendant's assignments of error have been considered and found to be without merit.

Affirmed.

Judges MORRIS and CLARK concur.

C & H TRANSPORTATION COMPANY v. N. C. DIVISION OF MOTOR VEHICLES

No. 7710SC98

(Filed 7 December 1977)

Automobiles § 138— permit to move large crane—"in daylight" provision—operation after sunset—no violation

Where defendant issued to plaintiff a special permit to transport a large crane over highways in N. C., and the permit provided, among other things, that the movement would be "in daylight," the mere showing by defendant that plaintiff's equipment was moving on the highway 35 minutes after sunset

was insufficient to establish that the "in daylight" provision of the permit was violated.

APPEAL by defendant from *Herring, Judge.* Judgment entered 16 December 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 17 November 1977.

Plaintiff instituted this action under G.S. 20-91.1 seeking to recover a penalty which defendant had assessed against it and which it had paid under protest. Defendant answered and denied a wrongful assessment.

Following a nonjury trial, the trial court found facts summarized in pertinent part as follows:

On 12 September 1974, defendant, pursuant to G.S. 20-119, issued to plaintiff a special permit to transport a large crane over Interstate 95 and U.S. 301 from the South Carolina state line to the Virginia state line. The permit provided, among other things, that the movement would be "in daylight".

On said date plaintiff began transporting said equipment in accordance with the permit. At about 8:03 p.m. daylight savings time, some 35 minutes after sunset at Lumberton, N.C., plaintiff's tractor-trailer hauling the equipment entered defendant's weigh station from I-95 near Lumberton.

Defendant's agent at the weigh station made a determination as to the weight of said vehicle and then alleged that plaintiff was "running over dimension load after sun down". Defendant thereupon assessed taxes and penalties against plaintiff in the total sum of $1,591, which amount plaintiff paid under protest.

The weigh station premises were lighted with mercury lights individually activated by light sensor mechanisms; they were burning at the time of plaintiff's entry. Some of the traffic on I-95 was moving with headlights on.

"There was clear weather and there was still light enough to see other vehicles on Interstate 95 while operating a vehicle on Interstate 95 at the time Mr. J. H. McKinney operated his tractor trailer and entered the weigh station. There was light enough for Mr. J. H. McKinney's oversized load to be seen by other motorists on Interstate 95 at the time Mr. McKinney entered the weigh station."

Based on its findings of fact, the court concluded that at the time in question "daylight had not ended", that plaintiff's vehicle was not operated in violation of the special permit, and that plaintiff was entitled to recover the amount paid under protest, plus interest and costs.

From judgment in favor of plaintiff predicated upon the findings and conclusions, defendant appealed.

Attorney General Edmisten, by Associate Attorney David D. Ward, and Deputy Attorney General William W. Melvin, for the State.

Norman L. Sloan for plaintiff appellee.

BRITT, Judge.

Defendant contends the court erred in concluding that plaintiff did not violate its special permit and in entering judgment for plaintiff. We find no merit in this contention.

Defendant argues that the mere showing that plaintiff's equipment was moving on the highway 35 minutes after sunset was sufficient to establish that the "in daylight" provision of the permit was violated. While defendant cites no authority in support of this argument, it suggests that G.S. 20-129(a) is instructive.

G.S. 20-129(a) provides:

> "When Vehicles Must Be Equipped. — Every vehicle upon a highway within this State during the period from a half hour after sunset to a half hour before sunrise, and at any other time when there is not sufficient light to render clearly discernible any person on the highway at a distance of 200 feet ahead, shall be equipped with lighted headlamps and rear lamps as in this section respectively required for different classes of vehicles, and subject to exemption with reference to lights on parked vehicles as declared in G.S. 20-134."

We reject defendant's argument. We think the case at hand presents the question whether the permit limiting movement to "in daylight" was violated, not whether the cited statute was violated. We hold that a question of fact was presented and that the trial court answered the question in favor of plaintiff.

The judgment appealed from is

Affirmed.

Judges PARKER and VAUGHN concur.

OCCIDENTAL LIFE INSURANCE COMPANY OF NORTH CAROLINA AND OLIC HOLDING CORPORATION, PETITIONERS v. JOHN R. INGRAM, COMMISSIONER OF INSURANCE, STATE OF NORTH CAROLINA

No. 7710SC861

(Filed 7 December 1977)

1. **Insurance § 1— domestic insurance company—plan of stock exchange to bring under holding company structure—arbitrary and capricious disapproval by Commissioner of Insurance**

The record supports the trial court's findings and its conclusion that the Commissioner of Insurance acted arbitrarily and capriciously when he disapproved a proposed plan of exchange of stock by which a domestic insurance company would be brought under a holding company type of corporate structure where it shows that for many weeks after the documents were available to him, the Commissioner failed even to read the petition and proposed plan of exchange of stock, the transcript of the public hearing conducted thereon, or the written recommendation made by the professional staff of the Department of Insurance; that he delayed and failed to render any decision until compelled to do so by a court order; that he then issued an order disapproving the plan on the basis of findings of fact, some of which are totally unsupported by any evidence while others are of only remote relevance; and that he refused to make findings of fact favorable to petitioners even though such findings are fully supported by a mass of convincing and uncontradicted evidence.

2. **Administrative Law § 5— judicial review of agency decision—Administrative Procedures Act—adequate review under another statute**

Under the statute providing that any person aggrieved by a final agency decision who has exhausted all administrative remedies is entitled to judicial review under Art. 4 of the Administrative Procedures Act "unless adequate procedure for judicial review is provided by some other statute," G.S. 150A-43, an "adequate procedure for judicial review" exists only if the scope of review is equal to that under Art. 4 of Administrative Procedures Act, G.S. Ch. 150A.

3. **Administrative Law § 5; Insurance § 1— plan of exchange of stock—disapproval by Commissioner of Insurance—judicial review under Administrative Procedures Act**

The scope of judicial review of an order of the Commissioner of Insurance disapproving a plan of exchange of stock by which a domestic insurance company would be brought under a holding company type of corporate structure is

that provided in Art. 4 of G.S. Ch. 150A rather than that provided by G.S. 58-9.3, since the scope of review provided in Art. 4 of G.S. Ch. 150A is substantially broader than that provided by G.S. 58-9.3.

4. **Administrative Law § 8; Injunctions § 3; Insurance § 1— plan of exchange of stock—mandatory injunction requiring approval by Commissioner of Insurance**

A superior court judge did not exceed his power and authority in issuing a manadatory injunction requiring the Commissioner of Insurance to approve petitioners' plan of exchange of stock by which a domestic insurance company would be brought under a holding company type of corporate structure where the Commissioner abused the powers granted to him by the General Assembly by arbitrarily and capriciously disapproving the plan of exchange when all of the competent evidence showed that petitioners were entitled to have the plan approved.

APPEAL by respondent from *Godwin, Judge.* Order entered 27 September 1977 in Superior Court, WAKE County. Heard in the Court of Appeals 17 November 1977.

On 8 June 1977, Occidental Life Insurance Company of North Carolina (Occidental), a domestic capital stock insurance company, and Olic Holding Corporation (Holding Corp.), a domestic stock corporation, filed with the respondent, the Commissioner of Insurance of North Carolina, a petition pursuant to the provisions of Art. 6A of G.S. Ch. 58 to obtain approval of a proposed Plan of Exchange whereby, upon consummation of the Plan, shares of Occidental owned by assenting stockholders of Occidental would be deemed to have been exchanged for a like number of shares of Holding Corp. on a share for share basis, with the result that Occidental would become a wholly owned subsidiary of Holding Corp. and the assenting shareholders of Occidental would become the shareholders of Holding Corp., with each such stockholder having, as among all such stockholders, the same proportionate interest in Holding Corp. as each had previously held in Occidental. The Plan also provided for the reorganization of some of the first and second tier subsidiaries of Occidental so that these would become subsidiaries of Holding Corp. rather than of Occidental. With their petition, the petitioners submitted to the Commissioner of Insurance three certified copies of their proposed Plan of Exchange, as adopted by their respective boards of directors, together with the financial statements and other data and documents required by G.S. 58-86.4(2). The petition contained allegations detailing the present corporate structures and stock ownership of each of the petitioners and of each of the present

subsidiaries of Occidental, the corporate reorganization which would be effected upon consummation of the Plan, and the advantages which would result from implementation of the Plan. Among these advantages as alleged in the petition were the following: Because of the size and diversity of operations within the present Occidental group of companies, a holding company type of organization would permit a more effective control by the board of directors of the Holding Corp. over the capital and personnel resources of the entire group. The management of the operating companies would have clear responsibility and authority for operating results, and clear lines of authority would be established between the Holding Corp. board of directors and the managements of the operating companies. A qualified staff in the Holding Corp. would provide its board with independent evaluations of operating results. Internal auditing would be made more effective by making that a function of the Holding Corp., thus giving the audit function independence from operating company management. Structurally, the business and financial risks among subsidiaries would be compartmentalized, thus reducing the chance that adverse results of one of the operating subsidiaries could have a major adverse effect on other operating companies. The proposed reorganization would permit the Holding Corp. to file consolidated federal income tax returns with its nonlife insurance company subsidiaries, something which is not permitted to life insurance companies under present federal income tax laws, thereby making it possible to offset losses in one such subsidiary against gains in another and permitting the passage of dividends from such subsidiaries to the parent Holding Corp. without a double tax when received by the parent. The proposed reorganization would provide a clearer organizational structure which would be more easily understood by shareholders and the public. The new structure would facilitate the acquisition or commencement of new insurance-related operating companies which would be directly under the Holding Corp. board and its staff. The proposed reorganization would result in a structure more appropriate to the current circumstances of the Occidental group of companies and more responsive to the competitive environment now taking shape.

As required by G.S. 58-86.4(2), a public hearing on the petition was scheduled to be held on 19 July 1977, and notice of this

hearing was duly published in newspapers of general circulation in six cities of this State. Written notice of the hearing was also mailed to the approximately 2400 stockholders of Occidental.

On 19 July 1977 the noticed public hearing was held before Deputy Commissioner W. Kenneth Brown. At this hearing the petitioners presented evidence to support the allegations in their petition and to establish that the proposed Plan complied in all respects with all statutory requirements and criteria for approval. No evidence was presented to the contrary. No one appeared in opposition to approval of the Plan. At the conclusion of the hearing, the hearing officer directed that the record show that all persons who wished to be heard had been heard, and he announced that he would give the matter his prompt attention as rapidly as the staff should prepare its recommendation.

On or about 18 August 1977 the Insurance Department staff gave its recommendation fully approving the Plan of Exchange. No action was taken on this staff recommendation by the hearing officer or by the Commissioner of Insurance. After the attorney for petitioners expressed concern to members of the Insurance Department staff because of the delay in receiving any decision on petitioners' proposed Plan, the hearing officer met with representatives of petitioners in the office of the Commissioner of Insurance on 6 September 1977. At this meeting the hearing officer informed petitioners' counsel that matters had come to his attention concerning investment problems which had been experienced by Occidental as disclosed by an Insurance Department examination conducted in 1972, that he understood petitioners' counsel was objecting to anything being added to the record, and that in view of these matters he was not going to enter an order in this proceeding. He also informed petitioners' representatives that the Commissioner of Insurance had consented to hear petitioners' counsel on 22 September 1977.

On 7 September 1977 petitioners filed suit in the Superior Court in Wake County against the hearing officer and the Commissioner of Insurance seeking an order pursuant to G.S. 150A-44 compelling some action by defendants either approving or disapproving petitioners' proposed Plan of Exchange. On 12 September 1977 petitioners took the depositions of the hearing officer and of the Commissioner of Insurance. In his deposition, the hearing officer testified that prior to holding the hearing on 19 July 1977,

he had not read the petition which had been filed on 8 June 1977 and that he did not know until the morning of the hearing that he was to be the hearing officer. In his deposition, the Commissioner of Insurance testified that as of the date of the deposition, 12 September 1977, he had not read the petition which had been filed by petitioners in his office on 8 June 1977, nor had he read the transcript of the public hearing held 19 July 1977 or the recommendation made by the Insurance Department staff.

On 12 September 1977 petitioners filed in their then pending action in the Superior Court and served on the defendants therein an affidavit signed by the local manager of Ernst and Ernst, the independent auditor for Occidental and its subsidiaries. In this affidavit the affiant pointed out certain disadvantages which would result if the reorganization were delayed until some time in 1978 rather than being accomplished at 31 December 1977. Included among the adverse consequences of such a delay would be the elimination of availability by one tax year of over $2,232,000 in loss carryovers to 1979 and 1982, with the possible result that the delay could cost the Occidental group of companies over $1,071,000 in taxes that they would otherwise not be required to pay.

On 15 September 1977 the hearing officer served on the petitioners a proposal for decision disapproving the Plan of Exchange. On 19 September 1977 the petitioners filed written exceptions to this proposal for decision but waived oral argument thereon.

On 19 September 1977 the then pending civil action came on for hearing in the Superior Court upon the return of a show cause order which had been entered therein on 7 September 1977. Plaintiffs presented evidence, including the deposition testimony of the Commissioner of Insurance and of the hearing officer. Defendants did not offer evidence. At the conclusion of the hearing, Judge James H. Pou Bailey entered an order dated 19 September 1977 making findings of fact from which he concluded as a matter of law that defendant Ingram had unreasonably delayed in entering an order either approving or disapproving petitioners' Plan of Exchange and that his failure to enter such an order constituted a wilfull failure by him to carry out the statutory duties of his office. In accord with his findings and conclusions, Judge Bailey granted petitioners' prayer for a mandatory injunction and ordered defendant Ingram, within twenty-four hours, to enter a

written order pursuant to G.S. 58-86.4 either approving or disapproving petitioners' Plan of Exchange. On 20 September 1977 an order was entered, signed in the name of the Commissioner of Insurance by the hearing officer in his capacity as Deputy Commissioner of Insurance. In this order the Commissioner of Insurance made findings of fact, including the following:

> 7. That the Report on Examination of Occidental Life Insurance Company of North Carolina for the years ending December 31, 1971 and December 31, 1972 indicates that the company had seriously depleted surplus as of December 31, 1971 which was substantially improved by December 31, 1972.
>
> 8. That the Annual Statements for the years 1970 through 1976 indicate that management of the company has undergone a number of changes and that since 1970 there have been six different people holding the office of President.
>
> * * *
>
> 12. That the holding company organizational framework provides flexibility to management which could seriously hurt the interest of policyholders and that the Plan of Exchange to create the holding company would therefore not be in the public interest.
>
> 13. That this great amount of flexibility, in management has caused harm to many North Carolina policyholders of other companies. (e.g., Summit Insurance Company of New York, National American Life Insurance Company of Louisiana, and Standard Life Insurance Company of Oklahoma.)
>
> 14. That if approved, this Plan of Exchange would permit such excessive flexibility in the management of Occidental Life Insurance Company as to constitute a hazard to the policyholders.

On these findings, the Commissioner concluded that petitioners' Plan of Exchange is not in the public interest, and accordingly he disapproved the Plan.

The present action was commenced on 20 September 1977 when the plaintiff-petitioners, Occidental and Holding Corp., filed their complaint and petition for review in the Superior Court in

Wake County against the respondent Commissioner of Insurance, alleging that the Respondent had been arbitrary and capricious in his order disapproving their Plan of Exchange in that, among other things, he had made findings unsupported by substantial evidence admissible under G.S. 150A-29, he had considered matters outside of the record of which no notice was given to petitioners, he had been selective and considered only irrelevant matters so removed in time as to be immaterial under G.S. 58-86.4, and he had not considered more current matters which support petitioners' Plan of Exchange and support the fact of petitioners' currently strong financial status. Petitioners prayed that respondent's order be reversed and that a mandatory injunction be issued to compel respondent to enter an order approving their Plan of Exchange in accordance with the evidence presented at the 19 July 1977 hearing. Respondent filed answer denying he had been arbitrary and capricious in entering his order disapproving petitioners' Plan of Exchange and challenging the court's power to order him to approve that Plan.

A hearing in the present action was held on 26 September 1977 before Superior Court Judge A. Pilston Godwin, Jr., upon the pleadings, the exhibits attached thereto, and exhibits filed by petitioners. These exhibits included copies of the original petition and the exhibits thereto as filed by petitioners with the respondent on 8 June 1977, a transcript of the 19 July 1977 public hearing, and copies of the documents and transcripts of the proceedings above referred to. On 27 September 1977 Judge Godwin entered an order in which he found as facts that there was no evidence in the record of the public hearing held on 19 July 1977 of certain matters admittedly considered by the hearing officer, being principally the matters referred to in findings of fact 7, 8, 12, 13, and 14 in the respondent's order entered 20 September 1977 in which he disapproved petitioners' Plan of Exchange, and that respondent had never given notice to petitioners that he was taking official notice of these matters. Judge Godwin also made findings of fact and conclusions of law as follows:

> 13. The Court finds the following Findings of Fact from the July 19 hearing:
>
> (a) The Plan of Exchange had been thoroughly researched and analyzed by Petitioners to insure that it would

provide management and structural advantages for Petitioners.

(b) The holding company format provides great flexibility which insurance companies need and there are no disadvantages from the utilization of the holding company format.

(c) If a holding company's record shows good growth and earnings, they would be more truly reflected in the price of the holding company stock than of a life insurance company and investors would be more likely attracted to the stock of a holding company than a life insurance company.

(d) The holding company structure provides a clear way of analyzing, on a consolidated basis, what a multi-corporate enterprise is doing and what it is worth.

(e) Under the holding company format, business and financial risks among the subsidiaries of the Occidental Group can be compartmentalized, thus reducing the chance that adverse results in one of the operating subsidiaries will have a major effect on other operating companies.

(f) Of the diversified financial institutions listed in the July 1977 issue of Fortune Magazine, over one half own and operate insurance companies within a holding company format.

(g) The formation of a holding company would benefit Occidental because it would enable Occidental to move much of its nonlife insurance activities from under the life company, (Occidental), would insulate Occidental's surplus from earnings fluctuations of the casualty subsidiaries, and would eliminate a distortion of the surplus of subsidiaries which now exist under allowed and accepted accounting practices.

(h) The holding company format would increase the capacity of the Board of Directors to fulfill their fiduciary responsibilities and to skillfully manage the business of the Group.

(i) Since 1973, Occidental has shown a continuous and consistent increase in surplus and has shown satisfactory statutory earnings.

(j) Occidental had earned in excess of one million dollars after taxes during each of the preceding four years and has earned an "A-Excellent" Rating by A. M. Best & Company.

(k) The equity of Occidental shareholders will be unaffected by the Plan of Exchange.

(l) A strong internal audit function is one of the best ways to properly protect the policyholders and shareholders of a company and that the most effective internal audit is one which exists independent of operating company management.

(m) The property-casualty operations of the Occidental Group have grown substantially in the past few years, and the Plan of Exchange would facilitate the ability of the Occidental Group to attract additional capital because of the structural realignment, thus assuring the continued growth of the property-casualty operations of the group.

(n) The holding company staff would provide critical support for the Board of Directors, helping them to be more effective in their fiduciary responsibilities.

(o) Specialized services such as investment advisory services, data processing services, planning services and others could be more effectively handled under the proposed holding company format.

(p) Carolina Securities Corporation, a Raleigh-based investment house, has recommended the purchase of Occidental's shares subsequent to the adoption of the Plan by the Occidental board to form a holding company.

(q) The exchange of shares would have the effect of increasing competition in the insurance business in North Carolina.

(r) No witness who testified at the hearing opposed the Plan or suggested it did not meet the statutory requirements.

14. The Petitioners have presented an affidavit by Ernst & Ernst and this Court finds pursuant thereto that the delay in the accomplishment of the proposed reorganization after December 31, 1977 could cost Occidental in excess of one million dollars in taxes over the next several years. The

Court further finds that this affidavit was given to the Respondent through his counsel on Monday, September 12, 1977.

15. The Court further finds that the Petitioners must seek and obtain the approval of a number of different regulatory authorities of both state and federal governments subsequent to the granting of any approval by the Respondent.

16. Respondent Ingram has stated under oath and this Court finds that as of September 12, 1977, he had not read the Petition filed by the Petitioners on June 8, and that he had not read the transcript of the July 19 hearing. There is no evidence that he has done so as of the date of this Order. He has admitted under oath and this Court finds that he had not looked at the Notices of Hearing and was not aware that the Petitioners had given notice to its shareholders and policyholders and the public of the July 19th hearing in six newspapers throughout the State of North Carolina. He has not read, considered or written anything in connection with the Petition as of September 12, 1977 and there is no evidence that he has done so as of the date of this Order. The Court further finds that Respondent, at the time he entered his final order, according to his own admission in the Order of September 20, 1977, had not fully studied the records before him.

17. The Plan of Exchange submitted with the Petition is in accordance with the provisions and requirements of Article 6A of Chapter 58 of the General Statutes of North Carolina.

18. Due notice of the public hearing of July 19, 1977 was given, as required by law, and all policyholders, shareholders and other interested persons were given an opportunity to appear at the public hearing and be heard. None appeared.

19. The proposed Plan of Exchange will permit the filing of consolidated income tax returns by OLIC Holding Corporation which could result in substantial tax savings to the policyholders and shareholders of Occidental. The business of insurance will continue to be the primary function of Occidental.

20. The proposed Plan of Exchange will not decrease Occidental's ability to carry on the insurance business.

21. Under the Plan of Exchange, Occidental will continue to be regulated by the North Carolina Department of Insurance.

22. Petitioners will be subject to regulation by the North Carolina Department of Insurance, the Securities and Exchange Commission and the insurance departments of any other jurisdiction in which an insurance business is conducted by Petitioners.

23. No officer, director or employee of Petitioners will receive any fee, commission or any other compensation or valuable consideration for promoting or assisting in the Plan of Exchange except as provided by the Plan.

CONCLUSIONS OF LAW

Upon the foregoing, the Court enters the following Conclusions of Law.

1. The defendant Ingram has a statutory duty pursuant to the provisions of G.S. Sec. 58-86.4 to enter an Order either approving or disapproving the Plaintiff's Petition filed with him on June 8, 1977.

2. The final Order of Respondent entered on September 20, 1977 was arbitrary and capricious in that, among other things, he considered matters outside the record and he was arbitrarily and unreasonably selective and considered only irrelevant matters so removed in time and relevancy as to be immaterial and did not consider more current matters all of which support Petitioners' Plan of Exchange and support the fact of Occidental's admittedly strong current financial status.

3. The conduct of the Respondent throughout this proceeding has been arbitrary and capricious in that, among other things, he has willfully engaged in a practiced and studied pattern of deliberate, persistent procrastination designed to defeat and deny the rights of the Petitioners and many thousands of Occidental's stockholders and policyholders.

4. The Order of the Respondent of September 20, 1977 and particularly Findings of Fact Nos. 7, 8, 12, 13 and 14, and the Conclusions of Law thereof are arbitrary and capricious and not supported by substantial evidence of record.

5. Respondent Ingram has violated G.S. Sec. 150A-30 by considering matters not in the record before him, and of which no notice was given to Petitioners as required by law.

6. The Plan of Exchange will not adversely effect (sic) the financial stability or management of Occidental or its general capacity or intention to continue the safe and prudent transaction of the insurance business. The interests of the policyholders and shareholders of Petitioners are protected. The terms and conditions of the Plan of Exchange are fair and reasonable and the Plan of Exchange is consistent with law and not in conflict with the public interest.

7. Petitioners have complied with all statutory requirements imposed by G.S. 58-86 et seq. for the effectuation of the Plan of Exchange set forth in their Petition of June 8, 1977, and they are entitled to the Respondent's approval as a matter of law.

8. Petitioners are entitled to a preliminary mandatory injunction commanding the Respondent to enter an order not inconsistent with the Findings of Fact and Conclusions of Law of this Order.

9. Respondents are entitled to the relief as set forth in G.S. Sec. 150A-51 and G.S. Sec. 58-9.3.

10. Unless Petitioners are granted the relief sought immediately, they will be irreparably harmed for which they have no adequate remedy at law.

11. The Respondent has engaged in a deliberate program of persistent procrastination and negligence and he has wilfully failed to carry out the statutory duties of his office, all to the prejudice of the rights of Petitioners, making prompt and affirmative action by this Court necessary.

On these findings and conclusions, the court reversed respondent's order of 20 September 1977 which had disapproved the petitioners' Plan of Exchange, remanded the matter to the

respondent, granted petitioners' prayer for a mandatory injunction, and ordered respondent, within twenty-four hours, to enter a new order not inconsistent with the court's findings of fact and conclusions of law.

From this order of Judge Godwin, the respondent Commissioner of Insurance appealed to the Court of Appeals. On 7 October 1977 this Court entered an order staying Judge Godwin's order pending appellate review by this Court. On 18 October 1977 the North Carolina Supreme Court dissolved the stay order without prejudice to respondent's appeal on the merits.

Ragsdale, Liggett & Cheshire by George R. Ragsdale, Peter M. Foley, William J. Bruckel, Jr., and Michael A. Swann for petitioners appellees.

Attorney General Edmisten by Assistant Attorney General Isham B. Hudson, Jr., for respondent appellant.

PARKER, Judge.

Two basic questions are presented by this appeal: First, whether the record adequately supports the court's findings and its conclusion that the respondent Commissioner of Insurance acted arbitrarily and capriciously when he disapproved petitioners' proposed plan of exchange, and, if that question be answered in the affirmative, second, whether the court exceeded its power and authority by issuing its mandatory injunction requiring the respondent to approve the plan. We answer the first question in the affirmative and the second in the negative, and accordingly we affirm the trial court's order.

By Ch. 938 of the 1967 Session Laws, our General Assembly enacted Art. 6A of G.S. Ch. 58. That statute sets forth the procedure to be followed when the directors and stockholders of a domestic insurance company with capital stock desire to effect a corporate reorganization so as to bring their company under a holding company type of corporate structure. Such a reorganization may result in very substantial advantages to the domestic insurance company and to its stockholders, as the record in this case clearly demonstrates. By enacting Art. 6A of G.S. Ch. 58, our General Assembly has recognized, and in so doing has established as the public policy of this State, that it is entirely proper for a domestic insurance company and its stockholders to enjoy those

advantages, provided the protective procedures prescribed in the statute are followed. Petitioners in this case have followed all prescribed statutory procedures.

Because there may be circumstances, not shown on the present record, in which such a corporate reorganization might work to the detriment of the domestic insurance company or its shareholders or policyholders, the statute provides that the corporate reorganization can be accomplished only after notice is given to all shareholders and to the public of a public hearing which the Commissioner of Insurance is directed to hold. At such a hearing any interested party has the right to appear and to become a party to the proceedings. The statute, G.S. 58-86.4(2), then provides:

> The Commissioner shall issue a written order approving the plan of exchange as delivered to him by the domestic company and the acquiring corporation and such modification therein as the board of directors of each such corporation shall approve, if he finds (i) that the plan, including all such modification, if effected, will not tend adversely to affect the financial stability or management of the domestic company or the general capacity or intention to continue the safe and prudent transaction of the insurance business of the domestic company, or of the acquiring corporation, if it is a domestic insurance company; (ii) that the interests of the policyholders and shareholders of the domestic company, and, if the acquiring corporation is a domestic insurance company, the policyholders of the acquiring corporation are protected; (iii) that the terms and conditions of the plan of exchange and the proposed issuance and exchange are fair and reasonable; and (iv) that the plan of exchange is consistent with the law and will not conflict with the public interest. If the Commissioner fails to approve the plan, he shall state his reasons for such failure in his order made on such hearing.
>
> Any order issued by the Commissioner hereunder shall be subject to court review in accordance with the provisions of G.S. 58-9.3.

It will thus be seen that, in the context of the present case, the above quoted portion of G.S. 58-86.4(2) mandates that "[t]he Commissioner *shall* issue a written order approving the plan of

exchange" (emphasis added), if, after holding the prescribed public hearing, he finds four things: (1) that the plan, if effected, will not tend adversely to affect the financial stability or management of the domestic insurance company or its general capacity or intention to continue the safe and prudent transaction of its insurance business; (2) that the interests of policyholders and shareholders are protected; (3) that the terms and conditions of the plan are fair and reasonable; and (4) that the plan is consistent with law and will not conflict with the public interest.

In the present case all of the detailed, complete, and voluminous evidence presented at the public hearing would support a favorable finding on each of the above four things. No shareholder or policyholder appeared at the public hearing in opposition to the plan. Members of the professional staff of the Insurance Department were present and participated in that public hearing. After reviewing the record, this professional staff recommended in writing entry of an order making favorable findings on the above four things. Nevertheless, after all of these proceedings had been completed and after a suit had been commenced in Superior Court to compel him to take some action one way or the other, the respondent Commissioner of Insurance, according to his own testimony given in his deposition taken on 12 September 1977, had never, as of that date, read the original petition or the proposed plan of exchange which had been on file in his office since 8 June 1977, had never read the transcript of the public hearing held by his hearing officer on 19 July 1977, and had never seen the written recommendation prepared by the professional staff of his Department. Yet eight days later, on 20 September 1977, he issued his order disapproving the plan.

The respondent's conclusion in his 20 September 1977 order that petitioner's plan is not in the public interest was based primarily on his Findings of Fact 7, 8, 12, 13, and 14. Finding of Fact No. 7 refers to a "Report of Examination" of Occidental for the years ending 31 December 1971 and 31 December 1972 which, according to the Finding, "indicates that the company had seriously depleted surplus as of December 31, 1971 which was substantially improved by December 31, 1972." The "Report of Examination" referred to was not introduced in evidence at the public hearing held 19 July 1977, and it does not appear in the record before us. Presumably it was a document in the files of

the Insurance Department of which respondent was taking official notice. If so, the respondent failed to comply with G.S. 150A-30 by making this known to petitioners "at the earliest practicable time" as required by that statute. More importantly, if the information in the document was relevant at all to the present inquiry, it was only remotely so as a matter of historic interest. Of far greater relevance were the facts, which respondent chose to ignore, that Occidental has earned in excess of one million dollars after taxes in each of the last four years, that from 1972 to the present it has shown a continuous and consistent increase in surplus, and that at the present time it is in an extremely strong financial condition. Similarly, respondent's Finding of Fact No. 8, that from 1970 through 1976 the management of Occidental has undergone a number of changes and that since 1970 six different people have held the office of President, if relevant at all to the present inquiry, is surely far less relevant than the fact, which is fully established by the record but which respondent chose to ignore, that during the most recent portion of that period Occidental has enjoyed a stable and extremely successful executive management. As to respondent's Findings of Fact 12, 13, and 14, there is simply no evidence in the record on which these could be based. In particular, nothing in the record supports respondent's finding in his Finding of Fact No. 13 that the "great amount of flexibility" in management provided by the holding company organizational framework "has caused harm to many North Carolina policyholders of other companies." The three "other companies" named in this finding are nowhere else mentioned in the entire record before us, and respondent has pointed to nothing which supports this finding. Finally, insofar as respondent's "Findings of Fact" are not factual findings at all but represent merely respondent's opinion as to the inadvisibility of a holding company organizational structure as a matter of public policy, we point out that the General Assembly itself determined the public policy of this State as being not inhospitable to a holding company organizational structure for domestic capital stock insurance companies when it enacted Art. 6A of G.S. Ch. 58, and nothing in the statute grants the respondent any power to change the public policy of this State as adopted by its General Assembly.

[1] In summary, the evidence in this record shows that for many weeks after the documents were available to him, the respondent

Commissioner of Insurance failed even to read the petitioners' petition, the proposed plan of exchange, the transcript of the public hearing conducted thereon, or the written recommendation made by the professional staff of his own Department; that he delayed and failed to render any decision until compelled to do so by a court order; that he then issued an order disapproving the plan on the basis of findings of fact, some of which are totally unsupported by any evidence while others are of only remote relevance; and that he refused to make findings of fact favorable to petitioners even though such findings are fully supported by a mass of convincing and uncontradicted evidence. We hold that the evidence fully supports the trial court's findings and its conclusion that the respondent acted arbitrarily and capriciously when he disapproved petitioners' proposed plan of exchange.

[2, 3] We now consider the second question presented by this appeal, whether the trial court exceeded its power and authority by issuing its mandatory injunction requiring the respondent to approve petitioners' plan. We hold that it did not. G.S. 58-86.4(2) provides that any order issued by the Commissioner of Insurance thereunder "shall be subject to court review in accordance with the provisions of G.S. 58-9.3." The scope of judicial review provided by G.S. 58-9.3 is somewhat limited, subsection (c) of that statute providing merely that "[t]he trial judge shall have jurisdiction to affirm or to set aside the order or decision of the Commissioner and to restrain the enforcement thereof." A substantially broader review is provided by G.S. Ch. 150A, our Administrative Procedures Act. G.S. 150A-43, which appears in Article 4, entitled "Judicial Review," of G.S. Ch. 150A, provides that any person aggrieved by a final agency decision who has exhausted all administrative remedies is entitled to judicial review under that Article, "unless adequate procedure for judicial review is provided by some other statute, in which case the review shall be under such other statute." In determining what is "adequate procedure for judicial review," as those words appeared in our former statute, G.S. 143-307, our Supreme Court held that an adequate procedure for judicial review exists "only if the scope of review is equal to that under G.S. Chapter 143, Article 33, 143-306 *et seq.*" *Jarrell v. Board of Adjustment*, 258 N.C. 476, 480, 128 S.E. 2d 879, 883 (1963). Effective 1 February 1976, G.S. 143-307 was replaced by G.S. 150A-43, and we now hold that "adequate

procedure for judicial review," as those words appear in present G.S. 150A-43, exists only if the scope of review is equal to that under present Article 4 of G.S. Ch. 150A. Since the scope of review provided in Art. 4, G.S. Ch. 150A is substantially broader than that provided by G.S. 58-9.3, we also hold that the scope of judicial review applicable in the present case is that provided for in Art. 4 of G.S. Ch. 150A.

G.S. 150A-51, entitled "Scope of review; power of court in disposing of case," provides:

> The court may affirm the decision of the agency or 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 agency findings, inferences, conclusions, or decisions are:
>
> * * *
>
> (5) Unsupported by substantial evidence admissible under G.S. 150A-29(a) or G.S. 150A-30 in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.
>
> If the court reverses or modifies the decision of the agency, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or modification.

[4] Respondent's counsel has correctly pointed out in his brief that "[t]he General Assembly has vested the Commissioner of Insurance, not the Superior Court, with the power to determine if the proposed exchange of stock meets the standards prescribed by G.S. 58-86.4." However, the powers conferred upon the Commissioner of Insurance by G.S. 58-86.4 are not so broad as to permit him arbitrarily to refuse to make findings favorable to petitioners when all of the evidence supports such findings and there is no competent evidence to the contrary. A clearly implied condition upon the powers conferred upon the Commissioner by G.S. 58-86.4 is that he will exercise them in good faith. If, as here, he acts arbitrarily, petitioners are not left helpless, nor are the courts powerless to grant them adequate relief. "In a case involving the exercise of discretion, mandamus lies to compel action by a public official but not to dictate his decision *unless there has*

been a clear abuse of discretion." *Sutton v. Figgatt*, 280 N.C. 89, 93, 185 S.E. 2d 97, 99 (1971). (Emphasis added.) As stated by Barnhill, J. (later C.J.), speaking for our Supreme Court, "[w]hen an officer acts capriciously, or in bad faith, or in disregard of law, and such action affects personal or property rights, the courts will not hesitate to afford prompt and adequate relief." *Pue v. Hood, Comr. of Banks*, 222 N.C. 310, 315, 22 S.E. 2d 896, 900 (1942). Moreover, it should be noted that under G.S. 150A-51 the court is given the power not only to reverse but also to *modify* a final agency decision *if the substantial rights of the petitioners may have been prejudiced because the agency findings or conclusions are arbitrary and capricious.* Such is the case here. An impartial study of the entire record in this case compels the conclusion that the Commissioner of Insurance abused the powers granted to him by the General Assembly when he arbitrarily and capriciously denied the petitioners the relief to which all of the competent evidence shows they were clearly entitled.

The order of Judge Godwin here appealed from is

Affirmed.

Judges BRITT and VAUGHN concur.

THE SEEMAN PRINTERY, INC. v. PHILIP C. SCHINHAN, INDIVIDUALLY AND D/B/A VON PRESS

No. 7615SC1011

(Filed 21 December 1977)

1. **Homestead and Personal Property Exemptions § 2— value of homestead exemption**

The value of the homestead exemption (i.e., land not subject to be sold under execution) remains at $1,000 as fixed in G.S. 1-372 and G.S. 1-386. Art. X, § 2(1) of the N. C. Constitution.

2. **Homestead and Personal Property Exemptions § 2— homestead exemption— allotment in hallway of home**

Constitutional and statutory enactments relating to the homestead exemption do not permit exemption of an entire usable dwelling house, regardless of its value. Therefore, defendant's $1,000 homestead was properly allotted, at defendant's direction, in an area in the hallway adjacent to the front door of defendant's house.

3. Homestead and Personal Property Exemptions § 2— appeal from allotment— question of law—no jury trial

Defendant was not entitled to a jury trial in the superior court upon his appeal of an allotment of his homestead by appraisers where no issue of fact was raised and the only issue raised was the legal one of whether statutory and constitutional provisions allowed defendant to claim his entire dwelling as his homestead exemption.

APPEAL by defendant from *Lee, Judge.* Judgment entered 12 November 1976 in Superior Court, ORANGE County. Heard in the Court of Appeals 1 September 1977.

On 27 May 1975 plaintiff obtained judgment against defendant for $5,900.00. No appeal was taken. After execution issued, defendant asked that his homestead be set aside, and appraisers were summoned and qualified as required by statute. Defendant owned his residence, a two-story dwelling located on a two acre lot in Chapel Hill, N.C. The appraisers valued this property at approximately $72,000.00, of which $19,000.00 represented the value of the land and $53,000.00 the value of the house. This property was subject to a deed of trust and to a prior judgment. Defendant, together with his wife, also owned other unimproved lots located in Orange and Franklin Counties, N.C. One of these was subject to a mortgage, and all were subject to the prior judgment.

When the sheriff and appraisers arrived at defendant's dwelling, the sheriff inquired of defendant what area he wished to select as his homestead. Defendant replied that he claimed his entire dwelling house with property sufficient to maintain the same and to provide ingress and egress, to which the sheriff responded that he could be allotted only an area equivalent to $1000.00 in value. Defendant objected, but when the sheriff again asked him to make a selection based on being allowed only an area equivalent to $1000.00 in value, defendant requested that the allotment of his homestead begin at a point at the front door of his dwelling. The appraisers thereupon allotted defendant's homestead in an area approximately 5 feet wide by 15.4 feet deep beginning at the front door of petitioner's dwelling and extending toward the rear of the house, the entire area so allotted being located in the hallway adjacent to the front door of defendant's house. This hallway area does not contain any plumbing, electrical, bedroom, bathroom, kitchen, or dining room facilities, nor does it afford access to the heating equipment located in the base-

ment of the house. The allotment made no provision for ingress or egress from the public road adjoining defendant's lot to the front door of his dwelling. The area allotted was subsequently described by exact metes and bounds as result of a survey commissioned by the sheriff. The appraisers made due return of their proceedings as required by G.S. 1-372.

In apt time defendant filed objections, and the matter was placed on the civil issue docket of the superior court for trial as provided in G.S. 1-381. At the hearing, defendant offered the testimony of an expert witness in the field of economic history who testified that in 1868, when the $1,000 homestead exemption was established, 250 acres of typical farm land in Orange County containing structures such as a house and barn could be purchased for $1,000. He further testified that $1,000 in 1868 would be worth $170,000 in 1976.

The court, sitting without a jury, concluded that defendant was not entitled to have the entire dwelling and surrounding real property included in his homestead exemption, and entered judgment affirming the appraisers' return. Defendant appealed.

Mount, White, King, Hutson, Walker & Carden by R. Hayes Hofler, III, for plaintiff appellee.

Weinstein, Sturges, Odom, Bigger & Jones, P.A., by T. LaFontine Odom for defendant appellant.

PARKER, Judge.

The first homestead exemption law in this State was enacted by our General Assembly by Ch. 61 of the Laws of 1866-67. By that statute a citizen of the State owning a freehold was permitted to petition for allotment of a homstead (i.e., land not subject to be sold under execution) "not exceeding one hundred acres if in the county, or one acre if in the city or town, which allotment may include a single dwelling and the necessary out-houses." This statute was short-lived, being quickly superseded by the provisions of the 1868 Constitution. Aycock, *Homestead Exemption in North Carolina*, 29 N.C.L. Rev. 143 (1950).

Article X, Sec. 2, of the 1868 Constitution provided as follows:

> Every homestead, and the dwellings and buildings used therewith, not exceeding in value one thousand dollars, to be selected by the owner thereof, or in lieu thereof, at the option of the owner, any lot in a city, town or village with the dwelling and buildings used thereon, owned and occupied by any resident of this State, and not exceeding the value of one thousand dollars, shall be exempt from sale under execution or other final process obtained on any debt. But no property shall be exempt from sale for taxes, or for payment of obligations contracted for the purchase of said premises.

Supplementary legislation implementing this constitutional provision was promptly enacted by Ch. 137 of the Public Laws of 1868-69. The major provisions of this statute have remained in effect throughout all of the years since its enactment and now appear in Article 32 of G.S. Ch. 1. This Article provides, in G.S. 1-371, for appointment of appraisers before levy is made upon the real estate of any resident who is entitled to a homestead. These appraisers are directed, in G.S. 1-372, to "value the homestead with its dwelling and buildings thereon, and lay off to the owner . . . such portion as he selects not exceeding in value one thousand dollars . . . ." If no selection is made by the owner, the appraisers are directed to make selection for him, "including always the dwelling and buildings used therewith." G.S. 1-376. Even when no execution has issued, a resident of the State entitled to the benefit of the homestead may, by petition to the clerk of superior court, have three "assessors" appointed, who "shall meet at the applicant's residence, and, after taking the oath prescribed for appraisers before some officer authorized to administer an oath, lay off and allot to the applicant a homestead with metes and bounds, according to the applicant's direction, not to exceed one thousand dollars ($1,000.00) in value . . . ." G.S. 1-386.

Article X, Section 2, of our State Constitution remained unchanged until 1 July 1971. On that date our revised Constitution, which was adopted by vote of the people at the general election held on 3 November 1970, became effective. Article X, Sec. 2(1), of our present Constitution provides:

> (1) *Exemption from sale; exceptions.* Every homestead and the dwellings and buildings used therewith, to a value fixed by the General Assembly but not less than $1,000, to be

> selected by the owner thereof, or in lieu thereof, at the option of the owner, any lot in a city or town with the dwellings and buildings used thereon, and to the same value, owned and occupied by a resident of the State, shall be exempt from sale under execution or other final process obtained on any debt. But no property shall be exempt from sale for taxes, or for payment of obligations contracted for its purchase.

[1] Comparison of former Article X, Section 2, with the present Article X, Sec. 2(1) reveals that the major difference is that under the former the homestead could not exceed $1000.00 in value, while under the present Constitution the homestead shall be to a value fixed by the General Assembly but not less than $1000.00. To date, our General Assembly has not amended G.S. 1-372 or G.S. 1-386 to increase the value of the homestead, and the value of the homestead remains at $1000.00 as fixed in those statutes.

It may well be, as defendant in the present case contends, that retention of the $1000.00 limitation largely vitiates the original purpose of the homestead exemption. Our Supreme Court once described that purpose as follows:

> The purpose of the homestead provision of the Constitution is to surround the family home with certain protection against the demands of urgent creditors. [Citations omitted.] It carries the right of occupancy free from levy or sale under execution so long as the claimant may live unless alienated or abandoned. It is the place of residence which the homesteader may improve and make comfortable and where his family may be sheltered and live, beyond the reach of those financial misfortunes which even the most prudent and sagacious cannot always avoid.

Williams v. Johnson, 230 N.C. 338, 343, 53 S.E. 2d 277, 281 (1949). That purpose certainly cannot be attained so long as the value of the exemption is limited to $1000.00. As the testimony of defendant's expert witness makes clear, while at one time a value of $1000.00 would permit the inclusion in a homestead exemption of a comfortable home, today the effects of inflation have been such that homes currently valued at $1000.00 either cannot be found or are unfit for human habitation. See Comment, *Does North Carolina Really Have a Homestead Exemption?* 2 Wake Forest Intra. L. Rev. 53 (1966). Be that as it may, our Constitution ex-

pressly vests in the General Assembly, not in the courts, the exclusive power to increase the value of the homestead exemption. Perhaps the refusal of our General Assembly to increase the value of the homestead exemption reflects a conscious determination that the exemption is no longer as economically or socially desirable as it was once thought to be. *See* Vukowich, *Debtors' Exemption Rights*, 62 Geo. L.J. 779, 797-807 (1974).

[2] Defendant's contention that our constitutional and statutory enactments relating to the homestead exemption should be so construed as to permit exemption of an entire usable dwelling house, regardless of its value, cannot be sustained. The short answer to this contention is that it requires that we ignore both the clear express language of our statutes and the interpretation which our Supreme Court has given to them. As already noted, G.S. 1-372 still limits the value of the homestead exemption to $1000.00, and G.S. 1-376, which was originally enacted as part of the same statute, must be read *in pari materia* and construed consistently with G.S. 1-372. Long ago our Supreme Court was confronted with a case in which the debtor claimed his homestead exemption in real property which the parties agreed was indivisible, the premises being a lot covered by a four-room house. In the Superior Court it was determined that the property had a value of $1200.00, and the Superior Court adjudged that a one-sixth undivided interest in the property should be sold and the proceeds applied to satisfy the claim of the creditor. On appeal by the debtor, our Supreme Court reversed, holding that this solution to the problem had no warrant in the provisions of the law. *Campbell v. White*, 95 N.C. 491 (1886). The opinion of the Court, written by Smith, C.J., then went on to observe as follows (pp. 494-95):

> This view disposes of the question of the ruling below and the subject matter of the appeal. But it is not improper for us to say that we do not see why a portion of the house, containing rooms of sufficient value, may not be set apart, as in an allotment of dower. There are inconveniences readily anticipated in such a subdivision, but they are unavoidable in giving effect to the law and preserving the rights of both debtor and creditor. It gives the former all the constitution allows—it exposes all beyond to the creditor's demand.
>
> A case was called to our attention, decided in a sister State, where the Court held that if the land was indivisible,

> the exemption should be allowed of the whole lot, though of value in excess of that fixed and limited by law, thus ignoring the creditor's rights altogether. We are not disposed to follow this ruling, for it would be just as reasonable to deny any homestead because none could be assigned of the value specified, and this would be to ignore the provisions made for the debtor. The right to the homestead and the right to subject the excess of the land to the payment of debts, are equally secured, and both must be recognized in making an apportionment.
>
> The course suggested would seem alone to be open, in consistency with the statute, until some legislation shall solve the problem, which the constitution will allow.

Although the above quoted language from the opinion of the Court in *Campbell v. White, supra,* may not have been essential to the actual holding of our Supreme Court in that case, it has never been disapproved. On the contrary, the case has been several times cited with approval by our Supreme Court and by respected authority. For example, 2 McIntosh, N.C. Prac. and Procedure, § 2026, p. 329, contains the following:

> The fact that the land is incapable of division, as where there is a dwelling on a small lot, will not justify the appraisers in giving the whole as a homestead, if it is worth more than $1,000, nor can the court order a sale and apportionment of the proceeds; but it is suggested that a part of the land and a part of the house might be set apart.

Carefully chosen language as to the nature of homestead exemption rights contained in an opinion of our Supreme Court, particularly when the decision in which it is contained has been cited with approval over a long span of years, tends to create a rule of property governing such rights so long as it is not superseded by a valid act of the General Assembly. See *Williams v. Johnson, supra.* To change such a rule of property at this late date by increasing the value of the homestead exemption would present a serious Constitutional question concerning the impairment of the obligation of contracts, at least insofar as the rights of present creditors are concerned. Accordingly, we hold that the rights of the parties in the present case are controlled by the language above quoted from the opinion in *Campbell v. White, supra,* and on authority of that opinion we reject defendant's contention

that he is entitled to claim his homestead exemption in his entire dwelling regardless of its value.

It may be conceded that the result reached in the present case is absurd and benefits neither the debtor nor his creditor. The debtor has his homestead in an area which is utterly useless to him, while the value of his remaining property from which his creditor must seek to collect his judgment has been substantially impaired. This unhappy result, however, was of the debtor's own choosing. More sensible alternatives were available to him. He had the right to designate the land from which his homestead should be allotted, and he could have chosen to have it allotted from a portion of his lot adjacent to the street and not covered by the dwelling or from one of the unimproved tracts. He chose the option most burdensome both to himself and to his creditor, and the Court may not grant him further relief.

[3] Defendant's remaining contention, that he was entitled to a jury trial in the Superior Court, is also without merit. No issue of fact was raised which called for jury determination. The parties expressly stipulated "that there was no question of fact as to whether the Sheriff and appraisers properly performed the procedural steps required under N.C. G.S. Sec. 1-369, *et seq.*," and no question was raised as to the valuations made by the appraisers. The only issue raised was the legal one of whether our statutes and Constitution permit the defendant to claim his entire dwelling as his homestead exemption. We agree with the trial court that he was not.

Affirmed.

Judges MARTIN and ARNOLD concur.

D. T. HURDLE v. RAYMOND T. WHITE AND THOMAS L. JONES

No. 761SC997

(Filed 21 December 1977)

1. Vendor and Purchaser § 1— contract to sell land—essential elements

Essential elements of an agreement to sell land include a designation of the vendor, the vendee, the purchase price, and a description of the land, the

subject matter of the contract, either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the contract refers.

2. Frauds, Statute of § 2.1; Vendor and Purchaser § 1— contract to sell land—check as memorandum of contract—sufficiency

A check drawn by plaintiff payable to defendant in the sum of $500 which bore the notation on its face, "For option on rest of Tuttle tract at at (sic) $45,000," which check had been endorsed and cashed by defendant was a sufficient memorandum of the parties' contract to meet the requirements of the statute of frauds, G.S. 22-2, since the check adequately identified the vendor and the vendee; the price was unequivocally stated as being $45,000; the amount of the purchase price was not rendered fatally uncertain because the check itself did not establish whether the $500 paid by the check was intended as a down payment to be applied against the purchase price or was intended only as consideration for granting the option, parol evidence being competent to ascertain the intended application of the $500; and the designation of the tract to be conveyed was sufficient to permit introduction of extrinsic evidence to identify the particular tract intended.

3. Vendor and Purchaser § 3— contract to sell land—sufficiency of description

In an action for the specific performance of a contract to convey land, plaintiff's evidence sufficiently identified the land in question where it tended to show that the words "Tuttle tract" appearing on the memorandum of the contract referred to a well known and unique tract of land; a deed was recorded conveying that tract by that name to defendant; there was no other tract in the county known by that name; the Tuttle tract could be clearly identified and accurately located upon the ground by reference to the metes and bounds description on a recorded plat; and failure of the description to pinpoint the location of the tract by village, town, city, county, state or country did not amount to a patent ambiguity.

4. Vendor and Purchaser § 3— contract to sell land—"rest of Tuttle tract"—sufficiency of description

In an action for the specific performance of a contract to convey land, description of the land in question as the "rest of Tuttle tract" was sufficient where plaintiff introduced evidence that defendant had earlier conveyed a sizeable portion of that tract to plaintiff and the "rest of Tuttle tract" referred to all of that tract which was still owned by defendant on the date of the transaction.

5. Vendor and Purchaser § 2— contract to convey land—time of performance—manner and form of payment

Where no time of performance of a contract to convey land is stated, the law implies that the option must be exercised within a reasonable time, and where the contract fails to specify the manner and form of payment, the contract is construed to require payment to be made in cash simultaneously with tender or delivery of the deed.

Hurdle v. White

APPEAL by plaintiff from *Small, Judge.* Judgment entered 15 September 1976 in Superior Court, PERQUIMANS County. Heard in the Court of Appeals 30 August 1977.

This is a civil action to obtain specific performance of a contract to convey land. At the time the action was commenced the land involved was owned by the original defendant, White. Thereafter, and after a notice of lis pendens had been filed, White conveyed the land to Jones, who was subsequently joined in this action as an additional party defendant.

Plaintiff alleged that on 15 July 1975 he and White entered into a contract whereby White gave plaintiff the option to purchase the land for the purchase price of $45,000.00, that plaintiff accepted the offer contained in the option and was ready, willing and able to pay the purchase price, but defendant refused to convey. The land involved was described in plaintiff's complaint as follows:

[L]ying and being in Belvidere Township, Perquimans County, North Carolina and more particularly described as follows:

> The Tuttle Tract containing 431.5 acres as described and delineated on plat prepared by T. J. Jessup, Registered Surveyor, entitled "Charlie Frank White Tuttle Tract-Craney Island, 431.5 acres, Belvidere Township, Perquimans County, North Carolina" which plat is now recorded in Plat Book 4, page 93 in the Office of the Register of Deeds of Perquimans County, excepting however, the lot formerly conveyed to Raymond T. White and wife, Della W. White, by deed now duly recorded in Deed Book 43, page 509 in the Perquimans County Register of Deeds Office, containing one acre of land together with a right-of-way and the right-of-way heretofore conveyed by Charlie Frank White recorded in Deed Book 52, page 346 and Deed Book 52, page 484 in the Perquimans County Office of the Register of Deeds, to Lawyers Title Insurance Corporation, Trustee and reference is made to said deeds for more particular description. This being a portion of the same property conveyed to Raymond T. White and wife, Della W. White, by certain deed recorded in Book 59, page 603 in the Perquimans County Office of the Register of Deeds.

> Excepting however from the above description is that property described in that certain deed from Raymond T. White and wife, Della W. White, and Thomas L. Jones, Trustee, recorded in Book 66, page 50 and containing 89.99 acres more or less.

Defendants denied the contract and, among other defenses, pled the statute of frauds.

At trial, plaintiff testified in support of the allegations in his complaint. To meet the defense of the statute of frauds, plaintiff introduced in evidence a check dated 15 July 1975 drawn by him payable to defendant White in the sum of $500.00, which check had been endorsed and cashed by White. On the front of the check appeared the notation:

> For option on rest of Tuttle tract at at (sic) $45,000.

Defendants stipulated that the signature of White endorsed on the back of the check was genuine and that White received the sum of $500.00 from negotiation of the check. Other evidence will be referred to in the opinion.

At the conclusion of plaintiff's evidence, the court granted defendants' motion for a directed verdict. Plaintiff appeals from the judgment dismissing his action.

Twiford, Seawell, Trimpi & Thompson by C. Everett Thompson for plaintiff appellant.

White, Hall, Mullen & Brumsey by Gerald F. White and John H. Hall, Jr., for defendant appellees.

PARKER, Judge.

The question presented by this appeal is whether the check was a sufficient memorandum of the contract to meet the requirements of our statute of frauds, G.S. 22-2, which provides that "[a]ll contracts to sell or convey any lands . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith . . . ." We hold that under the facts of this case the check endorsed by White was a sufficient memorandum of the contract, and accordingly we reverse the judgment dismissing plaintiff's action.

[1] A memorandum, by its very nature, is an informal instrument, and the statute of frauds does not require that it be in any particular form. A check can be a sufficient memorandum, provided it contains expressly or by necessary implication the essential elements of an agreement to sell. Annot., 153 A.L.R. 1112 (1944); Annot., 20 A.L.R. 363 (1922). A signature endorsed on the back of such a check has been held to be a sufficient signing. *Harper v. Battle*, 180 N.C. 375, 104 S.E. 658 (1920). Essential elements of an agreement to sell include a designation of the vendor, the vendee, the purchase price, and "a description of the land, the subject-matter of the contract, either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the contract refers." *Lane v. Coe*, 262 N.C. 8, 12, 136 S.E. 2d 269, 273 (1964).

[2] In the present case the check was clearly adequate to identify the vendor and the vendee, and the purchase price was unequivocally stated as being $45,000.00. The amount of the purchase price was not rendered fatally uncertain, as defendants contend, because the check did not of itself establish whether the $500.00 paid by the check was intended as a down payment to be applied against the purchase price or was intended only as consideration for granting the option. The writing clearly stated the price for the land, and parol evidence was competent to ascertain the intended application of the $500.00 payment. Moreover, although the price to be paid is certainly an essential element of a contract for the sale of land, our Supreme Court has held that where, as in the present case, the vendor is the party to be charged, our statute of frauds does not require that the price be stated in writing. *Lewis v. Murray*, 177 N.C. 17, 97 S.E. 750 (1919); *Bateman v. Hopkins*, 157 N.C. 470, 73 S.E. 133 (1911); *Thornburg v. Masten*, 88 N.C. 293 (1883). Thus, in the present case parol evidence was in any event competent to establish the purchase price.

[3] The land was described on the check as being the "rest of Tuttle tract." The designation of a tract of land by its popular name has long been recognized as sufficient under the statute of frauds to permit the introduction of extrinsic evidence to identify the particular tract intended. *Cherry v. Long*, 61 N.C. 466 (1868) (Land described as "Rayner tract" held sufficient); *Simmons v. Spruill*, 56 N.C. 9 (1856) (land described as the "William Wynn

farm" held sufficient); Annot., 23 A.L.R. 2d 6, at p. 32-39 (1952). *See also Smith v. Low*, 24 N.C. 457 (1842). In the present case plaintiff introduced in evidence a deed dated 24 October 1969 from Thomas L. Jones, Commissioner, to defendant White and his wife, Della (who is now deceased), recorded in Deed Book 59, Page 603 in the office of the Register of Deeds of Perquimans County. This deed described the lands conveyed thereby as follows:

> The Tuttle tract containing 431.5 acres as described and delineated on a plat prepared by T. J. Jessup, Register (sic) Surveyor entitled "Charlie Frank White-Tuttle Tract—Craney Island—431.5 acres, Belvidere Township, Perquimans County, North Carolina" which plat is now duly recorded in Plat Book 4 on page 93 in the office of the Register of Deeds of Perquimans County . . . .

Plaintiff also introduced in evidence the plat above referred to recorded in Plat Book 4 on page 93. This plat shows the boundary lines, marked by courses and distances and by reference to adjoining property owners, of a tract of land which is designated thereon as the "Tuttle Tract 431.5AC." No question was raised as to the accuracy or authenticity of this plat. Plaintiff also presented evidence that the tract of land shown on the plat was commonly known in the community as the "Tuttle Tract" and that no other property in the county was known by that name. Plaintiff's evidence thus shows that the words "Tuttle Tract" appearing on the check refer to a well-known and unique tract of land; that a deed has been recorded conveying that tract by that name to defendant White; that there is no other tract in Perquimans County known by that name; and that the Tuttle tract can be clearly identified and accurately located upon the ground by reference to the metes and bounds description on the recorded plat.

Defendants nevertheless contend that even if the description is sufficient as to a tract of land in Perquimans County, the failure of the description to pinpoint the location of the tract by "village, town, city, county, state or country" amounts to a patent ambiguity. We do not agree. The transaction must be evaluated in light of the circumstances of the parties.

> "The presumption is strong that a description which actually corresponds with an estate owned by the contracting party is intended to apply to that particular estate . . . ."

> . . . "When all the circumstances of possession, ownership and situation of the parties, and of their relation to each other and the property, as they were when the negotiation took place and the writing was made, are disclosed, if the meaning and application of the writing, read in the light of those circumstances, are certain and plain, the parties will be bound by it as a sufficient written contract or memorandum of their agreement."

Lewis v. Murray, 177 N.C. 17, 20-21, 97 S.E. 750, 752 (1919). *See also Norton v. Smith*, 179 N.C. 553, 103 S.E. 14 (1920). Here, plaintiff and defendant White were both citizens and residents of Perquimans County, and all the facts point inescapably to the conclusion that the "Tuttle tract" refers to a specific, clearly identified tract of land in Perquimans County. For other cases in which the omission of the town, township, or county has not been held to have created a patent ambiguity, see *Harper v. Battle*, *supra* (the location on the memorandum apparently referred to the location of the bank rather than the location of the land); *Gordon v. Collett*, 102 N.C. 532, 9 S.E. 486 (1889); *Thornburg v. Masten*, *supra*.

[4] Having concluded that the words "Tuttle tract" refer to a specific tract of land, we turn now to an examination of the entire description on the check which reads, "rest of Tuttle tract." The words "rest of" indicate that the description applies to only a portion of the Tuttle tract. "A contract to convey, excepting a part of the land described, is valid provided the land excepted can be identified." *Kidd v. Early*, 289 N.C. 343, 354, 222 S.E. 2d 392, 400 (1976). Admittedly, the mere words "rest of," standing alone, fail to identify the portion of the Tuttle tract which is to be excluded, but those words take on a clear meaning when interpreted in light of the circumstances of the parties and the land. *See Lewis v. Murray*, *supra; Norton v. Smith*, *supra*. At the time of the transaction, the defendant no longer owned the entire Tuttle tract because he had earlier conveyed an 89.99-acre portion of that tract to the plaintiff. The deed regarding that transaction was introduced into evidence and clearly indicated the portion of the Tuttle tract which had already been conveyed to the plaintiff. Defendant no longer owned the entire Tuttle tract, and it was therefore impossible for him to convey the entire tract to plaintiff

in this transaction. Plaintiff's earlier purchase of part of the Tuttle tract leads to the conclusion that the "rest of [the] Tuttle tract" refers to all of that tract which was still owned by defendant on the date of the transaction.

[5] The memorandum makes no mention of time of performance or manner of payment, but omission of those terms is not fatal. Where no time of performance is stated, the law implies that the option must be exercised within a reasonable time. *Lewis v. Allred*, 249 N.C. 486, 106 S.E. 2d 689 (1959); *Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 173 S.E. 2d 496 (1970); *Hardee's Food Systems, Inc. v. Hicks*, 5 N.C. App. 595, 169 S.E. 2d 70 (1969). Where the contract fails to specify the manner and form of payment, the contract is construed to require payment to be made in cash simultaneously with tender or delivery of the deed. *Kidd v. Early, supra.*

Furthermore, the language of the memorandum is adequate to show that there was a meeting of the minds of the parties sufficient to establish the existence of a contract. *See Chason v. Marley*, 224 N.C. 844, 32 S.E. 2d 652 (1945). Although a contract may be held invalid if material portions are left open for future agreement, *Kidd v. Early, supra*, we have held that the memorandum in this case contains the essential elements of a contract. While it is true that plaintiff sought to have an option drafted later which was to include all of the terms of the transaction, the memorandum contains all of the essential terms required by the Statute of Frauds, and later negotiations regarding subordinate features of the agreement do not negate the existence of a contract. *Yaggy v. B.V.D. Co., supra.*

Therefore, we conclude that the memorandum in the form of a check in this case contained only a latent ambiguity, that extrinsic evidence was admissible to aid the court in applying the description to the exact property to be sold, and that plaintiff offered sufficient extrinsic evidence to require submission of the case to the jury. Upon a new trial, defendants will have the opportunity to present evidence in support of the allegations in their answer pleading that the option was obtained by actual fraud and misrepresentation. Upon the record before us, their motion for directed verdict should have been denied.

Reversed and remanded.

Judges MARTIN and ARNOLD concur.

REA J. ELMWOOD v. ROBERT E. ELMWOOD

No. 7712DC54

(Filed 21 December 1977)

1. **Garnishment § 1— military retirement pay—garnishment for alimony**

Military retirement pay constitutes wages for the purpose of garnishment and is not prospectively subject to garnishment for an indebtedness arising from an order for the payment of alimony under North Carolina law.

2. **Garnishment § 1— 60-day exemption**

Defendant's military retirement pay was entitled to the 60-day exemption from the time of the garnishment order as provided by G.S. 1-362 where defendant, by affidavit, showed that his retirement pay is necessary to support his second wife and their natural and adopted children; therefore, the district court erred in distributing military retirement pay garnished from defendant to defendant's former wife in payment of arrearages in alimony and child support where all of such money was earned either prior to the garnishment order or within 60 days thereafter.

3. **Divorce and Alimony § 21.3— failure to pay alimony and child support—contempt**

The trial court did not err in finding defendant in contempt for failure to make the alimony and child support payments required by a court order where a contempt hearing was held at which defendant presented evidence, and the court found that defendant admitted his noncompliance with the order and found that his noncompliance was willful.

APPEAL by defendant from *Brewer, Judge*. Orders appealed from entered on 12 October, and 20 October 1976, in District Court, CUMBERLAND County. Heard in the Court of Appeals 25 October 1977.

This action arises from Rea J. Elmwood's (plaintiff) attempt to collect arrearages accrued from a February 1968 alimony and child support order directing Robert E. Elmwood (defendant) to pay $475 per month ($275 alimony and $200 child support) to plaintiff. In July 1975 plaintiff filed a petition for attachment of defendant's military retirement pay in order to collect an alleged $29,325 in arrearages of alimony and child support accumulated

since May 1970. On 14 July 1975, an order of attachment signed by District Court Judge Herring was filed. A notice of levy and a summons to garnishee, both directed to the Secretary of Defense and the U.S. attorney were also filed on that date. Service of levy was had on the Secretary of Defense and U.S. District Attorney by the Sheriff's forwarding the order of attachment, the summons to garnishee and notice of levy as provided by statute. The U.S. Marine Corps answered stating that at the time of service of the summons, 21 July 1975, the U.S. Marine Corps was indebted to the defendant in the amount of $531.09 in retirement pay; that since the time of the summons the U.S. Marine Corps had become additionally indebted to the defendant in the amount of $25.29 per day in retired pay for a total indebtedness of $1049.80. The U.S. attorney answered stating that from 11 July 1975 until 11 September 1975 (date the answer was filed), the defendant's retirement pay had been withheld pursuant to the order of attachment and notice of levy issued by the District Court and that as of 11 September 1975 there was a total amount due and owing to the defendant of $1,871.63. On 9 March 1976 the District Court entered an order vesting title directing the United States to pay into the court the amounts which had been withheld from the defendant and all amounts becoming due to the defendant in the future. The $1,871.61 paid into the court by the garnishee was disbursed to the plaintiff pursuant to a May 1976 disbursement order. On 23 March 1976 the U.S. attorney filed a motion to amend the judgment to comply with G.S. 1-440.28 which limits recovery to the amount owed to the defendant by the garnishee at the time of the judgment and G.S. 110-136 which limits garnishment for child support to 20% of the parent's monthly income. The court denied the motion, reasoning that 42 U.S.C.A. 659 permits the garnishment of defendant's retirement pay for the enforcement of legal obligations to provide child support and alimony payments; and that G.S. 110-136 did not repeal or overrule G.S. 1-440.2 which would permit the attachment and garnishment of defendant's military retirement pay in actions for alimony and child support. Defendant then filed a motion seeking relief from the garnishment order. Defendant asserted that the order vesting title was an invalid judgment because: (1) the defendant's prospective earnings in the form of military retirement pay are not attachable in that they do not constitute property owned by the defendant, or a debt due to him on the day the

order was filed; and (2) the garnishment order failed to accord him the 60-day exemption provided by G.S. 1-362. On 12 October 1976, the court denied the defendant's motion to dissolve the order of garnishment and to give effect to the statutory exemption of G.S. 1-362, reiterated the 9 March 1976 order, and on 20 October confirmed the May 1976 disbursement order.

Also on 20 October 1976 the court found the defendant to be in contempt of court for his willful noncompliance with the terms of the 1968 order. The court sentenced him to 30 days in jail but allowed the defendant to purge himself by paying off the child support and alimony arrearages. On 27 October 1976 the defendant authorized the garnishee to pay into the Clerk of Superior Court of Cumberland County 20% of all accrued and future retirement pay earnings as they become due and owing to the defendant until the child support arrearage of $12,400 is fully paid and satisfied. The garnishee continues to withhold the defendant's retirement pay. The defendant has not fully complied with the conditions upon which the contempt order was suspended, and the defendant has appealed.

Nance, Collier, Singleton, Kirkman and Herndon, by James R. Nance, for plaintiff appellee.

D. W. Grimes for defendant appellant.

MORRIS, Judge.

The defendant appellant's brief displays a total disregard for our rules of appellate procedure. The arguments present a question of law which should be answered, however, and we have, in the exercise of our discretion, searched the record and briefs as they apply to the important questions raised by this appeal.

The defendant presents several arguments to the Court in "stream of consciousness" form. The record, however, contains but three exceptions and three assignments of error. We, therefore, consider the defendant's three principal arguments. They are: (1) that the trial court erred in garnishing his military retirement pay as it is a wage earned from day to day and does not constitute property or a debt whose situs is within this State; (2) that the trial court erred in garnishing wages earned and accrued by the defendant within the 60 days preceding the garnishment order in violation of G.S. 1-362; and (3) that the trial court

erred by finding the defendant to be in contempt of court pursuant to G.S. 1A-1, Rule 70, without a hearing and without finding the defendant to be in willful disobedience of a court order.

[1] In response to the defendant's first two arguments the plaintiff asserts that military retirement pay is a debt or vested right of the defendant's accruing to him as a result of his years in service and that the pay does not constitute wages and is, therefore, subject to garnishment. Plaintiff also asserts that the 60-day exemption under G.S. 1-362 does not protect the retirement pay coming to the defendant because the money was actually earned while the defendant was on active duty in the service, a time prior to the 60-day exemption. At issue is the nature of military retirement pay. If it constitutes wages then no portion not earned at the time of the entry of the order can be garnished under North Carolina law for an indebtedness accruing from nonpayment of alimony. *Motor Finance Co. v. Putnam*, 229 N.C. 555, 50 S.E. 2d 670 (1948). If military retirement pay constitutes wages then the defendant would also be entitled to the 60-day exemption of G.S. 1-362. *Goodwin v. Claytor*, 137 N.C. 225, 49 S.E. 173 (1904). This Court has recently addressed this issue and decided that "military retirement pay is the equivalent of active duty pay for purposes of garnishment, and active duty pay clearly constitutes wages not subject to garnishment for alimony under North Carolina law. . ." . *Phillips v. Phillips*, 34 N.C. App. 612, 239 S.E. 2d 743 (1977). See also Tax Reduction and Simplification Act of 1977 (Public Law 95-30, 23 May 1977) Title V, § 501 "Clarification of Garnishment Provisions". If plaintiff's position that retirement pay is a debt due by the government were correct, she would be aided by 42 U.S.C.A. § 659 which requires consent by the United States to garnishment and similar proceedings for the enforcement of child support and alimony obligations. That statute is as follows:

> "Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States (including any agency or instrumentality thereof and any wholly owned Federal corporation) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States were a private person, to legal process

> brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments."

This statute merely provides that defendant's military retirement pay may be subjected to garnishment as if the United States were a private person residing in North Carolina. Having concluded that defendant's military retirement pay constitutes wages for the purpose of garnishment and as such is not prospectively subject to garnishment for an indebtedness arising from an order for the payment of alimony under North Carolina law, it was error for the District Court to garnish the defendant's military retirement pay for the purpose of paying the indebtedness resulting from arrearage in payment of alimony. See *Watson v. Watson*, 424 F. Supp. 866 (E.D.N.C. 1976). Recently our legislature has enacted G.S. 110-136 authorizing the garnishment of 20% of an individual's wage for the payment of child support. This statute does not, however, alter the longstanding rule prohibiting the garnishment of prospective wages for the nonpayment of alimony and other debts. *Phillips v. Phillips, supra; Motor Finance Co. v. Putnam, supra.*

[2] The plaintiff's answer to the defendant's second assignment of error contending that the trial court erred in distributing the $1,871.63 withheld from the defendant and paid into the court by the garnishee was based on the assumption that military retirement pay did not constitute wages and that the pay was earned by the defendant when he was on active duty, prior to the 60-day exemption of G.S. 1-362. We have, however, concluded that military retirement pay does constitute wages for the purpose of garnishment and as such is earned from day to day. Therefore, the defendant's military retirement pay was entitled to the 60-day exemption. The record discloses that all the money paid into the court by the garnishee was earned either within the 60 days next preceding the order of attachment and garnishment, or after the issuance of the garnishment order. The plaintiff contends that the defendant abandoned his right to the protection of G.S. 1-362 when he abandoned his North Carolina residency. Our Supreme Court, however, has extended the protection of this exemption to residents and nonresidents alike. *Goodwin v. Claytor, supra.* Defendant, by affidavit, has shown that his retirement pay is necessary to support his wife and two children by that marriage

and an adopted child of his first marriage living with him and his second wife. G.S. 1-362 provides that earnings for the period of 60 days "next preceding the order", cannot be applied to the debt "when it appears, by the debtor's affidavit or otherwise, that these earnings are necessary for the use of *a family supported wholly or partly by his labor*". (Emphasis supplied.) It was, therefore, error for the District Court to garnish and distribute the sum paid into the court by the garnishee.

Having concluded that the court's order was in error in garnishment of defendant's military retirement pay and in the distribution of the funds paid into the court, we need not discuss the alternative arguments posed by the defendant regarding due process in prejudgment garnishment of wage proceedings and the situs of the military retirement pay should we conclude it was an indebtedness.

[3] The defendant's third and last assignment of error is directed to the entry of judgment by the District Court finding him to be in contempt. The defendant argues that no hearing was held and that the court did not find the defendant to be in willful disobedience of the court order, both being requirements before the defendant may be found to be in contempt. This argument is without merit. The record discloses that a hearing was held at which the defendant presented evidence. The court, in its order finding the defendant in contempt, found as a fact that the defendant had admitted his noncompliance and found the noncompliance to be willful. The trial court complied with the procedural requirements of finding the defendant in contempt, and the contempt order remains valid. The conditions by which the defendant may purge himself of the contempt order are, however, invalid so far as they are inconsistent with this opinion.

The result then, is this: The trial court erred in its order of 12 October 1976 in failing to allow defendant's motion for dissolution of the orders in the nature of attachment and for effectuation of the G.S. 1-362 earnings exemption and also erred in its order of 20 October 1976 in confirming disbursement of $1,871.61 garnished earnings. Defendant's first two assignments of error are sustained. The third and last assignment of error is without merit and overruled because the court did not err in adjudging defendant to be in contempt.

Reversed in part; affirmed in part.

Judges VAUGHN and CLARK concur.

GEORGIA R. UPCHURCH v. C. STUART UPCHURCH, SR.

Nos. 7710DC109 and 7710DC115

(Filed 21 December 1977)

1. **Divorce and Alimony § 18.16; Appeal and Error § 16.1— appeal from alimony award pending—subsequent order by trial court improper**

The trial court had no authority to enter an order with respect to award of attorney fees where a final order had previously been entered in the alimony action, and defendant's appeal therefrom was pending.

2. **Divorce and Alimony § 18.11— dependent spouse's earning capacity—necessity for findings**

Though G.S. 50-16.5(a) specifies the earning capacity of the parties as one of the factors the court should consider in determining the amount of alimony, the court is not required in all cases to make findings of fact on the question of the dependent spouse's earning capacity.

3. **Divorce and Alimony § 18.11— dependent spouse's earning capacity—necessity for findings**

The trial court in an action for alimony did not err in failing to find facts with respect to the dependent spouse's earning capacity where the evidence tended to show that she had very limited earning capacity; the court found that her monthly requirements amounted to $860; and in awarding her only $600 per month, the court by implication was saying that plaintiff would have to rely on her own resources or labors for the remaining $260.

4. **Divorce and Alimony § 18.13— amount of alimony—defendant's ability to pay**

The trial court did not abuse its discretion in ordering defendant to pay alimony of $600 per month where the evidence tended to show that defendant's taxable income for the year previous to the hearing was slightly over $30,000; his projected income for the year of the hearing was $23,000; plaintiff was defendant's only dependent; defendant estimated his personal living expense at $800 per month; and defendant's debts were substantial but not so pressing as to relieve him of his lawful obligation to support his wife.

5. **Divorce and Alimony § 18.14— alimony—possession of home**

The trial court in an action for alimony did not abuse its discretion in concluding that plaintiff was entitled to possession of the parties' home. G.S. 50-17.

6. Divorce and Alimony § 18.16— alimony pendente lite—counsel fees—when award may be made

At any time a dependent spouse can show that she has the grounds for alimony pendente lite, the court is authorized to award fees to her counsel, and "at any time" includes times subsequent to the determination of the issues in her favor at the trial of her cause on its merits. G.S. 50-16.4.

7. Divorce and Alimony § 18.16— alimony pendente lite—attorney fees—findings required

The trial court erred in awarding attorney fees in an alimony action without making findings of fact showing that the fees were allowable and the amount awarded was reasonable.

APPEAL by defendant from *Barnette, Judge.* Orders entered 29 November 1976 and 30 December 1976 in District Court, WAKE County. Heard in the Court of Appeals 29 November 1977.

Plaintiff instituted this action to recover temporary and permanent alimony. In her complaint she alleged numerous grounds for divorce from bed and board and asked for alimony, possession of an automobile, possession of the residence formerly occupied by the parties, and attorney fees.

On 18 October 1976, the court entered judgment answering the substantive issues in favor of plaintiff, concluded that plaintiff was entitled to permanent alimony, and ordered a hearing to determine the amount of alimony. Defendant did not appeal from this judgment.

Following a hearing on 4 November 1976 the court, on 29 November 1976, entered an order finding facts summarized in pertinent part as follows:

At the time of trial on 30 September 1976, and at the time of the hearing on 4 November 1976, plaintiff was unemployed. She does not have any weekly, bi-weekly or monthly income. She has received $10,000 inheritance from her mother's estate; and she, along with three brothers and sisters, own a home which they inherited from their mother and said home has a value of approximately $25,000.

Defendant is employed as the owner-operator of Village Gulf in Raleigh, North Carolina. He filed a Federal income tax return showing income slightly in excess of $30,000 in 1975. He called as his witness his accountant who testified that defendant's projected income for 1976 is $23,000.

The cost of plaintiff's average monthly needs is $860. She owes accrued debts in the amount of $2,643.41 which were incurred prior to the separation of the parties.

Since the separation of the parties, plaintiff has been residing in a home owned by them as tenants by the entirety. She has been living in said home for approximately four years, the home is suitable for her needs and there is no present indebtedness thereon.

Defendant testified that he is not paying any house or apartment rent at the present time and spends his nights with various people without any expense to him. The court is unable to determine defendant's average monthly expenses other than $300 per month which he is paying his attorney.

Plaintiff has had possession of a 1968 Cadillac automobile which is registered in the name of the service station owned by defendant.

Based on said findings of fact, the court concluded and ordered that: (1) defendant pay plaintiff $600 per month permanent alimony; (2) plaintiff be given possession of the 1968 Cadillac; (3) plaintiff be awarded possession of the home owned jointly by the parties; and (4) defendant pay plaintiff's attorney $4,500.

On 6 December 1976 defendant filed notice of appeal from the 29 November 1976 order. On 30 December 1976 the court entered another order finding facts with respect to its award of fees to plaintiff's attorney and ordering again that defendant pay plaintiff's attorney $4,500. Defendant appealed from that order.

On 2 December 1977, the Court of Appeals ordered that the two appeals be consolidated for purposes of argument, consideration and opinion.

Gerald L. Bass, attorney for plaintiff-appellee.

Ragsdale & Kirschbaum, by William L. Ragsdale, attorney for defendant-appellant.

BRITT, Judge.

APPEAL FROM 30 DECEMBER 1976 ORDER

[1] Defendant contends that the trial court had no authority to enter the 30 December 1976 order. The contention has merit.

A final order was entered by the court on 29 November 1976. Defendant gave notice of appeal from the order and the court set the appeal bond on 6 December 1976. Thereupon, the trial court was divested of jurisdiction except to settle the record on appeal. *Wiggins v. Bunch*, 280 N.C. 106, 184 S.E. 2d 879 (1971); *Collins v. Collins*, 18 N.C. App. 45, 196 S.E. 2d 282 (1973). For that reason the 30 December 1976 order is vacated.

APPEAL FROM 29 NOVEMBER 1976 ORDER

Defendant contends first that the trial court erred in failing to find from the evidence that plaintiff had earning capacity. Considering the evidence presented in this case, we find no merit in the contention.

Plaintiff's evidence tended to show that she was fifty-three years old, that she completed high school, that she attended business college for two months, and that her entire job experience outside of the home consisted of part-time secretarial work for her husband's service station business.

[2] Defendant argues that the trial court was *required* to make findings with respect to plaintiff's earning capacity and cites *Spillers v. Spillers*, 25 N.C. App. 261, 212 S.E. 2d 676 (1975). We do not agree with the defendant's interpretation of *Spillers*. In that case this court held that it was proper for the trial court to *consider* the wife's earning capacity in determining the amount of alimony to be paid by her husband. G.S. 50-16.5(a) specifies the earning capacity of the parties as one of the factors the court should consider in determining the amount of alimony, but we do not think that in all cases the court is required to make findings of fact on the question of the dependent spouse's earning capacity.

[3] In the case at hand the court found that plaintiff's monthly requirements amounted to $860. In awarding her only $600 per month, the court by implication was saying that plaintiff would have to rely on her own resources or labors for the remaining $260. Considering plaintiff's very limited earning capacity as shown by the evidence, and the difference between her needs and the amount awarded as aforesaid, we hold that the court did not err in failing to find facts with respect to her earning capacity.

[4] Defendant contends next that the trial judge did not make sufficient findings of fact with respect to his ability to pay alimony, his average monthly expenses, and the amount of debts owed by him. He also contends that the court erred in requiring him to pay $600 per month alimony. We find no merit in these contentions.

As stated above, defendant's income tax return disclosed that his taxable income for 1975, the year previous to the hearing, was slightly in excess of $30,000, and his accountant projected his taxable income for 1976, the year in which the hearing was conducted, to be $23,000. The evidence showed that plaintiff was defendant's only dependent and he estimated his personal living expense at $9,600 annually or $800 per month. The amount of alimony defendant was ordered to pay annually was $7,200, making a total of $16,800 for alimony and his expenses. With a projected income of $23,000, this left defendant $6,200 with which to pay debts and his taxes. (It will be noted that plaintiff would have to pay income taxes on the alimony.) While the evidence disclosed that defendant's debts were substantial, caused primarily by the high standard of living the parties had established, it failed to show debts so pressing as to relieve defendant of his lawful obligation to support his wife.

With regard to the amount of alimony allowed, ordinarily this is a matter within the discretion of the trial judge and his decision will not be disturbed absent a showing of abuse of discretion. *Spillers v. Spillers*, supra; *Gibson v. Gibson*, 24 N.C. App. 520, 211 S.E. 2d 522 (1975). We perceive no abuse of discretion.

[5] Defendant contends the trial court erred in concluding that plaintiff is entitled to possession of the home and in awarding possession to her. We find no merit in this contention.

It is clear that the court has the power to grant the possession of real estate as a part of alimony. G.S. 50-17; 5 Strong's N.C. Index 3d, Divorce and Alimony, § 18.14. *Yearwood v. Yearwood*, 287 N.C. 254, 214 S.E. 2d 95 (1975). Defendant argues that the home in question is considerably larger than plaintiff needs and one that will be expensive to maintain. Here again we have a decision that was in the discretion of the trial judge and we perceive no abuse of discretion.

Finally, defendant contends the trial court erred in concluding that plaintiff's counsel was entitled to a reasonable fee and ordering him to pay plaintiff's counsel $4,500 without finding facts justifying the award. This contention has merit.

First, we address the question whether the court had the authority to require defendant to pay plaintiff's counsel any fee. We hold that the court had that authority.

Defendant argues that when the court awards *permanent* alimony it has no authority to order the payment of counsel fees and cites *Rickert v. Rickert*, 282 N.C. 373, 193 S.E. 2d 79 (1972). We think defendant misconstrues the opinion in that case. *Rickert* merely holds that in order for the court to award fees to counsel for a dependent spouse entitled to alimony, there also must be a showing that the dependent spouse has insufficient means to defray the necessary expenses of the litigation in which she receives relief. In *Rickert*, the Supreme Court held that plaintiff wife was not entitled to recover attorney fees when the record disclosed that she owned stocks and bonds valued at $141,362.50 and received an annual income therefrom in the amount of $2,253.

Former G.S. 50-16 (repealed and replaced in 1967 by G.S. 50-16.1, *et seq.*) clearly stated that counsel fees in alimony without divorce actions could be awarded after a final determination of the issues. In *Stanback v. Stanback*, 270 N.C. 497, 155 S.E. 2d 221 (1967), the Supreme Court upheld an award of counsel fees made after a trial of the cause on the merits.

With respect to the former statute (G.S. 50-16), Dr. Lee in his treatise on North Carolina Family Law, Vol. II, § 148, p. 205, said: "N.C. Gen. Stat. § 50-16 expressly authorizes an allowance of reasonable counsel fees to the wife in an action for alimony without divorce. . . . The right of the wife to counsel fees is so strongly entrenched in our practice as to be considered an established legal right."

In substituting G.S. 50-16.1 *et seq.* for repealed G.S. 50-16 (Ch. 1152, 1967 S.L.), the General Assembly followed very closely the recommendations of a study committee of the North Carolina Bar Association on family law. The primary purpose of the new legislation was to clarify the existing statutes on alimony and to write into the statutes established case law on the subject. We do

not believe that it was the intention of the Assembly to make drastic changes in the substance of the law previously existing.

G.S. 50-16.4 provides:

> *Counsel fees in actions for alimony.* — At any time that a dependent spouse would be entitled to alimony pendente lite pursuant to G.S. 50-16.3, the court may, upon application of such spouse, enter an order for reasonable counsel fees for the benefit of such spouse, to be paid and secured by the supporting spouse in the same manner as alimony.

G.S. 50-16.3 provides in pertinent part:

> *Grounds for alimony pendente lite.* — (a) A dependent spouse who is a party to an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce, shall be entitled to an order for alimony pendente lite when:
>
> (1) It shall appear from all the evidence presented pursuant to G.S. 50-16.8(f), that such spouse is entitled to the relief demanded by such spouse in the action in which the application for alimony pendente lite is made, and
>
> (2) It shall appear that the dependent spouse has not sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof. ***

[6] While the language of G.S. 50-16.4 could be improved upon, we do not think that its effect is to restrict the award of counsel fees to alimony pendente lite proceedings and actions of the court pursuant thereto. We construe the statute to say that *at any time* a dependent spouse can show that she has the grounds for alimony pendente lite—(1) that she is entitled to the relief demanded in her action or cross-action for divorce from bed and board or alimony without divorce, and (2) that she does not have sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof—the court is authorized to award fees to her counsel, and that "at any time" includes times subsequent to the determination of the issues in her favor at the trial of her cause on its

merits. See § 148, 1976 Cumulative Supplement, 2 Lee's N.C. Family Law, 3rd Ed.

We now consider defendant's contention that the award of attorney fees was not supported by sufficient findings of fact.

[7] As indicated above, counsel fees are not allowable in all alimony cases, only those that come within the ambit of G.S. 50-16.4 and G.S. 50-16.3. *Rickert v. Rickert, supra; Guy v. Guy*, 27 N.C. App. 343, 219 S.E. 2d 291 (1975). In order to award attorney fees in alimony cases the trial court must make findings of fact showing that fees are allowable and that the amount awarded is reasonable. In the case at hand the court did neither. Therefore, that part of the 29 November 1976 order awarding counsel fees is vacated and the cause is remanded for further proceedings on that question.

Order entered 30 December 1976 vacated.

Order entered 29 November 1976 affirmed in part, vacated in part, and cause remanded.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. BARBARA JEAN EATMAN, AKA BARBARA JEAN BRASWELL, AKA BARBARA JEAN MELVIN

No. 777SC587

(Filed 21 December 1977)

1. Criminal Law § 91.7— motion for continuance—location of witnesses

The trial court did not err in the denial of defendant's motion for a continuance in order to locate witnesses where the substance of the testimony the witnesses were expected to give was not divulged; the only information given was that the witnesses were defendant's husband, whose attendance at trial was "no problem," and defendant's brother, a transient who "probably" would be called as a witness; and defense counsel admitted that the witnesses had not been subpoenaed.

2. Robbery § 4— use of firearm

The State's evidence was sufficient for the jury to find that defendant committed a robbery with a firearm where both the victim and defendant's accomplice testified that one of the robbers had a gun pointed in the victim's face during the incident.

3. **Criminal Law § 126— instruction on unanimity of verdict**

The trial court's instruction that a unanimous verdict "means, of course, that if and when you agree, then all twelve of you must agree in that verdict" could not have led the jury to believe that a minority of the jury members must yield to a majority.

4. **Criminal Law § 114.2— instructions—consistency of trial testimony and prior statements—no expression of opinion**

The trial judge did not comment upon the evidence in violation of G.S. 1-180 when he instructed the jury that there was some evidence tending to show that defendant and her accomplice made statements to an officer which were "consistent" with their trial testimony where the court also instructed the jury that it should not consider the prior statements to the officer if they were not consistent with the in-court testimony of the witnesses.

5. **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 to the jury an issue of defendant's guilt of common law robbery where all of the evidence showed that a gun was used in the crime.

APPEAL by defendant from *Smith (Donald L.), Judge.* Judgment entered 17 March 1977 in Superior Court, WILSON County. Heard in the Court of Appeals 16 November 1977.

Defendant was indicted for armed robbery. She pleaded not guilty and was tried by a jury. State's evidence tended to show that on 20 December 1976 Dorothy Jean Parker was shopping at Penney's. Around 8:00 p.m. she left the store, went to her car in the parking lot and got into the back seat to lay down some packages. Two black girls, one tall and the other short, followed her to the car. The tall one held a gun in her face, while the short one grabbed her pocketbook and ran. The pocketbook contained several hundred dollars.

Janice Carolyn Batts is charged with the same offense as defendant. She testified that on 20 December 1976 she, defendant and another person went to Penney's for the purpose of snatching pocketbooks. Defendant pointed a gun at Dorothy Parker and asked Mrs. Parker for her pocketbook. Mrs. Parker refused to give up the pocketbook, and Janice Batts snatched it and ran. Johnny Moore, a detective with the Wilson Police Department, testified in corroboration of the preceding facts.

Defendant's evidence tended to show that she was in Fremont with her husband trying to reconcile her marriage from 12 December until 23 December 1976. Defendant lives in Bailey and

knows Janice Batts, but she did not participate in an armed robbery with Janice Batts at Parkwood. Janice Batts and defendant ceased to associate with one another prior to 20 December 1976 when Batts accused defendant of taking her gun. Defendant believes Batts is trying to get even with defendant because of the gun and because defendant refused to have sexual relations with her.

From a verdict of guilty and judgment entered thereon sentencing defendant to twenty (20) to twenty-five (25) years in prison, defendant appealed.

Attorney General Edmisten, by Associate Attorney Acie L. Ward, for the state.

Fitch, Butterfield & Sumner, by Milton F. Fitch, Jr., for the defendant.

MARTIN, Judge.

[1] Defendant's counsel contends that the trial court erred in denying his motion for continuance and thereby deprived defendant of an opportunity fairly to prepare and present her defense in violation of the Federal and State Constitutions. Specifically, counsel argues that he requested the continuance in order to locate a *crucial witness* whom he had previously attempted to locate without success.

It is a well recognized rule that the Sixth Amendment right of confrontation carries with it the opportunity fairly to prepare and present one's defense and the right to face one's accuser and witnesses with other testimony. N.C. Const. Art. I, § 23 (1971); *State v. Smathers*, 287 N.C. 226, 214 S.E. 2d 112 (1975); *State v. Rigsbee*, 285 N.C. 708, 208 S.E. 2d 656 (1974). If defendant's motion for continuance was in fact based on a right guaranteed by the Federal and State Constitutions, the decision of the trial court is reviewable as a question of law without a prior determination of gross abuse of discretion. *State v. Harrill*, 289 N.C. 186, 221 S.E. 2d 325 (1976). However, under the facts of this case, we do not believe any substantial issue concerning these constitutional guarantees is involved. Counsel's statement to the court in support of his motion to continue because of the absence of witnesses was lacking in specificity and unsatisfactory. *See State v. Rigsbee, supra.* The substance of the testimony the witnesses

were expected to give was not divulged; in fact, the only information imparted was that the witnesses were defendant's husband—whose attendance at trial was "no problem"—and defendant's brother—a transient who "probably" would be called as a witness. Additionally, defendant's counsel admitted that these witnesses had not been subpoenaed, notwithstanding thirty days had transpired since defendant's probable cause hearing. We conclude that defendant has established no violation of her constitutional rights nor shown abuse of discretion. Defendant's first assignment of error is overruled.

[2] Defendant next assigns as error the denial of her motions for nonsuit made at the close of the State's evidence and at the close of all the evidence. This assignment of error is without merit.

The record on appeal reveals that the victim, Mrs. Dorothy Parker, testified on several occasions—during direct and cross-examination—that one of the robbers had a "little, short" gun and it was pointed in her face during the incident. Moreover, State's witness Janice Batts testified to the same effect. Thus, with regards to whether the robbery was committed with a *firearm*, we hold that the evidence, viewed in the light most favorable to the State, was sufficient to submit the case to the jury on the charge of armed robbery.

[3] Defendant contends in her third argument that the court erred in charging the jury relative to the unanimous verdict requirement. The challenged instructions are as follows:

> "As you well know, this is a criminal case, and in a criminal case, we require any verdict which you jurors return be a unanimous verdict.
>
> DEFENDANT'S EXCEPTION NO. 23
>
> That means, of course, that if and when you agree, then all twelve of you must agree in that verdict. In no event, will this Court accept a majority verdict."

Defendant argues that this instruction is confusing in that it could have led the jury to think that a minority must yield to a majority; and that the court failed to accurately explain the concept to the jury and did not inform them that they did not have to recede from their positions if all could not agree on the same verdict. We disagree.

It is the law of North Carolina that no person can be finally convicted of any crime except by the unanimous consent of twelve jurors who have been duly impaneled to try his case. *State v. Hudson*, 280 N.C. 74, 185 S.E. 2d 189 (1971), *cert. denied*, 414 U.S. 1160, 39 L.Ed. 2d 112, 94 S.Ct. 920 (1974). In *State v. Parker*, 29 N.C. App. 413, 224 S.E. 2d 280 (1976), this Court found the following instruction to erroneously convey the impression that when a vote is taken and there is a majority—either for conviction or acquittal—the minority must then cast their vote with the majority and make the verdict unanimous, before returning the verdict in open court:

> "'. . . before you return your verdict it must be unanimous. You cannot return a verdict without a majority vote. That does not mean that your verdict must be unanimous when you retire. It means that it must be unanimous when you return to open court to announce it, because the jury is a deliberative body. You are to sit together, discuss the evidence, recall and review it all and remember it all; then after you have deliberated together return an unanimous verdict to open court.'"

For a decision in accord, see *State v. Cumber*, 32 N.C. App. 329, 232 S.E. 2d 291 (1977).

We do not think the challenged instruction in the instant case is susceptible to a similar interpretation. The defendant failed to include in her exception, although included in her argument, that portion of the instruction in which the trial court explains the first sentence of the challenged instruction by stating "That means, of course, *that if and when you agree*, then all twelve of you must agree in that verdict." (Emphasis added.) Viewing this language in light of the rule that the charge of the court must be read contextually, and isolated portions will not be held prejudicial when the charge as a whole is correct, *State v. Lee*, 277 N.C. 205, 176 S.E. 2d 765 (1970), we are unable to find error in the subject charge.

[4] In defendant's fourth assignment of error, she contends that the court erred in commenting on the testimony of a State's witness favorably, thus invading the province of the jury.

Defendant's argument is based on the following portion of the charge:

"Now, there was also some evidence, again take your recollection, but as I remember it, there was also some evidence which tended to show that at some earlier time, Dorothy Parker and Janice Carolyn Batts made some statements to Officer John Moore which was consistent with their testimony here in the courtroom

DEFENDANT'S EXCEPTION NO. 25

or which you might find was consistent with their testimony here in the courtroom, but you must not consider those earlier statements, if you should find that they were made, as evidence of the truth of what was said at the earlier time, because those statements, if you find that they were made, were not made under oath here in the courtroom. But, if you find that those earlier statements were made, and that those statements were consistent with the testimony of Miss Batts, and Mrs. Parker here in the courtroom, then you can consider that, together with all other facts and circumstances, which you find might bear upon Mrs. Parker's and Miss Batts' truthfulness in deciding whether or not you will believe their testimony."

It is well established that G.S. 1-180 does not allow a trial court to directly or indirectly indicate what impression the evidence has made on its mind or what deductions it thinks should be drawn thereform. *State v. Belk*, 268 N.C. 320, 150 S.E. 2d 481 (1966). However, it is equally established that the charge of the court will be construed contextually, and segregated portions will not be held prejudicial error when the charge as a whole is free from objection. *State v. Lee, supra; State v. Blackmon*, 6 N.C. App. 66, 169 S.E. 2d 472 (1969); *State v. Phillips*, 5 N.C. App. 353, 168 S.E. 2d 704 (1969). Thus, considering the entire portion of the charge relative to the statements made by Dorothy Parker and Janice Batts to Officer Moore, we find no expression of opinion by the trial court as to whether such statements were "consistent" with their testimony; in fact, the court admonished the jury that they were not to consider these out-of-court statements if they were not consistent with the witnesses' in-court testimony. This assignment is overruled.

[5] In defendant's fifth assignment of error, she contends that the court erred in failing to submit to the jury a charge on the lesser included offense of common law robbery.

The trial judge is not required to charge the jury upon a lesser degree of the crime charged when there is no evidence to sustain a verdict of defendant's guilt of such lesser degree, and when there is no conflicting evidence relating to the elements of the crime charged, no instruction is required. *State v. Lee*, 282 N.C. 566, 193 S.E. 2d 705 (1973). In the case at bar, the evidence showed the use of a gun in the crime and there was no conflicting evidence with respect to the element of the use of a firearm. Defendant's fifth assignment is without merit and is overruled.

Defendant's sixth assignment of error is without merit.

In the trial we find no prejudicial error.

No error.

Chief Judge BROCK and Judge CLARK concur.

STATE OF NORTH CAROLINA v. HERBERT A. SMITH, JR. AND BILLY A. GARRIS

No. 7726SC428

(Filed 21 December 1977)

1. Arson § 4.1— burning of building housing business—sufficiency of evidence

Evidence was sufficient to take the case to the jury on the charges of unlawful burning where it tended to show that defendants tried to recruit one of their employees to burn the building which housed their business; they acquired a large quantity of lacquer thinner that was not at the time needed for any legitimate purpose; on the day of the fire they moved the lacquer thinner from where it had been stored to the area where the damage from the fire was concentrated; the drum of thinner was turned over and the spigot was loosened; a tenant of the building was made to move on the day of the fire because, as one defendant told him, the building was "going up"; defendants gave the employee they had tried to recruit for the burning the day off; less than an hour before the fire was started one defendant called the employee and asked if he had an alibi because things were ready to "go down"; and, based upon his professional examination of the crime scene, an expert in the field of arson investigation was of the opinion that the fire was intentionally set.

2. Arson § 3— fire of incendiary origin—admissibility of expert opinion

An expert in arson investigation was properly allowed to give his opinion that a fire was of incendiary origin where the opinion was based on the ex-

pert's own examination of the premises and was based on a proper hypothetical question supported by the evidence.

3. Conspiracy § 6— conspiracy to burn building—sufficiency of evidence

Evidence was sufficient for the jury in a prosecution for conspiracy to burn a building used in trade and manufacturing where it tended to show that defendants were in business together; their company was having financial difficulty; they placed an $80,000 fire insurance policy on the property two months before the fire; defendants attempted to hire one of their employees to start the fire; and defendants communicated with the employee several times about the fire.

4. Conspiracy § 5.1— extrajudicial statements of coconspirators—admissibility

In a prosecution for conspiracy to burn and burning a building used in trade and manufacturing, the trial court properly allowed into evidence extrajudicial statements of the alleged coconspirators against each other, since the State offered evidence tending to show the existence of the conspiracy, and the witness's testimony related acts and declarations of the defendants in furtherance of the common design after it was formed and before it ended.

APPEAL by defendants from *Grist, Judge.* Judgments entered 3 February 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 24 October 1977.

Defendants were indicted for conspiracy to burn and burning a building used in trade and manufacturing. The building was occupied by Golden Bear Manufacturing and Machine, Inc., a company owned by defendants.

The State offered evidence tending to show the following. Donald Greene worked for defendants' corporation as a machinist. Three or four weeks before 19 April 1976, the day of the fire, defendant Garris told Greene that the company was having financial problems and offered Greene $500 to set fire to the building. Two or three days later Greene had a "round table" discussion with both defendants about burning the building. Defendant Smith offered Greene $1,000 to burn the building. Defendants had normally kept two or three gallons of lacquer thinner. About two weeks before the fire, a 55-gallon container of lacquer thinner was acquired and stored at the rear of the building. At about the same time Garris told Greene that they had to hurry and get the fire started because the financial losses would begin to show up in the company books. During the next week or so there were discussions off and on about how to start the fire. During the two weeks before the fire Garris would occasionally slap a hammer on the

table and make a loud noise and would make noises like "ka-boom" and smile and make gestures "like the place blew up." On the day of the fire Greene and Garris moved a drum of kerosene and a drum of lacquer thinner to the front of the building near the toolroom. On instructions from Garris, Greene put a brass spigot in the lacquer thinner. After lunch Garris told Greene that Greene could be off for the rest of the day. That afternoon Greene helped Jimmie Long, who rented office space from defendants, move some equipment out of the building to another location. Smith told Long to get his "stuff out because she was going up." About 5:00 p.m. defendant Smith called Greene and told Greene that things were getting ready to "go down" and asked Greene if Greene had an alibi. Around 6:00 p.m. Greene saw the building on fire on the television news.

On 19 April 1976, around 5:45 p.m., Jerry Sides and a number of other firemen went to the scene while the fire was in progress. In the process of fighting the fire, they observed that the most severe part of the fire was in the front left part of the building in the area of the shirt room and toolroom.

Allen Blackwelder was an inspector-investigator with the Charlotte Fire Department. On 19 April 1976, he went to the scene at about 6:30 p.m. He observed that the greatest concentration of fire was between the shirt room and the toolroom. Directly outside the shirt room there were two 55-gallon drums sitting horizontally and a third drum sitting vertically. Both horizontal drums had spigots inserted in the end, and one of the spigots was hanging free. One of the spigots was removed with a pair of channel locks and turned over to the crime laboratory. Tony Aldridge, a chemist with the Charlotte-Mecklenburg Crime Laboratory, went to the scene the day after the fire. In the area of the shirt room, he detected a heavy concentration of an aromatic chemical product in the air. Nearby on the floor he detected a large deposit of a liquid with the same odor as the vapors in the air. He later performed an analysis of the liquid on the floor as well as an analysis of the contents of one of the 55-gallon drums and determined that both were composed of toluene, generally called lacquer thinner. E. C. Johnson, an expert in the field of toolmark identification, examined the spigot and determined that marks thereon were made by a hard, semi-smooth tool. Charles Lane, an expert in the field of arson and fire investigation, formed an opin-

ion based upon his observations inside the building that the point of origin of the fire was the area outside the toolroom. In addition, based on his observations, he formed the opinion that the fire was incendiary in origin.

In February before the fire in April, defendants placed an $80,000 fire insurance policy on the property. In February, defendants also placed third mortgages on their homes to obtain funds to be used in the business.

Each defendant was found guilty as charged and sentenced to prison for terms of not less than five nor more than eight years.

Attorney General Edmisten, by Associate Attorney Patricia Hodulik, for the State.

W. Faison Barnes, for defendant appellants.

VAUGHN, Judge.

[1] Defendants contend that the court erred in failing to grant their motions for nonsuit on the charges of unlawful burning. Defendants correctly argue that the burden was on the State to prove (1) the fire, (2) that it was of incendiary origin, and (3) the connection of the accused with the crime. *State v. Cuthrell*, 233 N.C. 274, 63 S.E. 2d 549 (1951). They primarily argue that the State failed to show that the fire was of incendiary origin.

The State is, of course, entitled to every favorable inference that arises from the evidence, direct or circumstantial. The evidence was sufficient to permit the jury to find that defendants decided to burn their business to collect the proceeds from the fire insurance policy. They tried to recruit Greene to start the fire. They acquired a large quantity of lacquer thinner that was not then needed for any legitimate purpose. On the day of the fire, they moved the lacquer thinner from where it had been stored to the area where the damage from the fire was concentrated. The drum was turned over, and the spigot was loosened. The tenant, Long, was made to move on the day of the fire because, as defendant Smith told him, the building was "going up." They gave the employee Greene the afternoon off. Less than an hour before the fire was started, Smith called Greene and asked if he had an alibi because things were ready to "go down."

Based upon his professional examination of the crime scene, about which he testified in considerable detail, Lane, an expert in the field of arson investigation, was of the opinion that the fire was intentionally set. We conclude that the evidence, taken in the light most favorable to the State, was sufficient to take the case to the jury on the charges of unlawful burning. *State v. Moore*, 262 N.C. 431, 137 S.E. 2d 812 (1964); *State v. Clark*, 173 N.C. 739, 91 S.E. 372 (1917); *State v. Caron*, 26 N.C. App. 456, 215 S.E. 2d 878 (1975), *aff'd.*, 288 N.C. 467, 219 S.E. 2d 68, *cert. den.*, 425 U.S. 971. In summary, we will repeat what was said in *State v. Moses*, 207 N.C. 139, 141, 176 S.E. 267, 268 (1934):

> "The State's evidence in this case is sufficient to establish a motive and an opportunity for the defendant to commit the crime, that the fire was of an incendiary origin, and many other damaging circumstances tending to show defendant's guilt. However, it is not the fact of motive, or of opportunity, or of incendiary origin of fire, or of any other single circumstance taken by itself, but it was all of these circumstances, considered as a whole and in their relation to each other, that made it incumbent upon the court to submit this case to the jury. These related circumstances likewise warranted the jury in deciding the issue against the defendant. *S. v. Clark*, 173 N.C., 739.
>
> When each circumstance going to make up the evidence relied upon depends upon the truth of the preceding circumstance, circumstantial evidence may be likened unto a chain, which is no stronger than its weakest link; but, as in this case, when there is an accumulation of circumstances which do not depend upon each other, circumstantial evidence is more aptly likened to the bundle of twigs in the fable, or to several strands twisted into a rope, becoming, when united, of much strength."

[2] Defendants contend that it was error to allow the arson expert, Lane, to state that, in his opinion, the fire was of incendiary origin. We must overrule the exception. The opinion was based on the expert's own examination of the premises. He testified in detail about what he found and the basis for his opinion. The only pertinent fact about which the witness had no personal knowledge was the location of the drum of lacquer thinner im-

mediately after the fire. That fact, which was brought out by other testimony, was made a part of the hypothetical question. Unlike the witnesses in *Keith v. Gas Co.*, 266 N.C. 119, 146 S.E. 2d 7 (1966), Lane did not base his opinion on an hypothesis not supported by any evidence. The expert was properly allowed to give his opinion. *State v. Moore, supra; State v. Reavis*, 19 N.C. App. 497, 199 S.E. 2d 139 (1973).

[3] Defendants contend that their motions for nonsuit on the conspiracy charges should have been allowed. The question is, therefore, whether there is evidence from which the jury could infer that defendants unlawfully concurred in an agreement to do an unlawful act. *State v. Butler*, 269 N.C. 733, 153 S.E. 2d 477 (1967). The evidence, as previously discussed, clearly supports the inference that there was a union of wills between Smith and Garris to burn the property. The evidence here is clear and direct. Generally, a conspiracy must be proven by a number of indefinite acts which, standing alone, mean little but when put together permit an inference that a conspiracy had been formed. *State v. Puryear*, 30 N.C. App. 719, 228 S.E. 2d 536 (1976), *cert. den.*, 291 N.C. 325, 230 S.E. 2d 678. Closely related to the assignment of error on the nonsuit question are defendants' exceptions relating to the admission of extrajudicial statements of the alleged co-conspirators against each other. We first note that counsel on appeal did not represent defendants at trial and that objections to most of the testimony were not taken at trial or, if taken, were waived by the admission of testimony of similar import. Evidence so admitted is not the proper subject for assignment of error on appeal. *State v. Lowery*, 286 N.C. 698, 213 S.E. 2d 255 (1975), *mod.*, 428 U.S. 902. We have, nevertheless, reviewed the appropriate assignments of error and find them without merit. Generally they relate to statements made to Greene by one defendant when he was not in the presence of the other. One who joins in a conspiracy places his security in the hands of every other member of the conspiracy. The acts and declarations of each conspirator in furtherance of the common illegal plan are admissible against all. *State v. Butler, supra.*

[4] It is true, of course, that there must be proof of the conspiracy if declarations of co-conspirators are to be admitted. "Consideration of the acts or declarations of one as evidence against the co-conspirators should be conditioned upon a finding: (1) a con-

spiracy existed; (2) the acts or declarations were made by a party to it and in pursuance of its objectives; and (3) while it was active, that is, after it was formed and before it ended. [sic]" *State v. Conrad*, 275 N.C. 342, 348, 168 S.E. 2d 39, 43 (1969). Because of the very nature of the offense, the courts recognize the difficulty in proving the formation and execution of the plan and allow wide latitude in the order in which the pertinent facts are offered into evidence. If at the close of the evidence "every constituent of the offense charged is proved, the verdict rested thereon will not be disturbed." *State v. Thomas*, 244 N.C. 212, 214, 93 S.E. 2d 63, 65 (1956). Here the State offered evidence tending to show the existence of the conspiracy. Greene's testimony related acts and declarations of the defendants in furtherance of the common design after it was formed and before it ended. Greene also testified as to his own acts and declarations in the presence of one or more of the conspirators. The testimony was properly admitted.

Defendants' able counsel on appeal has brought forward other assignments of error. We have carefully considered them and conclude that they fail to disclose prejudicial error at trial.

No error.

Judges MORRIS and CLARK concur.

WENDELL HOLMES MURPHY, SR. v. EMILY WYNELLE MURPHY

No. 774DC64

(Filed 21 December 1977)

1. Rules of Civil Procedure § 15— refusal to permit conforming amendment

The trial court did not err in refusing to allow defendant's amended answer tendered at the close of the evidence where the matters alleged therein were not material to the single issue before the court—the validity of a separation agreement executed by the parties.

2. Husband and Wife §§ 4.1, 12.1— separation agreement—confidential relationship—presumption of unfairness—representation by attorney

Where the wife employs an attorney and, through him, deals with her husband as an adversary, the confidential relationship between husband and wife no longer exists, and there is no presumption of unfairness or that the

husband exercised a dominant influence over the wife in the execution of a separation agreement.

3. **Husband and Wife § 12.1— separation agreement—unfairness to wife—insufficiency of evidence**

The evidence was insufficient to justify unfairness to the wife as a ground for invalidating a separation agreement where it showed that the wife received $12,000 cash, the household and kitchen furniture, an automobile, and a house trailer and lot at the beach; the wife was represented by counsel; and the wife, as bookkeeper and secretary for many years of a corporation owned wholly by her husband and a corporation owned jointly by her husband and his father, had complete knowledge of the financial worth of the businesses.

4. **Husband and Wife § 12.1— separation agreement—duress or undue influence—insufficiency of evidence**

The evidence was insufficient to justify the setting aside of a separation agreement on the grounds of duress and undue influence by the husband where it tended to show that the wife was represented by able counsel; the husband told the wife that the agreement was temporary, that he needed the agreement to effect a loan, and that he loved her and would resolve any difficulties and resume marital relations; and the parties engaged in voluntary sexual relations on two or three occasions between the time of their separation and execution of the agreement.

5. **Husband and Wife § 12— separation agreement—reconciliation—sexual relations**

Defendant's evidence of sexual relations with plaintiff subsequent to the execution of a separation agreement, absent a showing that both parties had the intent to reconcile, was insufficient to show a reconciliation that would invalidate the executory portions of the separation agreement.

Judge MARTIN dissents.

APPEAL by defendant from *Crumpler, Judge.* Judgment entered 17 June 1976, District Court, DUPLIN County. Heard in the Court of Appeals 26 October 1977.

On 8 August 1973 plaintiff-husband filed for absolute divorce based on one year's separation. The parties had married on 23 May 1958, had had two children and had separated on 3 January 1972. They had executed a separation agreement dated 4 March 1972. Defendant-wife filed an answer and counterclaim followed by an amended answer and counterclaim, admitting the separation but alleging first, that the separation agreement was invalid because her consent had been obtained by fraud and undue influence and second, that the agreement had been rescinded by the conduct of the parties, who engaged in sexual relations since its execution.

The several issues were severed by the court when the case came on for trial, and trial was limited to the validity of the separation agreement. Two issues were submitted to the jury: (1) Was the separation agreement and property settlement dated 4 March 1972 a valid separation agreement when executed? (2) If so, was the separation agreement and property settlement dated 4 March 1972 terminated by the acts and conduct of the plaintiff and defendant? From judgment entered on jury verdicts in favor of plaintiff, defendant appeals.

Vance B. Gavin and William E. Craft for plaintiff appellee.

Kornegay, Bruce & Rice by G. R. Kornegay, Jr., R. Michael Bruce and Robert T. Rice for defendant appellant.

CLARK, Judge.

[1] At the close of all the evidence the defendant tendered another amended answer and counterclaim. The trial court allowed the second amended answer and counterclaim, including allegations not contained in the first amended answer and counterclaim to the effect that plaintiff induced her to sign the separation agreement by representing to her that the agreement was needed by plaintiff to effect a financing arrangement for his feed business, and that plaintiff represented that the agreement was temporary only because he loved her and the family would get back together. But the court denied so much of the tendered amendment as alleged that defendant was a student and had no income, that plaintiff had offered indignities to the person of the defendant, that plaintiff had not provided her with necessary subsistence, and that plaintiff had abandoned her. Defendant assigns this denial as error.

On motion of the plaintiff allowed by the court the trial below was limited to the question of the invalidity of the separation agreement raised by defendant's counterclaim. Defendant assigned as error this severance but abandoned the assignment by failing to discuss it in her brief. Rule 28, N.C. Rules of App. Proc., 287 N.C. 671, 741. Under these circumstances the denial by the court of the tendered paragraphs in defendant's amended answer and counterclaim was not error because the matters alleged (no income, indignities to the person, and failure to provide subsistence) were not material to the single issue before the

court, the validity of the separation agreement. Defendant attacked the separation agreement on the grounds of (1) duress and undue influence, (2) unfairness of the property settlement, and (3) resumption of marital relations and reconciliation. Conforming amendments under G.S. 1A-1, Rule 15(b) are within the sound discretion of the court and should not be allowed where they fail to support the action or defense upon the merits. *Magnolia Apts., Inc. v. Hanes*, 8 N.C. App. 394, 174 S.E. 2d 828 (1970); Shuford, N.C. Civ. Prac. and Proc., § 15-6.

There is some conflict in the evidence relating to the question of duress and undue influence on the part of the plaintiff in obtaining the execution of the 4 March 1972 separation agreement by defendant. It is admitted that the parties separated about 3 January 1972. Defendant testified that she ceased working as bookkeeper for the two corporations, one wholly owned by plaintiff and the other jointly owned by him and his father, about six months before the separation; that they were having trouble at the time, fusses and arguments. She did not disclose the nature of the trouble. Plaintiff testified on cross-examination that for six to eight months prior to the separation defendant's car was parked at the home of Milton Parker a majority of the time, that on the day of their separation her car was at his home all day, that she came home about 9:00 o'clock in the evening, that "[t]his is what our marital differences had been about over this whole period of time . . . . I couldn't stand it any longer."

Defendant employed a lawyer, Chris Blossom of Wallace, on 16 June 1971 some six months before the January 1972 separation. Blossom, called as a witness by plaintiff, testified that he represented defendant from that time until 21 March 1972 when he took the separation agreement to Vance Gavin, plaintiff's attorney in Kenansville, for execution by plaintiff. He prepared the separation agreement and negotiated the same with Mr. Gavin. Defendant signed the agreement after privy examination about two weeks before plaintiff.

[2] Defendant relies on the confidential relationship of husband and wife. When this relationship exists, transactions between them to be valid must be fair and reasonable, and there is a presumption of unfairness. *Link v. Link*, 278 N.C. 181, 179 S.E. 2d 697 (1971); *Eubanks v. Eubanks*, 273 N.C. 189, 159 S.E. 2d 562 (1968); 42 C.J.S., Husband & Wife, § 593, p. 172. But where the

wife employs an attorney and, through him, deals with her husband as an adversary, the confidential relationship between husband and wife no longer exists, and there is no presumption of unfairness or that the husband exercised a dominant influence over the wife. *Joyner v. Joyner*, 264 N.C. 27, 140 S.E. 2d 714 (1965).

The defendant-wife, having employed an attorney who prepared and negotiated the separation agreement, had the burden of proving that the agreement was unfair or was invalid because of duress and undue influence.

[3] The property settlement provisions of the separation agreement gave defendant-wife $12,000 cash, all of the household and kitchen furniture, a 1968 Oldsmobile Delta 88 automobile, and a house trailer and lot at Topsail Beach. The record on appeal does not reveal the value of the household and kitchen furniture, the automobile, or the trailer and beach lot. The evidence of the value of plaintiff's assets and net worth is conflicting. However, it is clear that defendant, as bookkeeper and secretary of the two corporations for many years, had complete knowledge of the financial worth of the businesses. Though she did not work in this capacity for eight or nine months before the separation agreement was executed, this time interval is not significant, there being no evidence of any circumstances that would result in any substantial change in the financial structure of the businesses. It is clear that defendant, who was amply represented by counsel, cannot prove the agreement was legally unfair merely by arguing that she obviously made a bad bargain. *See Tripp v. Tripp*, 266 N.C. 378, 146 S.E. 2d 507 (1966). We find the evidence insufficient to justify unfairness as a ground for invalidity of the agreement.

[4] Nor do we find convincing any evidence of duress and undue influence. Defendant's evidence that plaintiff told her the agreement was temporary, that he needed the agreement to effect a loan, that he loved her and would resolve any difficulties and resume marital relations are similar to the allegations of the plaintiff-wife in *Van Every v. Van Every*, 265 N.C. 506, 144 S.E. 2d 603 (1965), where the court held the allegations insufficient to support a claim of undue influence in view of her representation by able counsel in the separation agreement negotiations. In the case *sub judice* the defendant's evidence, including voluntary sexual relations on two or three occasions during the period of two

months from separation to the execution of the agreement, is insufficient to overcome the presumption of regularity. *McKaughn v. McKaughn*, 29 N.C. App. 702, 225 S.E. 2d 616 (1976).

[5] Defendant's evidence of sexual relations with plaintiff subsequent to the execution of the separation agreement, in the absence of any showing that both parties had the intent to reconcile, is not such reconciliation as to invalidate the executory portions of the separation agreement. *Cooke v. Cooke*, 34 N.C. App. 124, 237 S.E. 2d 323 (1977). "There must be a mutual agreement to be reconciled and a resumption of cohabitation as husband and wife." II Lee, N.C. Family Law, § 200, p. 423. In the case before us there is not evidence of such intent on the part of the plaintiff or of any mutual agreement to be reconciled.

In view of the insufficiency of the evidence to support unfairness, or undue influence, the defendant's assignments of error relating to the court's instructions and statement of contentions on these questions are without prejudice. We have carefully examined defendant's other assignments of error, and we find no abuse of discretion and no error by the court in its discovery orders and that the assignments are without merit.

It appears from the record on appeal that the intelligent and knowledgeable defendant sought and obtained the assistance of able counsel to represent her in drafting and negotiating a separation agreement, which defendant executed after privy examination, and that there is insufficient evidence to overcome the presumption that the agreement was fair, reasonable, and valid.

No error.

Chief Judge BROCK concurs.

Judge MARTIN dissents.

STATE OF NORTH CAROLINA v. TRAVIS BLACKBURN

No. 7723SC467

(Filed 21 December 1977)

1. **Narcotics § 4.1— possession of marijuana—marijuana found in mobile home—mobile home as defendant's residence—sufficiency of evidence**

In a prosecution for possession of marijuana with intent to sell and deliver, evidence was sufficient to show that a mobile home in which officers found over fourteen grams of marijuana was the residence of defendant where it tended to show that a search warrant was issued to search defendant's premises; the officers went to the premises; they testified several times that the mobile home was the residence of defendant; defendant came to the premises about five to ten minutes after the officers started their search; when defendant arrived the search warrant was read to him and a copy delivered to him; defendant's stepson later arrived at the premises; and correspondence bearing defendant's name was found in a bedroom in the mobile home.

2. **Criminal Law § 158.2; Narcotics § 4.1— manufacture of marijuana—marijuana growing in fields—connection with defendant's residence—sufficiency of evidence**

In a prosecution for manufacture of marijuana, defendant failed to support adequately his argument that fields near his residence in which officers found marijuana growing were not shown to have any connection with defendant or his residence, since officers testified at trial concerning the fields and their connection with defendant's residence using a blackboard diagram; the diagram and testimony related thereto were sufficient to cause the trial judge to submit the case to the jury and to cause the jury to return its verdict of guilty; and defendant failed to include the diagram or a picture thereof in the record on appeal.

3. **Criminal Law § 99.4— trial court's comment—no expression of opinion on evidence**

In a prosecution for manufacture of and possession with intent to sell marijuana where defendant claimed that there was no showing that the residence where officers found marijuana belonged to defendant, the trial court did not express an opinion that the fact of defendant's residence had been proven where the court, in explaining to defense counsel why an objection was groundless, repeated accurately the substance of a witness's testimony with respect to defendant's residence.

4. **Narcotics § 3.1— possession and manufacture of marijuana—marijuana growing in field—remoteness of evidence**

In a prosecution for manufacture of and possession with intent to sell marijuana, the trial court did not err in admitting evidence of marijuana found in a field to the rear of a store operated by defendant, and defendant's contention that the evidence was too remote chronologically and geographically is without merit.

5. Narcotics § 2— possession with intent to sell marijuana—no variance between indictment and proof

There was no fatal variance between an indictment which alleged possession with intent to sell and deliver "more than one ounce of marijuana" and evidence which showed that defendant possessed fourteen grams of marijuana.

APPEAL by defendant from *Crissman, Judge.* Judgments entered 17 February 1977 in Superior Court, WILKES County. Heard in the Court of Appeals 20 October 1977.

Defendant was charged in one bill of indictment (case No. 76CR5669) with possession with intent to sell and deliver a controlled substance (marijuana); and in a second bill of indictment (case No. 76CR5670) with the manufacture of a controlled substance (marijuana).

From verdicts of guilty as charged and jugments of imprisonment defendant appealed.

Attorney General Edmisten, by Special Deputy Attorney General William A. Raney, Jr., for the State.

Porter, Conner & Winslow, by Kurt R. Conner, and Moore & Willardson, by Larry S. Moore and John S. Willardson, for the defendant.

BROCK, Chief Judge.

Defendant first argues that the evidence was not sufficient to justify submission of either case to the jury. Defendant offered no evidence and his motions to dismiss were denied. He assigns as error the denial of his motions.

Case No. 76CR5669 (possession with intent to sell and deliver): Officers went to the mobile home residence of defendant with a warrant authorizing a search of defendant's premises. The mobile home was located in the Shepherds Crossroad section of Wilkes County and at the end of a dirt roadway about nine-tenths of a mile from its intersection with a paved roadway. Defendant was not present when the officers began their search but he arrived about five to ten minutes later. Inside the mobile home residence officers found cigarette butts in a container under the kitchen sink. These contained marijuana. In a drawer in a bedroom the officers found a plastic bag of marijuana with loose

marijuana also in the drawer. The plastic bag contained 14 grams of marijuana.

[1] Defendant argues that the State failed to show that the mobile home was the residence of defendant and therefore there was no showing of possession or control of the marijuana by defendant. While it is true that there was no evidence of formal title to the premises, nevertheless the evidence was sufficient to justify a finding that the mobile home was the residence of defendant. A search warrant was issued to search the defendant's premises; the officers went to the premises; they testified several times that the mobile home was the residence of defendant; defendant came to the premises about five to ten minutes after the officers started their search; when defendant arrived the search warrant was read to him and a copy delivered to him; defendant's stepson later arrived at the premises; correspondence bearing defendant's name was found in a bedroom in the mobile home. These circumstances constitute sufficient evidence of possession and control of the mobile home. "Where such materials [narcotics] are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." *State v. Harvey*, 281 N.C. 1, 12, 187 S.E. 2d 706, 714 (1972).

[2] Case No. 76CR5670 (manufacture of marijuana): The officers found about thirteen fields in which were growing large numbers of marijuana plants. These fields were in the immediate area of defendant's residence. Defendant argues nevertheless that the fields are not shown to have any connection with defendant or his residence. It is true that the recorded testimony of the officers does not connect the defendant or his residence with the fields. However, it is clear from the record on appeal that the officer drew a diagram on the blackboard locating the fields and the well worn paths in relation to defendant's residence. This main diagram with which the officer illustrated his testimony to the trial judge and jury was not sent to us as an exhibit. Our efforts to have it certified to us by the Clerk of Superior Court have been unsuccessful. The information we received was that a photograph of the diagram was taken, but the photograph has become lost.

All of the testimony of the officer concerning the fields and paths was given in such terms as "this field", "in this area", "trail that leads back over this area here", and "it comes by here and continues on out to the trailer." The record on appeal clearly indicates that the officer drew a diagram of the several fields, the paths, and the defendant's residence on the blackboard. His entire testimony was with relation to "here", "there", and "along here" as he obviously pointed to the diagram on the blackboard. No effort was made to make his testimony descriptive as to location except by reference to the diagram. We, therefore, cannot read the testimony and discern the relative locations of the paths the fields, and defendant's residence. However, the trial judge and the jury were made fully aware of these relative locations.

We presume the regularity of the trial. The burden is on the appellant to demonstrate the irregularity of error in the trial. We will not presume the absence of evidence to connect defendant with the fields of marijuana where the defendant has failed, albeit, perhaps, through no fault of his own, to bring to us all the evidence relative to his argument for dismissal. Clearly this diagram upon which the State, the trial judge, and the jury relied had sufficient probative value to cause the trial judge to submit the case to the jury, and to cause the jury to return its verdict of guilty. Appellant has the duty to see to the preservation of the record pertinent to his argument on appeal, and to demonstrate the error.

Defendant has failed to show error in the submission of the case to the jury. We find no error in the denial of defendant's motions to dismiss.

[3] By his assignment of error No. 2 defendant contends that the trial judge expressed an opinion that the fact of defendant's residence had been proven. Officer Garris testified before the jury, *inter alia*, as follows: "I participated in the investigation of criminal offenses against the defendant Travis Blackburn . . . . I had occasion to be at the residence or place of business of Travis Blackburn. That was when we executed a search warrant on August 5, 1976. We went to Mr. Blackburn's residence . . . but found that there was no one at the residence at that time. We knocked on the door and asked if there was anybody at home and looked around the premises but could not locate anyone. . . . Officer Radcliffe read the search warrant and we went inside the

trailer. . . . A short time later, 5 or 10 minutes, Mr. Blackburn came to the trailer." Later, after a *voir dire* concerning the validity of the search warrant, the same Officer Garris testified: "A short time thereafter we conferred with Captain Isaacs in reference to some fields being found near the residence of Mr. Blackburn." At this time counsel for the defendant objected "to the expression 'residence' of Mr. Blackburn" on the grounds that "that has not been established yet." By way of overruling the objection the trial judge stated, "He testified that he went to the residence of this defendant and knocked on the door and read the search warrant, and that the defendant came up about five minutes later."

We do not view this as an expression of opinion on the evidence. The trial judge, as a matter of courtesy, merely pointed out to counsel why the objection was groundless. The statement of the substance of the witness's testimony with respect to the residence was an accurate statement. This assignment of error is overruled.

[4] By his third assignment of error defendant contends that the trial judge committed error in admitting evidence of marijuana found in a field to the rear of a store operated by defendant. Defendant argues that the evidence is too remote chronologically and geographically. Chronologically, defendant argues that the indictment charges "on or about the 5th day of August" and the testimony shows that the officer observed this particular field on the 10th or 12th of August. We observe two weaknesses to this argument: (1) time is not necessarily an essential element of the offense of manufacturing marijuana; and (2) the size of the marijuana plants found in the field on 10 or 12 August was sufficient to show that the marijuana plants were in place on 5 August. Geographically, defendant argues that the testimony does not place this particular field "near defendant's residence" as alleged in the bill of indictment. From the record on appeal it is clear that the State's witness drew the field and the store on the blackboard diagram and demonstrated its relation to defendant's residence. Here again defendant has failed to demonstrate that the State's evidence showed geographical remoteness. Without the benefit of the crucial diagram we cannot interpret the testimony. We do not presume a failure by the State to make out its case. This assignment of error is overruled.

[5] Defendant's fourth assignment of error raises the question of a variance between indictment and proof. By his motion to dismiss defendant properly raised this question. The indictment charges possession with intent to sell and deliver "more than one ounce of marijuana." The evidence shows 14 grams of marijuana, exclusive of that found in the fields. Assuming that the abundance of marijuana found in the fields must be excluded as relating only to the manufacturing charge, we do not find a fatal variance. If the 14 grams is sufficient to support the charge of possession with intent to sell and deliver it does not matter that the State alleged more than one ounce. G.S. 90-95(a)(1) and G.S. 90-95(b)(2) are controlling in this case. The first (90-95[a][1]) makes it unlawful to possess with intent to sell or deliver marijuana. The second (90-95[b][2]) makes a violation of the first a felony, except as to a transfer of less than 5 grams of marijuana for no remuneration. The district attorney obviously drafted the indictment intending to convict defendant of "possession" in violation of G.S. 90-95(d)(4) at least in the event he was unable to make out a case of "possession with intent to sell and deliver." We find no fatal variance between the allegata and the probata. This assignment of error is overruled.

We have reviewed defendant's assignments of error to the jury instructions and to the admission of exhibits. We find no prejudicial error and see no value in a detailed discussion. They are each overruled.

Defendant had a fair trial free from prejudicial error.

No error.

Judges PARKER and ARNOLD concur.

NORTH CAROLINA NATIONAL BANK EXECUTOR OF THE ESTATE OF JANE GAITHER MURRAY, DECEASED v. McCARLEY & COMPANY, INC.

No. 773SC132

(Filed 21 December 1977)

1. **Trover and Conversion § 1; Uniform Commercial Code § 64—conversion of securities by stock broker—sale upon forged signature**

Plaintiff executor's complaint stated a claim for relief against defendant stock broker for conversion of securities owned by testatrix by selling such securities when the husband of testatrix, without her authority, delivered to defendant broker the certificates with stock assignment instruments bearing the forged signature of testatrix, the provision of G.S. 25-8-318 purporting to protect a broker who transfers securities at the insistence of a principal who has no right to dispose of them being available only as a defense, with the burden on defendant to present evidence that it acted in good faith and in accordance with reasonable commercial standards.

2. **Uniform Commercial Code § 25; Banks and Banking § 9.2—draft "payable through" bank—bank as collector—maker as drawee**

Where a draft declared that it was "payable through" a bank, such bank is deemed to be a collecting bank which was not authorized to pay the instrument but only to make presentment to the drawee, G.S. 25-3-120, and defendant stock broker assumed the status of a drawee when it made a "payable through" draft with plaintiff executor's testate as payee.

3. **Banks and Banking § 11.2; Trover and Conversion § 1; Uniform Commercial Code § 30—payment of forged drafts—conversion by maker**

Plaintiff executor's complaint was sufficient to state a claim for relief against defendant stock broker for conversion of drafts where it alleged that defendant issued drafts payable through a bank to plaintiff's testate and that defendant paid the drafts upon the forged indorsements of plaintiff's testate. G.S. 25-3-419(1)(c).

APPEAL by plaintiff from *Browning, Judge*. Order entered 22 October 1976 in Superior Court, PITT County. Heard in the Court of Appeals 6 December 1977.

Civil action wherein plaintiff filed a complaint seeking damages of $109,003.22 from the defendant for the alleged conversion of certain securities and the improper payment of the proceeds from the sale of such securities. From an order granting defendant's motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, plaintiff appealed.

R. D. Darden, Jr., and Kenneth M. Kirkman, for the plaintiff appellant.

Speight, Watson and Brewer, by W. W. Speight and W. H. Watson, for the defendant appellee.

HEDRICK, Judge.

A 12(b)(6) motion tests the sufficiency of the complaint to state a claim upon which relief can be granted. A complaint may be dismissed pursuant to Rule 12(b)(6) " 'if clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim.' But a complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.* Pleadings are to be liberally construed. Mere vagueness or lack of detail is not ground for a motion to dismiss, but should be attacked by a motion for a more definite statement." 2A Moore's Federal Practice, § 12.08 (1974). Accord, *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). The principle enunciated in *Sutton v. Duke*, *supra*, was succinctly stated in *Cassels v. Motor Co.*, 10 N.C. App. 51, 55, 178 S.E. 2d 12, 15 (1970) as follows:

> "A complaint is sufficient to withstand a motion to dismiss where no insurmountable bar to recovery on the claim alleged appears on the face of the complaint and where allegations contained therein are sufficient to give a defendant sufficient notice of the nature and basis of plaintiffs' claim to enable him to answer and prepare for trial."

[1] The first portion of plaintiff's complaint, labeled "FIRST CAUSE OF ACTION," is summarized and quoted as follows: The deceased, Jane Gaither Murray, left a will which has been admitted to probate in Carteret County and which designates the plaintiff as executor. During the life of the deceased, her husband, James David Murray, without her authority, delivered certain stock certificates along with stock assignment instruments bearing the forged signature of the deceased to the defendant corporation, a stock broker. The complaint then reads as follows:

"6. THAT Defendant knew or should have known from the circumstances surrounding the aforesaid sales of the securities of Jane Gaither Murray that said sales were made without her authority.

"7. THAT Defendant was under a duty to inquire as to the propriety of the aforesaid transactions, and negligently failed to do so.

"8. THAT Defendant thus converted the said securities belonging to Jane Gaither Murray."

Article 8 of the Uniform Commercial Code, as codified in Chapter 25 of the North Carolina General Statutes, confers on the true owner of securities which have been transferred upon an unauthorized endorsement, remedies against the issuer of the securities, G.S. 25-8-311, and against the ultimate purchaser of the securities, G.S. 25-8-311(a), 315. It does not appear that Article 8 provides any right of action in favor of the owner against the broker who consummated the transfer. *See* Folk, *Article Eight: Investment Securities*, 44 N.C. L. Rev. 654, 694 (1966). However, the Uniform Commercial Code is by its own terms complementary to the common law except where there is a conflict. G.S. 25-1-103; G.S. 25-8-315, Official Comment 2.

On the facts set forth in the allegations in plaintiff's first claim there clearly exists a common law action of conversion against the defendant. The rule is stated in 12 Am. Jur. 2d, *Brokers* § 105 (1964): "As a general rule, even though a broker may act in the best of faith, if he sells personal property in behalf of a principal who has no title thereto . . . he is liable to the true owner for its conversion; . . . ." *See also Southern Ohio Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 479 F. 2d 478 (6 Cir. 1973); *Patterson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 266 N.C. 489, 146 S.E. 2d 390 (1966). While the Code, G.S. 25-8-318, purports to protect a broker who transfers securities at the insistence of a principal who has no right to dispose of them, its protection is only available as a defense with the burden on the defendant to present evidence that it acted in good faith and in accordance with reasonable commercial standards. *Southern Ohio Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra.*

When the allegations of plaintiff's first claim for relief are considered in the light of the foregoing principles of procedure

and substance, we are of the opinion that the complaint states a claim for relief against the defendant for the conversion of Mrs. Murray's securities sold by the defendant without the true owner's authority.

That portion of plaintiff's complaint denominated as his "SECOND CAUSE OF ACTION" incorporates all allegations previously stated and, in addition, alleges as follows:

> "2. THAT Defendant, having caused said securities to be sold, issued drafts on which Defendant was maker and payor, payable through Wachovia Bank and Trust Company, N.A. and made payable to Jane Gaither Murray; said drafts being more fully identified in Exhibit A hereto.
>
> "3. THAT said drafts were negotiated by indorsements purporting to be the signature of Jane Gaither Murray but which were not, in fact, signed by her.
>
> "4. Defendant was under a duty to refuse to pay said drafts unless indorsed by the payee, Jane Gaither Murray.
>
> "5. Defendant did, in fact, pay said drafts upon the unauthorized, non-genuine signatures aforesaid, in violation of the aforesaid duty."

[2] Defendant's status in the context of negotiable instruments law is critical to the question of whether this second portion of plaintiff's complaint states a claim under Rule 8(a). According to our law, when an instrument declares that it is "payable through" a bank then such bank is deemed to be a collecting bank which is not authorized to pay the instrument, but only to make presentment to the drawee. G.S. 25-3-120 and Official Comment thereunder; *see also First Federal Savings & Loan Assoc. v. Branch Banking and Trust Co.*, 282 N.C. 44, 191 S.E. 2d 683 (1972). Defendant assumed the status of a drawee when it made a "payable through" draft with the plaintiff's intestate as payee. *See* 2 Anderson on the Uniform Commercial Code § 3-120:3 (2d Ed. 1971).

The Uniform Commercial Code provides in absolute terms that "[a]n instrument is *converted* when . . . it is paid on a forged indorsement." G.S. 25-3-419(1)(c) (emphasis added). Justice (now Chief Justice) Sharp's opinion in *Modern Homes Construction Co. v. Tryon Bank and Trust Co.*, 266 N.C. 648, 147 S.E. 2d 37 (1966),

which antedated our adoption of the UCC, presaged the above statute and aligned North Carolina with the majority view which allows "the holder to recover on the theory of a conversion *of the check* when the drawee pays a check upon a forged or unauthorized endorsement." *Modern Homes Construction Co. v. Tryon*, *supra* at 653, 147 S.E. 2d at 41; *see* Navir, *Contracts*, 45 N.C. L. Rev. 897 (1967). Justice Sharp stated the rule as follows:

> "When the drawee bank takes a check without the payee's endorsement, delivers cash in the amount of the check to one unauthorized to receive its payment, and ultimately returns the check to the drawer, the bank has assumed complete control over the check, dealt with it as its own, and withheld it from its rightful owner. Such dealings constitute a tortious conversion of the check, [citations omitted]; and the payee is entitled to recover its value. *Prima facie*, this is the face value of the paper converted." (Citations omitted).

Other authorities clearly support this principle. 2 Anderson on the Uniform Commercial Code, *supra* at § 3-419; Annot., 87 ALR 2d 638; Annot., 100 ALR 2d 670. We feel compelled to note that some contrary language appears in *First Federal Savings & Loan Assoc. v. Branch Banking and Trust Co.*, *supra* at 56-7, 191 S.E. 2d at 691. In *First Federal*, however, since the plaintiff was not the payee of the draft, there was no allegation of conversion in the plaintiff's complaint. The conflict is apparently resolved by the different positions which the plaintiffs in the two cases occupy.

[3] In the present case the plaintiff has alleged facts sufficient to place itself within the framework of the law above. According to the allegations, the plaintiff as the payee was the victim of a conversion of the draft when it was paid by defendant upon a forged endorsement. The plaintiff is, therefore, entitled to proceed in its effort to prove its allegations.

We note that the trial judge in his order dismissing plaintiff's claims pursuant to defendant's Rule 12(b)(6) motion made the gratuitous conclusion that "[p]laintiff alleges inconsistent remedies in its first and second cause of action, and an election between the two inconsistent remedies is required by law." While the plaintiff clearly cannot *recover* on both claims, Rule 8(e)(2)

permits a party to "state as many separate claims . . . as he has regardless of consistency . . . ." *See Alpar v. Weyerhaeuser Co.*, 20 N.C. App. 340, 201 S.E. 2d 503 (1974). The evidence offered in support of the allegations in the complaint will determine upon which claim, if either, plaintiff will recover.

For the reasons stated the order dismissing plaintiff's complaint is reversed and the cause is remanded to the Superior Court of Carteret County for further proceedings.

Reversed and remanded.

Judges MORRIS and ARNOLD concur.

JAMES THOMAS SMITH, SR. AND ATLAS RAILROAD CONSTRUCTION COMPANY, A NORTH CAROLINA CORPORATION v. PACIFIC INTERMOUNTAIN EXPRESS COMPANY, A NEVADA CORPORATION

No. 7728SC85

(Filed 21 December 1977)

1. **Appearance § 1.1; Rules of Civil Procedure § 12— jurisdictional defense—subsequent trial preparation—defense not waived**

Where defendant promptly asserted lack of jurisdiction of the trial court by motion filed in the cause and served on plaintiffs, defendant did not thereafter waive the defense of lack of jurisdiction and make a general appearance where, before a hearing on the motion to dismiss, defendant filed an answer, counterclaimed for damages, filed interrogatories, filed a motion to amend the answer, and filed a motion to compel plaintiffs to verify answers to interrogatories.

2. **Rules of Civil Procedure § 12— jurisdictional defense—assertion as first step—subsequent trial preparation—defense not waived**

If a defendant promptly asserts his jurisdictional defense as his *first* step in the lawsuit, he has performed his duty in alerting the court and the other parties, and he may then proceed with prudent preparation for trial without losing his defense.

3. **Appearance § 1.1; Rules of Civil Procedure § 12— jurisdictional defense—waiver by general appearance—general appearance defined**

The term "general appearance" as used in G.S. 1-75.7 should be held to refer generally to appearances made either before the filing of jurisdictional motions under Rule 12(b) before pleading or, if no such motions are filed, the appearances made before the defense is raised in responsive pleadings.

APPEAL by defendant from *Lewis, Judge.* Order entered 3 December 1976 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 15 November 1977.

Plaintiffs filed suit against the corporate defendant and the administratrix of its deceased employee on 17 June 1976 asking for over $105,000 in damages for injuries allegedly arising out of the collision of two tractor trailer trucks near Waynesville, N.C., on 20 August 1973. Plaintiffs later took a voluntary dismissal in the action against the estate of the deceased employee and that action is not relevant to this appeal. Plaintiffs attempted to obtain service of process on the corporate defendant by summonses issued as follows:

> G. A. Sywassink
> Vice President in Charge of Operations
> PACIFIC INTERMOUNTAIN EXPRESS, INC.
> 1417 Clay Street
> Oakland, California 94600

and to:

> ROBERT ROSS
> Terminal Manager
> P. 1 E
> 525 Johnson Road
> Charlotte, North Carolina 28206.

On 19 July 1976, defendant, under the provisions of Rule 12(b), filed a motion to dismiss the action for insufficiency of process, and, in the alternative, moved for a change of venue. Plaintiffs' counsel was served with a copy.

On 10 August 1976, defendant filed answer wherein, after affirmatively stating that it was not waiving the motions previously filed, it denied the material allegations of the complaint and asserted a counterclaim for damages it sustained in the same accident on which plaintiffs' suit was based. An amendment, immaterial to the appeal, was filed to the answer on 6 October 1976. On 13 August 1976, defendant directed interrogatories to plaintiffs. Plaintiffs responded with unverified answers, and on 3 November 1976, defendant moved that plaintiffs be required to answer them under oath.

Defendant's motion to dismiss came on for hearing during the week of 22 November 1976. The file did not contain the original summonses, but these were subsequently supplied by counsel for plaintiffs. During the course of the hearing, counsel for plaintiffs advised the court they were going to take a voluntary dismissal of the action. Subsequently, they changed their position and asked to be heard again on the motion. On 3 December 1976, the court entered an order wherein it concluded that defendant had not been served with proper process and denied plaintiffs' motion to amend the summonses. The court further found, however, that the defense of lack of jurisdiction was no longer available to defendant because it had utilized the facilities of the court in manners inconsistent with the defense of lack of jurisdiction by the "filing of an answer containing a counterclaim, by consenting to a Notice of Dismissal, by filing interrogatories, by filing a motion to amend the Answer, and by filing a motion to compel the plaintiffs to verify the answers to interrogatories." The court further concluded that defendant's actions constituted a general appearance and denied the motion to dismiss.

John A. Powell, for plaintiff appellees.

Morris, Golding, Blue & Phillips, by James N. Golding, for defendant appellant.

VAUGHN, Judge.

The court correctly concluded that the summonses were insufficient to make Pacific Intermountain Express Company a party to the lawsuit. *Russell v. Manufacturing Co.*, 266 N.C. 531, 146 S.E. 2d 459 (1966); *Wiles v. Construction Co.*, 34 N.C. App. 157, 237 S.E. 2d 297 (1977).

[1] The question presented is whether defendant may now avail itself of the defense of lack of jurisdiction. Rule 12 (b) of the Rules of Civil Procedure gave defendant two options. It could have waited and raised the defense of lack of jurisdiction in its answer. It did not do so. Instead, it promptly exercised its right to assert the defense by motion filed in the cause and served on plaintiffs. The filing of the motion to dismiss was its first activity in the lawsuit. Plaintiffs, therefore, having been advised of the defense within about one month of the time they started the suit, were at liberty to take appropriate steps to obtain proper service. They

elected not to do so. Thereafter, and before hearing on the motion to dismiss, defendant proceeded to take what it deemed appropriate steps to protect itself in the event its motion to dismiss should be denied. It filed answer and what appears to have been a compulsory counterclaim. It also filed interrogatories to aid in the defense of the case in the event the courts should eventually rule that it had been properly served with process.

Except for the provisions of G.S. 1-75.7, there would seem to be little doubt that defendant properly preserved its right to assert the defense of lack of jurisdiction by asserting it in a timely motion to dismiss as its first act of recognition of the lawsuit. G.S. 1-75.7 provides, however, that when a person "makes a general appearance" in a court otherwise having jurisdiction, the court acquires jurisdiction over him without any service of summons. The cases from this jurisdiction that have discussed the interaction of that section and Rule 12 have generally involved activities of a defendant wherein he utilized the power of the court or became an "actor" in the proceeding *before* timely raising the defense of lack of jurisdiction by motion or answer. *See Simms v. Stores, Inc.*, 285 N.C. 145, 203 S.E. 2d 769 (1974). An exception is *Wiles v. Construction Co., supra.* In that case we held that

> "by taking plaintiff's deposition on 14 May 1976 (after answer was filed raising the jurisdictional defense), the corporate defendant did not waive the defense of insufficiency of service of process. This decision is in accord with decisions of a majority of the courts that have considered the effect of taking depositions upon the defense of lack of personal jurisdiction. *See e.g., Neifeld v. Steinberg*, 438 F. 2d 423 (3rd Cir. 1971) and *Kerr v. Compagnie de Ultramar*, 250 F. 2d 860 (2nd Cir. 1958). *See also* 2A Moore's Federal Practice, ¶ 12.12, at 2327."

(We note that by order entered 6 December 1977, the Supreme Court of North Carolina has allowed a motion for discretionary review of our decision in *Wiles.*)

In determining that defendant must abandon its defense of lack of jurisdiction, the trial judge relied on *Simms v. Stores, Inc., supra.* As we noted earlier, however, the Court in *Simms* addressed itself to activities of a potential defendant *before* timely

raising the defense of lack of jurisdiction. The Court carefully reviewed the history of the appropriate statutes, decisions of federal courts, and those of this State. It would serve no useful purpose to repeat that process here. It is sufficient to say that it is well established that a party may raise the defense of lack of personal jurisdiction within the time to answer or move under Rule 12(b) and still lose the defense, "[I]f the court considers a defendant's conduct sufficiently dilatory or inconsistent with the *later* assertion of one of those defenses such conduct will be declared a waiver." (Emphasis added.) *Simms v. Stores, Inc., supra*, at 155. The reasons behind the rule are well founded. A party should not be allowed to use the court's time on the merits of a controversy and then, at a later time, unveil a jurisdictional defense. Such conduct not only wastes the court's time but may unnecessarily mislead and prejudice an opponent who, through no fault of his own, remains ignorant of the defense.

As the Court in *Wyrough & Loser, Inc. v. Pelmor Laboratories, Inc.*, 376 F. 2d 543 (3rd Cir. 1967) points out, however, there are other policies that must be considered. *Wyrough* involved a defendant participating in a suit and *thereafter* imposing a Rule 12(b) defense within the time permitted by the rules. Even so, the Court pointed out that a defendant should not be forced into a procedural straight jacket by forcing him to possibly forego valid defenses by hurried and premature pleading. The Court concluded that the reconciliation of these countervailing policies must be decided on a case by case basis. The Court held that defendant should have alerted the court to possible jurisdictional defenses *before* it assumed such an active role in the lawsuit.

[2] It seems to us that if, as here, a defendant promptly asserts his jurisdictional defense as his *first* step in the lawsuit, he has performed his duty in alerting the court and the other parties. His opponent can then attempt to correct the jurisdictional difficulty or assume the consequences of his failure to do so. He is not misled and cannot thereafter be unfairly prejudiced by allowing defendant to proceed with prudent preparation for trial. The judicial process is thereby expedited instead of being delayed.

[3] To hold otherwise, it seems, is to require a defendant either to abandon a valid jurisdictional defense he has appropriately raised or to ignore the lawsuit and thereby forfeit the use of

many legitimate tools of defense, including discovery for the preparation of responsive pleadings and trial as well as the preservation of testimony. The term "general appearance" as used in G.S. 1-75.7 should be held to refer generally to appearances made either before the filing of jurisdictional motions under Rule 12(b) before pleading or, if no such motions are filed, the appearances made before the defense is raised in responsive pleadings. Such an interpretation is consistent with the practice of allowing a defendant, after he has properly raised a personal jurisdiction defense, to participate in a trial on the merits without waiving the jurisdictional defense. *See e.g., Mullen v. Canal Co.*, 114 N.C. 8, 19 S.E. 106 (1894). That policy was continued with the enactment of G.S. 1-277(b), (enacted in Chapter 954 of the Session Laws of 1967 along with the new Rules of Civil Procedure.) That section provides, in pertinent part, that any party has the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person of the defendant "or such party may preserve his exception for determination upon any subsequent appeal in the cause."

It is thus anticipated that a defendant may participate in a full trial on the merits after an erroneous ruling against him on his jurisdictional motion, and that after his appeal to the appellate division, he can still have the action dismissed for the court's lack of personal jurisdiction, notwithstanding that he "voluntarily appeared" and made a "general appearance" on the merits of the case in both the trial and appellate divisions of the court. If utilization of the court to that extent pending a *final* decision on his jurisdictional motion is not a "general appearance" so as to give the court jurisdiction, surely this defendant has not made such an appearance by his utilization of the court by making reasonable preparations for trial on the merits pending *initial* determination of his jurisdictional motion.

As indicated, we conclude that the court erred when it failed to allow defendant's motion to dismiss for lack of jurisdiction. The judgment is, consequently, reversed.

Reversed.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. CHARLES M. VEHAUN

No. 7715SC614

(Filed 21 December 1977)

1. **Crime Against Nature § 1— taking indecent liberties with minors—constitutionality of statute**

The statute prohibiting the taking of indecent liberties with a minor, G.S. 14-202.1, is not void for vagueness because of the use of the phrases "immoral, improper or indecent liberties" and "lewd or lascivious act."

2. **Crime Against Nature § 1; Constitutional Law § 4— taking indecent liberties with minors—equal protection—standing to challenge**

Defendant had no standing to challenge the constitutionality of the statute prohibiting the taking of indecent liberties with a minor on the ground that the provision of the statute requiring the perpetrator of the crime to be five years older than the victim who is under sixteen created two arbitrary classifications where the victim was a nine year old child, any person sixteen years of age or older who took indecent liberties with such child would be subject to the statute, and defendant is thus not a member of the class against which the statute allegedly discriminates.

3. **Crime Against Nature § 3— taking indecent liberties with minor—uncorroborated testimony by victim**

The uncorroborated testimony of the victim is sufficient to convict a defendant of taking indecent liberties with a minor in violation of G.S. 14-202.1, if such testimony establishes all the elements of the offense.

APPEAL by defendant from *Hobgood, Judge.* Judgment entered 9 March 1977 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 29 November 1977.

Defendant was indicted for taking indecent liberties with a minor in violation of G.S. 14-202.1. Prior to trial, defendant's motion to dismiss the charge on the grounds that it was vague and uncertain in violation of the due process clause of the Fourteenth Amendment was denied. He pled not guilty and was tried before a jury.

Evidence for the State tended to show:

Defendant is a thirty-seven-year-old man who rented a room in the home of Anne Cunningham in Atlanta, Georgia, in December of 1975. Phillip Jackson, the nine-year-old son of Anne Cunningham, is the complainant. Phillip, with the permission of his parents, was allowed to accompany the defendant to Burling-

ton, North Carolina, to visit with defendant's family during Christmas of 1975 and after school ended in the summer of 1976. He remained with the defendant and his family until 29 July 1976 when defendant sent him home by bus.

In early August, Phillip confided in his younger brother that the defendant had taken indecent liberties with him. Upon learning of the situation from the younger brother, Phillip's mother elicited further details from Phillip and later in the month went to Burlington to talk with Officer Faucette of the Burlington Police Department. Officer Faucette investigated and on 1 November 1976 defendant was indicted.

Phillip testified that defendant had forced him to sleep in defendant's bedroom; that defendant had attempted to sodomize him, had attempted to force him to commit acts of fellatio upon him, had committed at least one act of fellatio upon him, and on numerous occasions had attempted such activity; and that defendant would whip him if he refused to cooperate.

At the conclusion of the State's evidence, defendant's motions to dismiss the charges and enter a not guilty verdict were denied. Defendant presented several witnesses, but their testimony was not included in the record. At the conclusion of defendant's evidence, his renewed motion to dismiss was denied.

The jury found defendant guilty as charged and the court entered a judgment imposing a ten-year prison sentence from which he appeals.

Attorney General Edmisten, by Associate Attorney Robert W. Newsom III, for the State.

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

BRITT, Judge.

By his first assignment of error, defendant contends that the trial court erred in denying his motion to dismiss on the grounds that G.S. 14-202.1 is unconstitutional under the State and Federal Constitutions. He argues first that the statute is unconstitutionally vague in violation of his due process rights, and second, that the statute as written denies him equal protection of the law. We find no merit in either of these contentions.

[1] With respect to the due process argument presented by defendant, our research does not reveal a North Carolina case upholding the constitutionality of the language of G.S. 14-202.1. However, the language of G.S. 14-202.1 is similar to Section 22-3501(a) of the 1967 District of Columbia Code which was held constitutional in *Moore v. United States*, 306 A. 2d 278 (1973).

G.S. 14-202.1 provides:

> Taking indecent liberties with children.—(a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> (1) Willfully takes or attempts to take any *immoral, improper,* or *indecent liberties* with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or
>
> (2) Willfully commits or attempts to commit any *lewd* or *lascivious* act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.
>
> (b) Taking indecent liberties with children is a felony punishable by a fine, imprisonment for not more than 10 years, or both. (Emphasis supplied.)

Section 22-3501(a) of the 1967 D.C. Code provides:

> (a) Any person who shall take, or attempt to take any *immoral, improper, or indecent liberties* with any child of either sex, *under the age of sixteen years* with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires, *either of such person or of such child, or of both such person and such child,* or who shall commit, or attempt to commit, any *lewd or lascivious* act upon or with the body, or any part or member thereof, of such child, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires, either of such person or of such child, or of both such person and such child shall be imprisoned in a penitentiary, not more than ten years. (Emphasis supplied.)

The defendant in the *Moore* case, like the defendant in the present case, argued that the use of language such as "immoral, improper, indecent liberties", and "lewd or lascivious act" is un-

constitutionally vague. In rejecting this contention and upholding the language as constitutional, the court in *Moore* (page 281) set forth the following guidelines:

> The appropriate test for whether a penal statute is sufficiently precise to withstand constitutional attack on the grounds of vagueness is whether the statute gives a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 2298-2299, 33 L.Ed. 2d 222 (1972). . . .

The court further stated that the language of the D. C. statute clearly referred to sexual conduct with a minor child and described with reasonable specificity the proscribed conduct. In a similar manner, the language in the North Carolina statute provided defendant in the present case with sufficient notice that his conduct was criminal.

[2] Defendant's equal protection argument is also without merit for the reason that defendant lacks standing to challenge the statute since he cannot show how the alleged unconstitutional feature of the statute injures him.

State v. Trantham, 230 N.C. 641, 644, 55 S.E. 2d 198 (1949), laid down the following guidelines on the question of standing:

> "Courts never anticipate a question of constitutional law before the necessity of deciding it arises." *Chemical Co. v. Turner*, 190 N.C. 471, 130 S.E. 154. They will not listen to an objection made to the constitutionality of an ordinance by a party whose rights it does not affect and who therefore has no interest in defeating it. *St. George v. Hardie*, 147 N.C. 88; *Monamotor Oil Co. v. Johnson*, 292 U.S. 86, 78 L.Ed. 1141; 11 A.J. 750.
>
> It is not sufficient to show discrimination. It must appear that the alleged discriminatory provisions operate to the hurt of the defendant or adversely affect his rights or put him to a disadvantage. [Citations.]
>
> When the class which includes the party complaining is in no manner prejudiced, it is immaterial whether a law discriminates against other classes or denies to other persons equal protection of the law. 11 A.J. 757. He who seeks to

raise the question as to the validity of a discriminatory statute has no standing for that purpose unless he belongs to the class which is discriminated against. [Citations.]

Defendant argues that the provision of the statute requiring the perpetrator of the crime to be five years older than the victim who is under sixteen creates two arbitrary classifications: (1) a class of persons over sixteen who molest children but are less than five years older than their victims, and (2) a class of persons over sixteen who molest children and are five years older than their victims.

In order for a defendant to assert that he was denied equal protection, he must show that he is a member, or could possibly be a member, of the class against which the statute allegedly discriminates. In the present case, the victim is a nine-year-old boy and the defendant is a thirty-seven-year-old man. In order for the allegedly discriminatory classification to become operative, the victim would have to be at least eleven years old to create the possibility that the defendant could fall within the classifications involving the five-year age difference. As a result, under the applicable legal principles cited above, the defendant in this case is unable to show that he is a member of the class against which the statute allegedly discriminates. Therefore, he lacks standing to challenge the constitutionality of the statute on the grounds that it denies him equal protection.

In his second and third assignments of error, defendant argues that the court erred in failing to grant his motion for a directed verdict because the complainant's testimony was not sufficiently corroborated, and that the court erred by failing to instruct the jury that defendant could not be convicted unless the complainant's testimony was corroborated. We find no merit in either of these contentions.

"The general rule is that the testimony of a single witness will legally suffice as evidence upon which the jury may found a verdict." Stansbury's North Carolina Evidence (Brandis Rev. Ed.), § 21, p. 51. The only exception to this rule involve prosecutions for perjury, treason, seduction of a woman, and abduction of a married woman. Stansbury's North Carolina Evidence (Brandis Rev. Ed.) § 21. There is no requirement in North Carolina that the

testimony of a complaining witness under G.S. 14-202.1 be corroborated before a defendant may be convicted.

Further, North Carolina case law involving the uncorroborated testimony of an incest victim indicates that if the court adopted a corroboration requirement similar to that used under Section 22-3501(a) of the 1967 District of Columbia Code, as the defendant urges, such a rule would be contrary to the trend of judicial decisions in North Carolina. In *State v. Wood*, 235 N.C. 636, 637, 70 S.E. 2d 665 (1952), the Supreme Court stated:

> There is no statute providing that the testimony of the prosecutrix must be corroborated by the evidence of others in a prosecution for incest. In consequence, a conviction for incest may be had against a father upon the uncorroborated testimony of the daughter if such testimony suffices to establish all of the elements of the offense beyond a reasonable doubt. 42 C.J.S. Incest, § 17. . . .

Similarly in the present case, there is no statutory requirement that the complainant's testimony be corroborated.

[3] In the absence of such a statutory requirement, and in view of prior judicial decisions involving uncorroborated testimony of incest victims, we hold that the uncorroborated testimony of a victim under G.S. 14-202.1 would be sufficient to convict a defendant if such testimony suffices to establish all the elements of the offense.

In the present case, the testimony presented by the State was more than sufficient to survive defendant's motion for nonsuit.

For the reasons stated above, we conclude that defendant received a fair trial free from prejudicial error.

No error.

Judges PARKER and VAUGHN concur.

LEE D. ANDREWS v. JOHN R. TAYLOR, SR. AND WIFE, BETSY TAYLOR, JOHN R. TAYLOR, JR., JOHN R. TAYLOR COMPANY, INC., AND MEREDITH SWIMMING POOL COMPANY

No. 7718SC51

(Filed 21 December 1977)

1. **Negligence § 59.2—licensee—owner's duty**

When a person enters upon the premises of another solely and exclusively in pursuit of his own pleasure, he is a licensee, and an owner owes a licensee only the duty to refrain from injuring him wilfully or through wanton negligence and from doing any act which increases the hazard to the licensee while he is on the premises.

2. **Negligence § 59.3—swimming pool—licensee's death—no negligence of owner**

In an action to recover for the wrongful death of intestate who was a licensee on defendant's property, having gone there for the purpose of swimming, evidence was insufficient to show that defendant was wilfully or wantonly negligent in the operation and maintenance of the pool; the failure of defendant to provide lifeguards and rescue equipment at his pool did not amount to negligence in light of the absence of any regulation requiring the same and the presence of the "swim at your own risk" notice; and plaintiff failed to show that the availability of lifeguards or rescue equipment would have prevented intestate's death.

3. **Negligence § 30.1— manufacturer of swimming pool—insufficient evidence of negligence**

In an action to recover for the wrongful death of intestate which occurred when he dove from a board into a pool manufactured by defendant, evidence was insufficient to show negligence in the design and construction of the pool where evidence disclosed that the design of the pool was in compliance with applicable slope requirements, and there existed substantial doubt as to whether certain recommendations were even applicable to the subject pool because of the height of the diving board.

APPEAL by plaintiff from *Crissman, Judge.* Judgment entered 19 August 1976 in Superior Court, GUILFORD County. Heard in the Court of Appeals 25 October 1977.

Plaintiff, administrator, instituted this civil action on 6 March 1975 to recover for the wrongful death of his intestate, Kenneth M. Stokes, who lost his life by drowning in a swimming pool designed and constructed by defendant Meredith Swimming Pool Company, and operated and maintained by defendants John R. Taylor, Sr., Betsy Taylor, John R. Taylor, Jr. and John R. Taylor Company, Inc.

Evidence offered at trial tended to show that on 22 July 1974, the date of intestate's death, defendant John R. Taylor, Jr. owned and managed an apartment complex in Greensboro, North Carolina, known as Creekbend Apartments, including a swimming pool located on said premises. On that date, plaintiff's intestate Kenneth M. Stokes was visiting Claude Moyea, a tenant at Creekbend Apartments. Stokes and Moyea entered the pool area and Stokes went swimming, using the diving board. Stokes dove off the board and landed near the life line which runs across the middle or "break line" of the pool; the depth at the break line is five feet (5'). He did not surface for about a minute and was finally pulled from the water by several men. He was not breathing and had a bruise on his forehead and scars on his knees and chin. After unsuccessful attempts by paramedics to revive Stokes, he was pronounced dead upon arrival at Moses Cone Hospital.

The pool at the apartment complex is a kidney-shaped structure approximately sixty-two feet (62') in length. The diving board is twelve feet (12') in length, four feet (4') of which extends over the water at a height of 24 inches (24"). The deepest point in the pool is the drain at a depth of nine feet (9'). From the drain to the break line, the pool floor has a slope of one foot (1') vertical for every three feet (3') horizontal. The break line is twenty-four feet (24') from the back wall of the pool under the diving board. A sign is posted at the entrance to the pool which recites in pertinent part: "No lifeguard on duty. Swim at your own risk."

John C. Nantz, Jr., an engineer with the North Carolina Commission for Health Services (formerly State Board of Health), testified that his agency promulgated recommended minimum standards governing the design, construction and operation of public swimming pools. These recommendations covered the relationship between the depth of the diving well area of a swimming pool and the height of the diving board. Although the subject pool was at variance with certain recommended measurements, Nantz testified that such recommendations were based on the use of a diving board with a height (above the water) of one (1) meter — fifteen inches (15") higher than the diving board in use at the Creekbend Apartment pool. In addition, the recommended standards included no provisions requiring lifeguards or rescue equipment (other than a first-aid room) at this type of pool. Nantz further testified that Guilford County had not adopted the State

recommendations; and based on his reading of the Guilford County Board of Health regulations governing swimming pools, he could find no violation with respect to the Creekbend pool.

Franklin C. Odell, Jr., found by the court to be an expert in the field of engineering, testified that he was familiar with the Guilford County regulations — specifically, the section which provides that the slope of the pool floor between the deepest part (the drain) and the break line shall not exceed one foot (1') vertical in three feet (3') horizontal. He stated that straight away from the diving board, from the drain to the break line, the slope of the floor was in conformity with the county regulation. He also stated that on a different line — to the left of the diving board — the slope was greater than one foot (1') in three feet (3') and thus, in violation of the county regulation. However, he did not actually measure this line. Odell further testified that he found the depth markers to be located in their proper place.

Opinion testimony offered by plaintiff as to the cause of intestate's death was excluded by the court upon defendant's objection.

At the close of plaintiff's evidence, all the defendants moved for a directed verdict. The court allowed the motions. The plaintiff excepted and appealed to this Court.

Lee D. Andrews, for the plaintiff.

Smith, Moore, Smith, Schell & Hunter, by Bynum M. Hunter, for the defendants.

MARTIN, Judge.

The sole question before this Court is whether the evidence adduced at trial, considered in the light most favorable to the plaintiff, was sufficient to justify a reasonable inference that intestate's death was the proximate result of the alleged negligence of the defendants.

Since the record affirmatively reveals that defendant John R. Taylor, Jr. owned and operated the apartment complex, we initially find that plaintiff has failed to establish any grounds for negligence against defendants John R. Taylor, Sr., Betsy Taylor and John R. Taylor Company, Inc. The judgment in favor of these defendants is affirmed.

[1] In determining the liability, if any, of defendant John R. Taylor, Jr., for the death of the intestate while swimming in defendant's pool, we must first ascertain the nature of defendant's *duty* to the intestate; any evidence tending to show that defendant Taylor violated this duty in operating and maintaining the swimming pool is evidence of negligence. It is well established that the duty owed a person on the premises of another depends upon the visitor's *status* — as an invitee, licensee or trespasser. *Hood v. Coach Co.*, 249 N.C. 534, 107 S.E. 2d 154 (1959); *Clarke v. Kerchner*, 11 N.C. App. 454, 181 S.E. 2d 787 (1971). When a person enters upon the premises of another solely and exclusively in pursuit of his own pleasure, as did plaintiff's intestate in the instant case, he is a licensee. *Adams v. Enka Corp.*, 202 N.C. 767, 164 S.E. 367 (1932); *see Murrell v. Handley*, 245 N.C. 559, 96 S.E. 2d 717 (1957). Regarding the duty owed by an owner to a licensee, our courts have held that an owner owes to a licensee only the duty to refrain from injuring him *wilfully* or through *wanton* negligence, and from doing any act which increases the hazard to the licensee while he is on the premises. *Hood v. Coach Co., supra; Dunn v. Bomberger*, 213 N.C. 172, 195 S.E. 364 (1938); *Haddock v. Lassiter*, 8 N.C. App. 243, 174 S.E. 2d 50 (1970).

[2] We are of the opinion, and so hold, that in the instant case no facts were presented sufficient to show or justify the inference that defendant Taylor was wilfully or wantonly negligent in the operation and maintenance of the Creekbend Apartment swimming pool. The failure of defendant Taylor to provide lifeguards and rescue equipment at his pool did not amount to negligence in light of the absence of any regulation requiring the same and the presence of the "swim at your own risk" notice. Further, plaintiff has failed to show that the availability of lifeguards or rescue equipment would have prevented intestate's death. *See Adams v. Enka Corp., supra.* The judgment in favor of defendant Taylor is affirmed.

Plaintiff has also contended that evidence adduced at trial was sufficient to show negligence by defendant Meredith Swimming Pool Company in the design and construction of the swimming pool. We disagree.

[3] The record reveals that plaintiff relied upon the regulations of the Guilford County Board of Health and the recommendations of the North Carolina Commission for Health Services as evidence

of the standard of care in the design and construction of swimming pools. However, testimony by plaintiff's experts discloses not only that the design of the pool was in compliance with the applicable slope requirements, but also that there existed substantial doubt as to whether certain recommendations were even applicable to the subject pool because of the difference in the diving board's height. In light of this evidence, any inference which a jury might draw therefrom would be the result of speculation and conjecture. This issue was properly withdrawn from the jury's consideration. Accordingly, the judgment in favor of defendant Meredith Swimming Pool Company is affirmed.

The trial court's entry of judgment for all defendants on their respective motions for directed verdict is

Affirmed.

Judges BRITT and HEDRICK concur.

IN THE MATTER OF: PHILLIP BYERS

No. 7720DC580

(Filed 21 December 1977)

1. Infants § 18— determination of delinquency—sufficiency of evidence

The evidence was sufficient to support a finding that defendant is a delinquent child by reason of his having assaulted and taken money from another where, in response to questioning by the judge, a codefendant stated that he had participated in the assault and that his three codefendants (including defendant) had also participated.

2. Infants § 16— juvenile hearing—lay judge—due process

A juvenile delinquency hearing did not violate due process because it was held before a lay judge without a right to a trial *de novo* before a legally trained judge. G.S. 7A-285.

APPEAL by defendant from *Lampley, Judge*. Order entered 11 May 1977 in District Court, UNION County. Heard in the Court of Appeals 16 November 1977.

Sgt. Frank Benton, a Monroe police officer, filed a juvenile petition alleging that the defendant is a delinquent child by

reason of his having assaulted and taken $34 from James Smith. Three other minors were allegedly involved in the assault on Mr. Smith, and the charges against all four were heard together. Defendant was represented by counsel, and at the hearing he denied the allegations of the petition. From an order placing him in the custody of the Department of Human Resources for an indefinite period not to exceed his eighteenth birthday, defendant appealed.

At the hearing, Sgt. Benton testified that he had obtained similar statements from all defendants except Byers. One of the statements was read into evidence but was not admitted against the defendant Byers. James Smith testified concerning the assault, but he was unable to identify any of his attackers. Defendant's counsel then moved for a dismissal of the petition against the defendant on the ground of insufficient evidence. Before ruling on the motion, the judge asked one of the accused juveniles, Donald Duncan, if he had participated in the assault and robbery and whether the other defendants had also participated. Duncan responded affirmatively to both questions. The judge then denied defendant's motion to dismiss and entered an order placing Byers in the custody of the Department of Human Resources.

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

Humphries and McCollum, by Joe P. McCollum, Jr., for defendant appellant.

MORRIS, Judge.

[1] The defendant's first two assignments of error are directed to the sufficiency of the evidence relating to the charges contained in the juvenile petition. The defendant contends that, under the rules applicable to a criminal prosecution, the evidence would have been insufficient to submit this case to a jury and, therefore, the petition against the defendant should have been dismissed for the same reason. We disagree. In response to questioning by the judge, co-defendant Duncan stated that he had participated in the assault on Mr. Smith and that his three co-defendants (including defendant Byers) had also participated. Defendant does not object to this evidence, and we conclude that the evidence, when viewed in the light most favorable to the

State, was sufficient to support the findings of the judge in his juvenile order placing the defendant in the custody of the Department of Human Resources. These assignments of error are overruled.

[2] The defendant's third assignment of error is directed to the constitutionality of G.S. 7A-285. Defendant contends that the hearing in the instant case did not meet the requirements of due process under the Fourteenth Amendment because it was held before a lay judge and without a right to a trial *de novo* before a legally trained judge. We disagree. The defendant argues that *North v. Russell*, 427 U.S. 328, 96 S.Ct. 2709, 49 L.Ed. 2d 534 (1976), requires that a trial or hearing presenting the possibility of confinement must be before a legally trained judge or the defendant must have the right to trial *de novo* before a legally trained judge. Appeal from a juvenile hearing conducted in our district courts lies directly to the North Carolina Court of Appeals, and a juvenile defendant does not have the right to a trial *de novo* in superior court before a legally trained judge. We do not believe that *North v. Russell, supra,* declares this procedure to be unconstitutional. Considering the procedure of the Kentucky criminal justice system which provides that less serious offenses must first be tried in district court (where many judges are laymen) with the possibility of trial *de novo* before a legally trained judge in a superior court, the Supreme Court stated that:

> "In the context of the Kentucky procedures, however, it is unnecessary to reach the question whether a defendant could be convicted and imprisoned after a proceeding in which the only trial afforded is conducted by a lay judge." P. 334.

It is apparent that the Court left undecided the issue pressed upon us by the defendant. We conclude that G.S. 7A-285 is constitutional and that the defendant's due process rights were not violated when his juvenile hearing was conducted before a lay judge. It is clear that the Supreme Court in *North v. Russell* did not hold that a trial must be held before a legally trained judge before a defendant may be imprisoned, and we believe there is nothing in the Constitution to support such a decision.

Even if the holding of the *North* case had been as the defendant has argued, it would not be applicable to G.S. 7A-285. In *North* the U.S. Supreme Court was dealing with Kentucky

criminal procedures, and the defendant ran the risk of imprisonment. Had criminal charges been pressed against the defendant Byers in North Carolina, he would have been entitled to a trial *de novo* in Superior Court where his trial would have been heard by a judge licensed to practice law, though laymen are not excluded from the bench in North Carolina either by statute or constitution. This procedure was expressly approved in *North v. Russell, supra.* In the case *sub judice*, however, the defendant was before the district court on a juvenile petition, and we have noted that when the institution to which a juvenile is committed is not of a penal character " 'such investigation is not one to which the constitutional guaranty of a right to trial by jury extends, nor does the restraint put upon the child amount to a deprivation of liberty . . . , nor is it a punishment for crime.' " *In re Whichard*, 8 N.C. App. 154, 161, 174 S.E. 2d 281, 285 (1970), *appeal dismissed*, 276 N.C. 727 (1970), quoting from *In re Watson*, 157 N.C. 340, 72 S.E. 1049 (1911). Indeed, our Juvenile Court Act "treats 'delinquent children not as criminals, but as wards and undertakes . . . to give them the control and environment that may lead to their reformation and enable them to become law-abiding and useful citizens, a support and not a hindrance to the Commonwealth.' " *In re Walker*, 282 N.C. 28, 39, 191 S.E. 2d 702, 709 (1972).

Furthermore, it is our legislative policy that the judge consider the needs of the child in the disposition of a juvenile petition. G.S. 7A-286. The noncriminal nature of juvenile hearings and the nonpenal nature of the confinement at risk has been noted by the North Carolina Appellate Courts in several cases. *In re Burrus*, 275 N.C. 517, 169 S.E. 2d 879 (1969), *aff'd sub nom McKeiver v. Pennsylvania*, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed. 2d 647 (1971); *State v. Rush*, 13 N.C. App. 539, 186 S.E. 2d 595 (1972); *In re Whichard, supra.*

We conclude that our Juvenile Court Act, pursuant to its benevolent guidelines, and with the right of appeal directly to this Court, passes the most strict requirements of fairness and due process. The possibility of confinement resulting from a hearing before a lay judge does not alter this conclusion.

Affirmed.

Judges HEDRICK and ARNOLD concur.

CHARLES L. GRAY TRADING AND DOING BUSINESS AS CHARLES L. GRAY COMPANY v. AMERICAN EXPRESS COMPANY, A CORPORATION

No. 777DC76

(Filed 21 December 1977)

1. **Uniform Commercial Code § 25— traveler's check as negotiable instrument—date unnecessary—named payee necessary**

A traveler's check is a negotiable instrument within the purview of Article III of the Uniform Commercial Code, and, though the absence of a date on such a check does not render it incomplete and unenforceable under G.S. 25-3-115, absence of the name of the payee does make the instrument legally incomplete. G.S. 25-3-104.

2. **Uniform Commercial Code § 25— traveler's checks—no named payee—failure of holder to complete**

Where plaintiff was given traveler's checks in exchange for goods, but the checks were not dated and did not bear the name of the payee, plaintiff had the authority to complete the instruments, had nine years so to do, and did not; therefore, the instruments remained incomplete and unenforceable as a matter of law. G.S. 25-3-115.

3. **Estoppel § 4.7— refusal of payment on traveler's checks—incompleteness—no estoppel to raise defense**

Where plaintiff presented to a bank traveler's checks which were blank as to date and payee, but the bank refused payment on the ground that the checks were stolen, plaintiff's contention that defendant was estopped to raise the defense of incompleteness of the instruments is without merit.

APPEAL by plaintiff from *Harrell, Judge*. Judgment filed 18 October 1976 in District Court, EDGECOMBE County. Heard in the Court of Appeals 15 November 1977.

Plaintiff, owner of Charles L. Gray Company, a wholesale grocery company located in Rocky Mount, received an order on 9 August 1967 from Ernie's Truck Stop for about $4,900 worth of cigarettes. He delivered the cigarettes to the manager of Ernie's. The manager gave the cigarettes over to Joseph Faillance of New York. Faillance paid the manager with $4,800 in American Express Travelers checks. Plaintiff saw Faillance sign and countersign the checks. Faillance did not date the checks or make them payable to anyone. The signature and countersignature were similar. The manager gave the checks to plaintiff in payment for the cigarettes. The checks remained blank as to date and payee. The manager did not endorse the checks over to plaintiff. On 10

August 1967 plaintiff turned the checks over to a local bank, still blank as to date and payee, and was refused payment on the ground that the checks were stolen. Payment was similarly refused after plaintiff forwarded the checks to Chase Manhattan Bank. Plaintiff never filled in the blanks.

Plaintiff filed suit on 15 December 1970, but when the case came on for trial on 15 October 1973, it was placed on the inactive list. On 10 June 1976 the case was returned to the active list. Defendant moved both for summary judgment and for dismissal for failure to prosecute, pursuant to N.C.R. Civ. P. 41(b). The trial court allowed both of defendant's motions. From entry of these judgments plaintiff appeals.

Ezzell, Henson & Fuerst by Robert L. Fuerst and Thomas W. Henson for plaintiff appellant.

Jordan, Morris & Hoke by Charles B. Morris, Jr. for defendant appellee.

CLARK, Judge.

Plaintiff brings forward two assignments of error. The first contends that the court committed error in granting defendant's motion for summary judgment. Summary judgment may not be granted if there is any genuine issue as to any material fact. N.C.R. Civ. P. 56(c). Defendant argued that the checks were incomplete and therefore unenforceable as a matter of law. Plaintiff apparently contends, in part, that he met the burden of raising an issue as to whether the date and name of payee were necessary to complete the instrument by introducing the affidavit of J. Edgar Booth which stated that Booth took traveler's checks without hesitation if the top and bottom signatures matched. Such affidavit does suggest that business practice does not require that the name of payee and date be filled in, but Article III of the Uniform Commercial Code is contradictory.

[1] A traveler's check is a negotiable instrument within the purview of Article III of the Uniform Commercial Code. G.S. 25-3-114 explicitly permits an instrument to be undated. Dating therefore is not a necessary element, the absence of which makes the instrument incomplete and unenforceable under G.S. 25-3-115. However, the name of the payee is an essential element. The payee's name is not one of the "[t]erms and omissions not affect-

ing negotiability" under G.S. 25-3-112. G.S. 25-3-104 demands "[a]ny writing to be a negotiable instrument within this article must . . . *be payable to order or to bearer.*" [Emphasis added.] G.S. 25-3-104(1)(d). Under old law of commercial paper and now incorporated into the Uniform Commercial Code, a note payable neither to order nor to bearer is not negotiable. *Newland v. Moore*, 173 N.C. 728, 92 S.E. 367 (1917). Specificity on the face of the instrument is required whether payment be to order or to bearer. *Johnson v. Lassiter*, 155 N.C. 47, 71 S.E. 23 (1911); G.S. 25-3-111(b). Therefore, it is clear that the checks were legally incomplete because they lacked the name of the payee.

[2] G.S. 25-3-115 permits completion of an incomplete instrument if done "in accordance with authority given . . . ." *Jones v. Jones*, 268 N.C. 701, 151 S.E. 2d 587 (1966), construing old law now incorporated into the Uniform Commercial Code, considered that the instrument's primary makers had the authority to complete the instrument by inserting the name of the payee. The holder had final authority. *Lawrence v. Mabry*, 13 N.C. 473 (1830), held that a bill of exchange drawn and issued in blank for the name of the payee may be filled in by a bona fide holder in his own name, and will bind the drawer. It is clear that plaintiff had the authority to complete the instruments, had nine years so to do, and did not. The instruments remained incomplete and unenforceable as a matter of law.

[3] Plaintiff further contends that defendant is estopped to raise the defense of incompleteness of the instruments because the checks were first refused on the grounds that they were stolen before proper issuance and thus void, that he did not complete the checks because he thought their unenforceability was due to their voidness rather than their incompleteness. Plaintiff did not plead estoppel. Ordinarily, estoppel is not available as a defense unless specifically pleaded. *Wright v. Mercury Ins. Co.*, 244 N.C. 361, 93 S.E. 2d 438 (1956). But our Supreme Court has established very liberal rules of amendment of pleadings and, in case of summary judgment will consider the pleadings amended to conform to evidence raised in the affidavits. *Whitten v. AMC/Jeep, Inc.*, 292 N.C. 84, 231 S.E. 2d 891 (1977).

In the case *sub judice* plaintiff has not raised evidence of estoppel in his affidavits sufficient to meet his burden of proof. See *Solon Lodge, K. of P.C. v. Ionic Lodge, F.A. & A.M.*, 245

N.C. 281, 95 S.E. 2d 921 (1957). Estoppel exists as a defense for innocent persons misled to their prejudice by fault or dereliction. 3 Strong's N.C. Index, Estoppel § 4. The doctrine has no application where the "innocent" party was misled through his own want of reasonable care and circumspection. *Trust Co. v. Finance Co.*, 262 N.C. 711, 138 S.E. 2d 481 (1964). It has no application where both parties are "innocent." *Davis v. Montgomery*, 211 N.C. 322, 190 S.E. 489 (1937). In the case *sub judice* plaintiff has not demonstrated anywhere any fault or dereliction on the part of defendant. The issue of whether checks stolen before issuance are void so as to render even a holder in due course without enforcement has not been settled in our jurisdiction, but it is not a "derelict" issue and defendant was neither frivolous nor consciously misleading when it refused to honor the checks. Plaintiff did not raise any evidence of estoppel to defendant's defense that the instruments were unenforceable as a matter of law because incomplete. Summary judgment was properly granted on that ground, and we need not reach either the issue of voidness or plaintiff's second assignment of error.

Affirmed.

Chief Judge BROCK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. HERBERT F. KING

No. 7728SC649

(Filed 21 December 1977)

1. **Criminal Law § 143.5— probation revocation—report of probation officer—additional evidence**

The trial court did not base the revocation of defendant's probation only upon the unsigned, unverified violation report of defendant's probation officer, and the evidence was sufficient to support the revocation, where the probation officer appeared before the court and testified under oath to substantially the same facts as were contained in his report, and defendant testified and put on other evidence at the hearing.

2. **Criminal Law § 143.10— probation revocation—consideration of evidence of inability to pay**

There is no merit in defendant's contention that the court's statement at the conclusion of a probation revocation hearing directing the probation officer

to "prepare an order revoking the probationary sentence and placing the prison sentence into effect instanter" shows that the court failed to consider or evaluate defendant's evidence of his inability to make the child support payments required by his probationary judgment.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 6 July 1977 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 6 December 1977.

Defendant was charged with violating the terms and conditions of his probation and, pursuant to proper notice, appeared and participated in hearing to determine the validity of such charge. At the hearing, the State presented evidence—through the testimony of defendant's probation officer and the violation report filed by him—tending to show that on 25 August 1976 defendant was sentenced to 5 years imprisonment for felonious abandonment and nonsupport of his children which sentence was suspended for 5 years upon the condition that defendant pay into court $100 per month for the support of his children; that defendant had made no monthly payments pursuant to the order; that defendant had been allowed to go to Georgia to obtain employment but had never gotten a job; that defendant appeared to be in good health when he left for Georgia except for cirrhosis of the liver caused by an alcohol problem; and that when defendant was arrested in Georgia, he told the probation officer that he had been unable to find a job due to a lack of work references and that he had stopped drinking.

Defendant testified that he had been unable to secure employment in Georgia although he had tried diligently; that he is trained in civil engineering and worked in this field for 14 years while he was in the Army; that he has applied for disability benefits, but his application is still being processed; and that he has a drinking problem for which he has not sought treatment recently, but for which he would be willing to accept treatment should the court so order. Defendant's brother testified that in his opinion defendant has been unable to obtain or retain employment because of his drinking problem, and that he would be willing to help his brother attend rehabilitation sessions if so allowed by the court. Defendant also introduced a psychiatric report prepared prior to his August 1976 trial for nonsupport stating

that defendant has a drinking problem but has a very high I.Q., is responsible for his actions and is competent to stand trial.

The court found that defendant had wilfully and without lawful excuse violated his probation judgment and ordered defendant's probation revoked and the suspended sentence activated immediately.

Attorney General Edmisten, by Special Deputy Attorney General W. A. Raney, Jr., for the State.

Assistant Public Defender Lawrence C. Stoker, for the defendant.

MARTIN, Judge.

[1] Defendant contends the court erred in revoking his probation based upon the unsigned, unverified violation report of the probation officer and cites as authority *State v. Thomas*, 236 N.C. 196, 72 S.E. 2d 525 (1952). In *Thomas*, the probation revocation was based solely upon the defendant's plea of *nolo contendere* to charges amounting to a violation of the condition of his probation judgment, evidence of this plea appearing in the unverified report of the probation officer. Neither the defendant nor the probation officer presented other evidence at the hearing. The Court held that the plea of *nolo contendere* could not be used against the probationer as an admission of the violation, but that "proof of such violation, if any, must be made independently of such plea. . . ." In so holding, the Court observed that "the suspended sentence should not be invoked on the unverified report of the probation officer." Clearly this case is not controlling authority on the question before this Court. In the instant case, the probation officer appeared before the court and testified under oath to substantially the same facts as were contained in his unsigned report; thus, the reliability of this information was subject to cross-examination. Moreover, defendant was afforded the opportunity to participate and, in fact, did so by testifying and putting on additional evidence at the hearing. Upon conclusion of the hearing in the case *sub judice*, the court clearly had sufficient competent evidence before it on which to base its finding. *See State v. Langley*, 3 N.C. App. 189, 164 S.E. 2d 529 (1968). Defendant's first assignment of error is overruled.

[2] In his second assignment of error, defendant contends that the court erred in revoking his probation for the reason that the court failed to consider or evaluate defendant's evidence of his inability to make the payments required by his probationary judgment. In support of this contention, he relies on the court's statement at the conclusion of the hearing directing the probation officer to "prepare an order revoking the probationary sentence and placing the prison sentence into effect instanter." We find no merit in this contention.

Defendant cites as authority for this contention *State v. Young*, 21 N.C. App. 316, 204 S.E. 2d 185 (1974). In that case, the probationer offered evidence which, if believed, showed that he was *unavoidably* without the means to make required payments. Because the trial court found only that the probationer had wilfully violated the terms and conditions of his probation, this Court held that it was manifestly unclear whether the trial court had properly considered and evaluated the probationer's evidence, and therefore, ordered that a new hearing be had. We find the narrow holding of the *Young* case to be inapposite to the facts of the instant case as defendant's evidence disclosed no "unavoidable inability" to pay. Even if the court found defendant's evidence to be true, it could still find that no lawful excuse existed for defendant's failure to make payments. In addition, the trial court affirmatively indicated that it reached its determination "[f]rom the evidence presented. . . ." This assignment of error is overruled.

Affirmed.

Chief Judge BROCK and Judge CLARK concur.

GRACE O. CHAMBLESS v. JOHN H. CHAMBLESS

No. 7722DC60

(Filed 21 December 1977)

1. Divorce and Alimony § 18.8— alimony pendente lite—list of plaintiff's expenses—admissibility

In an action for alimony pendente lite, lists prepared by plaintiff of her estimated living expenses were admissible in evidence to illustrate plaintiff's testimony.

2. Divorce and Alimony § 18.12— alimony pendente lite—plaintiff's right to relief—sufficiency of evidence

Evidence in an action for alimony pendente lite was sufficient to support the trial court's conclusion that defendant's conduct constituted indignities to the person of the plaintiff so as to render her condition intolerable and her life burdensome where such evidence tended to show that defendant repeatedly told plaintiff that he did not love her and did not want anything further to do with her; the parties frequently argued and on one occasion defendant struck plaintiff; and defendant resisted plaintiff's attempts at reconciliation.

3. Divorce and Alimony § 18.11— alimony pendente lite—plaintiff's dependency—sufficiency of evidence

Evidence in an action for alimony pendente lite was sufficient to support the trial court's finding that defendant was the supporting spouse and plaintiff was the dependent spouse where such evidence tended to show that plaintiff was unemployed and had no outside income; and prior to the separation, defendant furnished plaintiff an allowance of $75 per week, paid for household expenses, paid for plaintiff's clothing, and maintained a checking account to which plaintiff had access.

APPEAL by defendant from *Martin (Lester P.), Judge.* Judgment entered 24 August 1976 in District Court, DAVIDSON County. Heard in the Court of Appeals 26 October 1977.

Plaintiff-wife instituted this action seeking alimony without divorce and alimony *pendente lite*, and alleging as grounds therefor, *inter alia*, abandonment, indignities to her person, and failure to provide necessary subsistence so as to render her condition intolerable and her life burdensome. Defendant-husband filed answer and counterclaimed for divorce from bed and board, alleging grounds therefore. Defendant subsequently amended his answer and counterclaim, alleging as alternative defenses that the parties had not actually separated, that they had continued to cohabit, and that the plaintiff had constructively abandoned him.

The cause came on for hearing in district court upon plaintiff's motion for alimony *pendente lite* and counsel fees *pendente lite*. At the hearing, both parties presented evidence, from which the district court made findings of fact favorable to the plaintiff, concluded that plaintiff was entitled to an award of alimony *pendente lite*, and ordered defendant to pay to plaintiff $100.00 per week and to surrender to her possession of the residence owned by the parties as tenants by the entireties.

From the foregoing judgment of the district court, defendant appeals.

Walser, Brinkley, Walser & McGirt, by Walter F. Brinkley, for plaintiff.

Wilson & Biesecker, by Joe E. Biesecker, for defendant.

BROCK, Chief Judge.

[1] Defendant brings forth six assignments of error, two of which are not argued on appeal and thus are deemed abandoned. Defendant's second assignment of error is to the introduction into evidence of plaintiff's exhibits Nos. 7 and 8, which were paper writings prepared by plaintiff and identified by her as lists of estimated expenses which would allow her to maintain her standard of living. Prior to the introduction of the lists, plaintiff testified as to the annual amounts she would need. Plaintiff was allowed to introduce the lists in lieu of reading out the items contained therein. The lists were clearly admissible to illustrate plaintiff's testimony as to the amount of her expenses. This assignment of error is overruled.

Defendant next assigns error to the trial court's finding of fact and conclusion of law that the conduct of the defendant constituted indignities to the person of the plaintiff so as to render her condition intolerable and her life burdensome. Defendant contends that this finding of fact and conclusion of law is not supported by the evidence. We disagree.

The following discussion of "indignities" appears in 1 Lee, N.C. Family Law, § 82 at p. 311:

> "Indignities may consist of unmerited reproach, studied neglect, abusive language, and other manifestations of settled hate and estrangement. The fundamental characteristic of indignities is that it must consist of a course of conduct or continued treatment which renders the condition of the injured party intolerable and life burdensome. The indignities must be repeated and persisted in over a period of time."

[2] The trial court made findings of fact that plaintiff and defendant had frequent arguments and that on one occasion defendant struck plaintiff; that on numerous occasions defendant advised plaintiff that he did not love her and did not want to continue to live with her; that as the relationship of the parties deteriorated, defendant refused to discuss the situation with

plaintiff and resisted her efforts at reconciliation; that defendant advised plaintiff he was through with her and didn't want anything further to do with her; that plaintiff had repeatedly attempted to become reconciled and resume the marital relationship but that defendant had demonstrated continued indifference and had continued to tell plaintiff he did not love her, did not want to live with her, and that even though they might live and eat in the same house, he would not eat or sleep with her or have anything to do with her.

These findings of fact are supported by plaintiff's testimony, and thus are conclusive on appeal. As such, they demonstrate a course of conduct on the part of defendant sufficient to fall within the definition of indignities. Defendant's second assignment of error is overruled.

[3] In assignments of error numbers four and five, which he discusses together, defendant contends that the trial court's findings of fact and conclusions of law that plaintiff is substantially dependent on defendant and substantially in need of maintenance and support, and that defendant wilfully failed to provide necessary subsistence, are not supported by competent evidence. This argument has no merit.

Defendant concedes that he is the supporting spouse and plaintiff the dependent spouse. The record contains uncontradicted evidence and the court made findings of fact that plaintiff was unemployed and had no outside source of income. The court also found as facts, and the record is undisputed that prior to the separation, defendant furnished plaintiff $75.00 per week for incidental personal and normal household expenses; paid for the remainder of the groceries and household expenses, including maintenance, utilities, and insurance; furnished plaintiff an automobile; paid for some of her clothing and maintained a checking account with a balance of $1,000.00 to $2,000.00 a month to which plaintiff had access and which she frequently overdrew. The court found that since the separation, defendant has furnished groceries and other expenses, paid for some clothing, and furnished to plaintiff $150.00 a month in cash.

Thus it appears that plaintiff's pre-separation allowance from defendant substantially exceeded her post-separation allowance. Defendant does not contend that his earnings are insufficient to

justify the amount of the trial court's award. On these facts we cannot say that the trial court erred or abused his discretion in concluding that plaintiff has been substantially dependent upon defendant for maintenance and support, and that defendant failed to furnish plaintiff with necessary subsistence according to her means and condition. Defendant's fourth and fifth assignments of error are overruled.

For the reasons set forth herein, the judgment of the district court below is

Affirmed.

Judges MARTIN and CLARK concur.

JOY I. SMATHERS v. ALAN D. SMATHERS AND JOSEPHINE H. SMATHERS AND JOY I. SMATHERS v. ALAN D. SMATHERS AND JOSEPHINE H. SMATHERS

No. 7730DC86

(Filed 21 December 1977)

Uniform Commercial Code § 26— notes payable to order of another—absence of indorsement by payee—burden of showing ownership

The trial court erred in finding as a matter of law that plaintiff is the "owner and holder" of notes made payable to the order of another where the notes had not been indorsed by the payee, the burden being on plaintiff to establish that she is the transferee of the notes and thus under G.S. 25-3-201(1) has such rights as her transferor had therein. G.S. 25-1-201(20).

APPEAL by defendants from *McDarris, Judge.* Judgment entered 29 October 1976 in District Court, HAYWOOD County. Heard in the Court of Appeals 15 November 1977.

In separate actions plaintiff seeks to recover on two promissory notes, each of which was signed by defendants and made payable to the order of John H. Smathers. Although the notes were not indorsed, plaintiff alleged she is presently the owner and holder of the notes by assignment. Defendants answered and admitted that they executed the notes to John H. Smathers, who was the father of the male defendant, but alleged that it was the understanding of the parties that defendants would not have to

pay the notes and that they were only for record in the later settlement of the John H. Smathers Estate. Defendants also denied that plaintiff is the owner of the notes. The two actions were consolidated for trial and were tried by the court without a jury.

At trial, plaintiff introduced the notes in evidence and stipulated that they had never been indorsed by the payee. Plaintiff testified that the notes had been given to her husband by his father, John H. Smathers, the payee, and that they came to her as result of her husband's death three years ago. There was also evidence that John H. Smathers had died and that First Union National Bank was executor of his estate.

At conclusion of the evidence, the court entered judgment finding "as a matter of law that the plaintiff is the owner and holder of the two promissory notes being sued on and pursuant to Section 25-3-301 of General Statutes of North Carolina is entitled to enforce payment in her own name." From judgment for plaintiff for the amount of the notes plus interest, defendants appeal.

Richard W. Riddle for plaintiff appellee.

W. R. Francis and Roberts, Cogburn & Williams by Max O. Cogburn and Max O. Cogburn, Jr., for defendant appellants.

PARKER, Judge.

G.S. 25-1-201(20) defines a "holder" as "a person who is in possession of a document of title or an instrument or an investment security drawn, issued or indorsed to him or to his order or to bearer or in blank." The notes upon which plaintiff sues were not drawn, issued or indorsed to her or to her order or to bearer or in blank. Therefore, plaintiff is not the holder of the notes within the meaning of the Uniform Commercial Code, G.S. Ch. 25, and the trial court erred in according her the rights of a holder under G.S. 25-3-301.

Dillingham v. Gardner, 219 N.C. 227, 13 S.E. 2d 478 (1941), cited by plaintiff and which apparently was relied upon by the trial court, is not apposite. The record in that case revealed that the note there in question had been indorsed by the payee and that it was thereafter successively indorsed until it was finally assigned in writing to the defendant Gardner, who had possession of the note when payment was obtained by foreclosure of the

deed of trust which secured the note. The language in the opinion in that case must be read in the light of the record then before the court. In any event, since the decision in that case our General Assembly has enacted present G.S. Ch. 25, the Uniform Commercial Code, and the provisions of that statute control the rights of the parties in the case now before us.

G.S. 25-3-201(1) provides in part that "[t]ransfer of an instrument vests in the transferee such rights as the transferor has therein . . . ." However, subsection (3) of that section provides that until the instrument is indorsed "there is no presumption that the transferee is the owner." Referring to this clause of subsection (3), Official Comment No. 8 to Section 3-201 of the U.C.C. states:

> The final clause of subsection (3), which is new, is intended to make it clear that the transferee without indorsement of an order instrument is not a holder and so is not aided by the presumption that he is entitled to recover on the instrument provided in Section 3-307(2). The terms of the obligation do not run to him, and he must account for his possession of the unindorsed paper by proving the transaction through which he acquired it.

In the present case, the plaintiff testified to some of the circumstances under which she obtained possession of the notes, but the trial court made no findings of fact with respect thereto. Indeed, the trial court, which heard this case without a jury, made no findings of fact whatsoever as it was required to do by G.S. 1A-1, Rule 52(a)(1). Instead, it based its judgment for the plaintiff entirely upon its finding "as a matter of law that the plaintiff is the owner and holder" of the notes. Since we have found that legal conclusion was in error, defendants are entitled to a new trial. Upon a new trial, plaintiff may be able to establish that she is the transferee of the notes and thus under G.S. 25-3-201(1) has such rights as her transferor had therein. This may include the right to maintain an action to enforce payment of the notes, subject, however, to any defenses which defendants could have asserted against her transferor.

New trial.

Judges BRITT and VAUGHN concur.

CATHERINE BYRD SMITH AND GARLAND SMITH v. LUMBERTON MOTORS, INCORPORATED AND FORD MOTOR COMPANY

No. 7716SC23

(Filed 21 December 1977)

Negligence § 30.2— car destroyed by fire—failure to show cause

In an action to recover damages for destruction of an automobile by fire, the trial court properly directed verdicts in favor of defendants, the manufacturer and seller of the car, since plaintiffs failed to show that something defendants did or neglected to do was a proximate cause of the fire which injured them.

APPEAL by plaintiffs from *Canaday, Judge.* Judgment entered 1 September 1976 in Superior Court, ROBESON County. Heard in the Court of Appeals 29 September 1977.

This is an action to recover damages for destruction of a 1973 Mercury owned by Catherine Smith and radio equipment that was installed in the vehicle and owned by Garland Smith. Plaintiffs seek to recover from each defendant on theories of negligence and breach of warranty.

The evidence in the light most favorable to plaintiffs tends to show: Plaintiff Garland Smith has owned 75 to 100 automobiles in the past 40 years. On or about 5 October 1972, he went to a showing of 1973 automobiles at Lumberton Motors and took a 1973 Mercury for a test drive during which the car bucked, skipped, and backfired under the hood. He returned the car and informed a salesman, Sessoms, of the backfiring. The next day he returned to Lumberton Motors and agreed with Sessoms to purchase the car. Sessoms told Garland Smith to bring the car back and they would tune it up and get it running right. During the next weekend the car continued to backfire under the hood. On Monday he took the car to Lumberton Motors but could not get it serviced. On Tuesday he returned the car to Lumberton Motors, and it was serviced by R. A. Horne. The car still did not run properly. That night Garland Smith saw Horne at the Sheriff's Department and told Horne the car was in worse condition than when he took it in. Horne told Smith that he had knocked some holes where the breather cap fits onto the carburetor. He asked Smith not to tell anyone because Horne was not supposed to have done that to the car. Horne said that he did not know what else to do with the car

but that a factory man would be down in a few days and that Horne would call Smith to bring the car back. Smith returned the car to Lumberton Motors one more time to get some tires changed and on that occasion he talked to Horne and Sessoms who told him they were still expecting the factory representative. The car continued to backfire until 6 December 1972. During that period of time no one from Lumberton Motors or Ford Motor Company telephoned or wrote to Smith about the car. Around 2:00 a.m. on 5 or 6 December 1972, while Smith was turning around on a road, the car sputtered and backfired and went up in flames. The sound of the backfire and the flames came from under the hood. The wind was blowing; the gas tank exploded; and the car was virtually destroyed. Prior to the fire, Smith had driven the car approximately 5,000 miles. After the fire plaintiffs received in the mail two notices from Ford stating that the Mercury was included in a recall program. The notices stated that certain parts within the distributor could exhibit unacceptable wear during normal use and the wear could result in a gradual deviation from the proper ignition setting for the vehicle. Dr. Carl Frank Zorowski, an expert in the field of mechanical engineering, testified in response to a hypothetical question that in his opinion "the defective condition that existed in the automobile on the date of its purchase" was probably the cause of the fire.

At the close of all the evidence the court directed verdicts in favor of both defendants and entered judgment dismissing the action.

Lee and Lee, by Martha K. Walston, for plaintiff appellants.

Page & Britt, by W. Earl Britt, for defendant appellee, Lumberton Motors, Incorporated.

McLean, Stacy, Henry & McLean, by William S. McLean, for defendant appellee, Ford Motor Company.

VAUGHN, Judge.

The briefs filed on behalf of all of the parties are, in substantial part, devoted to arguments relating to the existence, validity and applicability of warranties and to the alleged negligence of defendants. If our view of the evidence is correct, however, it is not necessary to reach those questions. Whatever plaintiffs' theory, they must show that something defendants did or

neglected to do was a proximate cause of their injury. We conclude that they have shown no causal connection between their loss and the defendants. There is evidence that the automobile was destroyed by fire but no evidence as to what caused the fire.

There is evidence that the automobile did not run properly either before it was purchased or during the five thousand miles that Smith elected to operate it. There is, however, no evidence of what defect, if any, there was that prevented the car from running properly. The testimony of plaintiffs' expert witness did not help them. He first saw the burned automobile about three years after the fire. There is no indication that his personal examination revealed anything about the cause of the fire. He did testify that "the defective condition that existed in the automobile on the date of its purchase was probably the cause of the fire which ensued some time later." His answer was in response to a hypothetical question which asked him to assume that "a defective condition existed in or about the engine" of the vehicle on the day it was purchased. The answer adds nothing to plaintiffs' case. If he meant that *any* defective condition that existed probably caused the fire, his assertion is incredible and without probative force. If he was referring to a *particular* defect that might have existed, his testimony is silent with respect thereto.

The opinion of an expert is to assist the jury in evaluating matters in evidence. The expert witness may not supply an evidentiary fact not in evidence and beyond the personal knowledge of the expert, under the guise of an expert opinion. *Hubbard v. Oil Co.*, 268 N.C. 489, 151 S.E. 2d 71 (1966); *Keith v. Gas Co.*, 266 N.C. 119, 146 S.E. 2d 7 (1966).

The recall notice referred to earlier is, in pertinent part, as follows:

> "We have found that certain parts within the distributor in the ignition system on your 1973 Ford or Lincoln-Mercury product could exhibit unacceptable wear during normal operation. This wear could then result in a gradual deviation from the ignition setting specified for your particular vehicle.
>
> To correct this wear problem, we have developed a special clip that fits inside the distributor. This clip is designed to reduce wear to the affected distributor parts and at the same time help maintain the specified ignition setting."

The recall notice does not provide the necessary causal link between defendants' conduct and the fire. There was no evidence, including that from the expert witness, that the condition described in the notice could have caused the fire. Moreover, plaintiffs' evidence negates any such inference. Plaintiffs' new automobile did not run properly at the time it was purchased. Any possible trouble from the matter described in the recall notice would develop gradually.

There was no evidence that any act of Lumberton Motors caused the fire. Smith was told within one week of the purchase of the car that his engine difficulty would have to be diagnosed by a factory representative and could not be corrected locally. Notwithstanding this, plaintiffs elected to keep the car and operate it for two months and for almost 5,000 miles. Nor is there any evidence to suggest that the extra holes that Horne put in the breather cap caused the fire.

In summary, if plaintiffs are to recover in either contract or tort, they must show a causal connection between defendants' alleged misfeasance and their injury. We conclude that plaintiffs have failed to carry that burden. *See e.g., Kekelis v. Machine Works*, 273 N.C. 439, 160 S.E. 2d 320 (1968); *Insurance Co. v. Chevrolet Co.*, 253 N.C. 243, 116 S.E. 2d 780 (1960); *Harward v. General Motors Corp.*, 235 N.C. 88, 68 S.E. 2d 855 (1952); *Burbage v. Suppliers Corp.*, 21 N.C. App. 615, 205 S.E. 2d 622 (1974); *Williams v. General Motors Corp.*, 19 N.C. App. 337, 198 S.E. 2d 766 (1973); *Coakly v. Ford Motor Co.*, 11 N.C. App. 636, 182 S.E. 2d 260 (1971).

The judgment is affirmed.

Affirmed.

Judges MORRIS and CLARK concur.

GELDER & ASSOCIATES, INC. v. ST. PAUL FIRE AND MARINE INSURANCE COMPANY

No. 7710SC53

(Filed 21 December 1977)

Principal and Surety § 10— bond to release laborer's and materialman's lien—extent of surety's obligation

A bond posted to release the principal's land from plaintiff's lien for labor and materials was not intended to secure only the rights plaintiff had by virtue of its lien on the land but obligated the surety to pay any sum that the courts finally determined to be due from the principal to plaintiff in an action to recover for the labor and materials; therefore, the surety's obligation under the bond was not extinguished when the principal's land was sold at a foreclosure sale under a prior lien.

APPEAL by defendant from *Herring, Judge.* Judgment entered 28 August 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 25 October 1977.

Plaintiff sues defendant on a bond executed by Airpark Industrial Center, Inc. as principal and by defendant as surety.

The controversy in this case began when Airpark Industrial Center, Inc. failed to pay plaintiff all that it owed for clearing, grading and paving land owned by Airpark. Plaintiff then filed notice of a laborers' and materialmen's lien against the property and started suit against Airpark to enforce that lien on 1 August 1974. On 6 September 1974, Airpark and defendant executed the bond that is the subject of this lawsuit and deposited it with the clerk of superior court. As required by G.S. 44A-16(6), the clerk then cancelled the lien of record.

On 23 June 1975, the land was sold at a foreclosure sale under the terms of a deed of trust which had been executed before plaintiff commenced its work on the land and before plaintiff's lien could have attached. There was no surplus from the foreclosure sale.

Plaintiff's suit against Airpark was tried in January, 1976, and plaintiff was awarded a judgment in the amount of $23,538.79. In March, 1976, plaintiff started this suit against defendant as surety on the bond that was posted to release the land from plaintiff's lien. The judge concluded that there was no issue as to any material fact and that plaintiff was entitled to judgment as a mat-

ter of law. He entered summary judgment for plaintiff in the amount of $23,538.79. This is the amount of plaintiff's judgment against Airpark, the principal on the bond.

Edgar R. Bain, for plaintiff appellee.

Smith, Anderson, Blount & Mitchell, by John L. Jernigan and Joseph E. Kilpatrick, for defendant appellant.

VAUGHN, Judge.

Defendant contends that the court erred in granting plaintiff's motion for summary judgment and argues that defendant was entitled to a judgment in its favor as a matter of law.

A laborers' and materialmen's lien may be discharged of record by, among other ways, complying with the following:

> "Whenever a corporate surety bond, in a sum equal to one and one-forth [1 1/4] times the amount of the lien or liens claimed and conditioned upon the payment of the amount finally determined to be due in satisfaction of said lien or liens, is deposited with the clerk of court, whereupon the clerk of superior court shall cancel the lien or liens of record." G.S. 44A-16(6).

Plaintiff's lien on Airpark's property was so discharged when Airpark as principal and defendant as surety posted a bond, in pertinent part as follows:

> KNOW ALL MEN BY THESE PRESENTS that we, AIRPARK INDUSTRIAL CENTER, INC., . . . as principal, and ST. PAUL FIRE AND MARINE INSURANCE COMPANY, . . . as surety, are held and firmly bound unto Gelder and Associates, Inc., a North Carolina corporation with its principal office and place of business in Wake County, North Carolina, in the sum of Twenty-Nine Thousand Five Hundred Dollars ($29,500.00) for the payment of which sum we hereby obligate and bind ourselves and our respective legal representatives and successors, jointly and severally.
>
> The condition of the foregoing obligation is that:
>
> * * *
>
> NOW, THEREFORE, if the above principal and surety shall well and truly protect and save harmless the obligee from

any loss up to the sum of Twenty-Three Thousand Five Hundred Thirty-Eight Dollars and Seventy-Nine Cents ($23,538.79), costs of court, and interest, as the same shall be determined to be due obligee by principal by the courts of North Carolina upon a final determination in the above referenced action, this obligation shall be null and void, but otherwise to be and remain in full force and effect."

Defendant contends that the bond was intended solely to secure whatever rights plaintiff had by virtue of the lien on the land, that it was not intended to give plaintiff any greater security than it originally had by virtue of the lien and that, since the foreclosure of the property would have extinguished plaintiff's lien had not the bond been executed, the foreclosure cancelled defendant's obligations under the bond. Defendant's argument ignores the plain wording of the bond. The bond unconditionally obligates defendant to pay any sum that the courts finally determine to be due plaintiff by the principal, Airpark, up to the amount of $23,538.79, plus court costs and interest. That amount has now been determined. There is nothing in the contract to limit defendant's obligations to what plaintiff might have collected had the lien not been discharged. Defendant guaranteed payment of all that its principal owed plaintiff, not what plaintiff might have been able to collect.

The statute, G.S. 44A-16(6), is more for the benefit of the landowner than the lien-creditor. In many instances substantial development projects are fettered by the existence of liens for relatively small amounts over which there are serious disputes as to the sums due. Time is often of the essence. The landowner finds himself faced with the dilemma of either paying what he considers to be an unjust claim or incurring the risks inherent in the delay pending litigation of the claim. Under this statute the landowner can post a bond and free his land from the weight of the lien while the parties litigate over the amount, if any, that may finally be determined to be due. He can accomplish the same result by depositing cash with the clerk. G.S. 44A-16(5). He is then free to sell, mortgage, or otherwise encumber the land free of the lien. The lien-creditor has no choice as to whether the lien will be cancelled. He can, however, rest in the knowledge that, if he proves his debt, the debt will be paid. He is thereby relieved of the necessity of protecting his interest in the land by taking all

the steps that a prudent creditor would take, including possible negotiations with other creditors and efforts to insure that, in the event of a foreclosure, the property does not sell for less than its real value.

The contract is clear. Defendant's obligation will be enforced as written. Summary judgment for plaintiff was, therefore, properly entered.

Affirmed.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. JOHN RICKS

No. 7710SC675

(Filed 21 December 1977)

Rape § 5— rape of twelve year old—consent by victim—insufficient evidence of rape

Evidence was insufficient for the jury in a prosecution for rape of a twelve year old girl where it tended to show that defendant offered the girl money for sexual intercourse and asked her to go down to the pond for that purpose; the girl refused him, but subsequently followed defendant to the pond; on defendant's orders, but without any threat of force, she took her pants down and submitted to intercourse without complaint and made no protest until 10 or 20 minutes later when he began to hurt her; all this time the girl was within sight of the house where her mother was; and the only direct testimony about the girl's consent was that while she really did not want to go to the pond, she went anyway because she did not know what to do and, while she did not want to have sexual intercourse with defendant, she did not protest nor did she tell him so.

APPEAL by defendant from *Braswell, Judge.* Judgment entered 23 June 1977 in Superior Court, WAKE County. Heard in the Court of Appeals 8 December 1977.

Defendant was indicted for the rape of twelve-year-old Felicia Bellamy, the daughter of the woman with whom he lived. The State's evidence tended to show that on 12 February 1977, defendant offered Felicia $2.00 if she would have sexual intercourse with him. She refused but later followed him to a pond near her home. When asked to take off her panties and lie down, she did

so. After intercourse had continued for some time, she complained that he was hurting her. This was not the first time defendant had intercourse with the girl. Felicia also testified that defendant whipped her and her brothers and sisters when he wanted them to mind him.

Defendant was convicted of second degree rape. He was sentenced to forty years in prison.

Attorney General Edmisten, by Associate Attorney Thomas F. Moffitt, for the State.

W. Thurston Debnam, Jr., for defendant appellant.

VAUGHN, Judge.

Defendant assigns as error the court's failure to dismiss the case at the close of the State's evidence due to its insufficiency. He alleges that the State produced no evidence from which a jury could reasonably infer that the act of intercourse was by force and against the will of Felicia Bellamy. We are compelled to agree.

It is well established that consent is a complete defense to an indictment charging the rape of a female over the age of twelve. *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974). Consent, however, is not synonymous with submission, for submission due to fear, fright, coercion or realization that in the particular situation resistance is futile is not consent sufficient to provide the defense. *State v. Hines*, 286 N.C. 377, 211 S.E. 2d 201 (1975); *State v. Primes*, 275 N.C. 61, 165 S.E. 2d 225 (1969). Moreover, the age of the woman is an important consideration in determining what situations would reasonably induce submission due to fear or coercion. *State v. Carter*, 265 N.C. 626, 144 S.E. 2d 826 (1965).

With these factors in mind we review the prosecutrix's testimony. Felicia testified that defendant offered her money for sexual intercourse and asked her to go down to the pond for that purpose. She testified that she refused him. After he left alone, she followed, leaving the comparative safety of the house where her mother was present. On defendant's orders, but without any threat of force, she took her pants down and submitted to intercourse without complaint and made no protest until ten or twenty minutes later when he began to hurt her. All this time she was

within sight of the house where her mother was. Although she testified that defendant was the head of the household in which she lived and had whipped all of the children when he wanted them to mind him, the only direct testimony about her consent was to the effect that while she really did not want to go to the pond she went anyway because she did not know what to do and that while she did not want to have sexual intercourse with defendant she did not protest nor did she tell him so.

In denying the defendant's motion to dismiss, the court relied upon *State v. Miller*, 268 N.C. 532, 151 S.E. 2d 47 (1966), and *State v. Carter, supra.* In *Miller*, the victim, a seventeen-year-old girl tricked into getting into a car with five men, testified that she begged and tried to resist. In *Carter*, the victim was the defendant's seven-year-old stepdaughter. While her mother was absent, he slapped her, threw her on the kitchen floor, and severely injured her while forcing himself upon her. There is no such evidence in this case. The Court in deciding *State v. Carter, supra*, quoted extensively from cases from other jurisdictions which emphasized the vulnerable position of a girl faced with the superior strength of an adult male where there is no one nearby to aid her. Felicia, however, left the presence of her family and followed defendant knowing his purpose. Moreover, by her own testimony when the alleged rape took place she was near enough to the house to see it and presumably be heard screaming.

In reviewing other cases where the evidence of fear and coercion was sufficient to support a finding that the victim submitted without extensive struggle but did not consent to intercourse, we find that generally the woman was faced with a stronger man in a place where there was no one to come to her aid if she screamed or resisted and that she testified about her fear. *See e.g., State v. Hines, supra; State v. Primes, supra; State v. Overman*, 269 N.C. 453, 153 S.E. 2d 44 (1967).

Viewing the evidence in the light most favorable to the State, we cannot say that it raises any reasonable inference that the act of sexual intercourse was consummated by force, actual or implied, or that it was without Felicia's consent. The evidence shows a sordid use of a young girl for which the District Attorney may be well advised to prosecute defendant under an appropriate charge. The evidence is, however, insufficient to support a conviction for rape.

Reversed.

Judges BRITT and PARKER concur.

S. E. HANNER AND WIFE, ERMA P. HANNER v. DUKE POWER COMPANY

No. 7721SC130

(Filed 21 December 1977)

Easements § 8.3— power line right-of-way—right to cut trees

The trial court properly granted summary judgment for defendant power company in an action to recover damages for the allegedly wrongful cutting of trees on a right-of-way granted by plaintiffs to the power company since the right-of-way agreement specifically gave the power company the right to clear trees from the right-of-way, plaintiffs' right to grow "crops" on the right-of-way did not include trees, and the power company by the terms of the agreement did not waive its right to cut the trees by agreeing at various times to allow trees under 16 feet tall to remain on the right-of-way.

APPEAL by plaintiff from *Collier, Judge*. Judgment entered 5 November 1976, in Superior Court, FORSYTH County. Heard in the Court of Appeals 6 December 1977.

Plaintiffs own, in Forsyth County, certain real property which is subject to a right-of-way granted to defendant in a 1941 agreement by plaintiffs' predecessor in title. The agreement, in pertinent part, provides that defendant power company has the right

> "to keep said strip of land free and clear of any or all structures, trees and other objects of any nature except those placed in or upon same by the Power Company, its successors or assigns; with the right at all times to cut away all trees located upon said land outside of said strip, which if they should fall or be blown or cut down might strike any of said wires, poles, towers, lines, apparatus, appliances, or structures . . . provided that the failure of the Power Company, its successors or assigns, to exercise any of the rights herein granted shall not be construed as a waiver or abandonment of the right thereafter at any time, and from time to time, to exercise any or all of such rights.

> "IT IS AGREED that the grantor(s) may use said strip of land for growing such crops and maintaining such fences as may not interfere with the use of said right of way by the Power Company for the purposes hereinabove mentioned."

Sometime prior to 1966, small trees began to grow on the right-of-way, and in April of that year, plaintiffs apparently spoke to employees of defendant, asking that the trees be allowed to grow. Between 1966 and 1975 plaintiffs spoke to defendant's employees on several more occasions, and the result was that the power company refrained from cutting any trees which were less than 16 feet tall. In early 1975, however, defendant, without notifying plaintiffs, went upon the right-of-way and cleared all of the growing trees.

Plaintiffs initiated this action to recover damages for the allegedly wrongful cutting of the trees. Defendant moved for summary judgment and from the granting of defendant's motion, the plaintiffs appeal.

Henry C. Frenck for the plaintiff appellants.

Womble, Carlyle, Sandridge & Rice, by W. P. Sandridge, Jr., for defendant appellee.

ARNOLD, Judge.

The sole question presented by plaintiff on this appeal is whether there is a genuine issue of material fact which will preclude summary judgment in favor of defendant. *See* G.S. 1A-1, Rule 56. Plaintiffs specifically argue that the contract of easement is an ambiguous contract which may be made certain by extrinsic evidence and which must be interpreted by a jury under proper instructions of the law. While plaintiffs' statement of the law regarding ambiguous contracts is correct, *Goodyear v. Goodyear*, 257 N.C. 374, 126 S.E. 2d 113 (1962), we do not find that the contract of easement in the present case is ambiguous.

Plaintiffs' argument that the word "crops" as used within the contract is ambiguous is clearly without merit. The contract specifically gave defendant the right to clear trees from the right-of-way, and plaintiffs' right to grow "crops" was specifically limited by this provision. By the terms of the contract, defendant

did not, by agreeing at various times to allow trees to remain, waive its right as stated in the contract.

Defendant did not deny any fact set forth by plaintiffs. There being no ambiguity in the written contract, and, consequently, no genuine issue of material fact, the rights of the parties became a question of law and summary judgment in favor of defendant was properly granted.

Affirmed.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. ANDREW KEYS

No. 772SC567

(Filed 21 December 1977)

Criminal Law § 73.2; Forgery § 2— uttering check with forged endorsement— knowledge that endorsement forged— evidence improperly excluded

In a prosecution for uttering a check with a forged endorsement, the trial court erred in refusing to allow defendant to testify as to what a third person told him when she gave him the check, since the evidence was not hearsay but was relevant to the issue of defendant's knowledge that the endorsement on the check was forged.

APPEAL by defendant from *Crissman, Judge.* Judgment entered 20 April 1977 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 15 November 1977.

Defendant was indicted for uttering a check with a forged endorsement. Evidence showed that on 3 or 4 May 1976, Mrs. Leona Battle's social security check disappeared from her purse. Defendant had access to the purse. On 4 May 1976, defendant cashed the check at Barber's Gulf Service. At that time the check was endorsed with Leona Battle's name and defendant added his own. Defendant testified that he had cashed the check for Mary Battle, a relative of his wife.

Defendant was found guilty as charged. He was sentenced to four to six years in prison.

Attorney General Edmisten, by Associate Attorney Robert W. Newsom III, for the State.

Carter, Archie & Grimes, by Samuel G. Grimes, for defendant appellant.

VAUGHN, Judge.

Defendant offered his own version of the events leading to his cashing the check at Barber's Gulf Service. He testified that he got the check from Mary Battle, his wife's cousin. When he began to explain what she had told him in connection with the transaction, the following exchange took place.

"Q. You came out . . .

A. She [Mary Battle] was sitting in the car and she asked me . . .

Q. Sitting in whose car?

A. Sitting in my car and asked me . . .

MR. GRIFFIN: Objection.

COURT: Don't tell what she said.

A. That's the only way I can explain, your Honor.

COURT: Well you can't tell what she said.

EXCEPTION NO. 3

I got the check from her and I gave her money for it, $83.30. The check was endorsed with Leona Battle's name on the back of it.

Q. Did you ask Mary Battle what she was doing with Leona Battle's check?

MR. GRIFFIN: Objection.

COURT: Sustained."

The court declined defendant's request that the answers be put in the record. On cross-examination, it appeared that among other things defendant wished to testify that he understood that Mary was Leona's niece and that she had Leona's permission to get the check cashed.

Defendant correctly contends that the judge erred when he excluded the testimony. The exclusion was apparently based on the notion that the question called for "hearsay" testimony. Evidence is "hearsay" when its probative force depends upon the competency and credibility of some person other than the witness by whom it is sought to produce it. *Chandler v. Jones*, 173 N.C. 427, 92 S.E. 145 (1917). The testimony was not offered to establish the truth of what Mary Battle told the witness. It was only offered to prove, by defendant's testimony, that Mary Battle had made the declaration. The credibility of defendant and not of Mary Battle was before the jury, and he should have been allowed to answer the question. *State v. Griffis*, 25 N.C. 504 (1843). The excluded testimony was highly relevant to the case being tried. Knowledge that the endorsement was forged is an essential element of the offense of uttering an instrument with a forged or false endorsement. *State v. Greenlee*, 272 N.C. 651, 159 S.E. 2d 22 (1968); *State v. Jackson*, 19 N.C. App. 749, 200 S.E. 2d 199 (1973); *State v. Wyatt*, 9 N.C. App. 420, 176 S.E. 2d 386 (1970).

If the jury believed *defendant's* testimony, they could have found that he came by the check honestly and uttered it without knowing that it carried a forged endorsement. A similar set of circumstances was presented in *State v. Bethel*, 97 N.C. 459, 1 S.E. 551 (1887). In that case, Bethel was being tried for receiving stolen goods, a peck of chestnuts. The court excluded testimony from Bethel that one Harris told defendant that the chestnuts belonged to Harris and his partner Branch and that the pair wanted Bethel to sell the chestnuts for them. Justice Merrimon, for the Court, held that how defendant came by the chestnuts was a material inquiry. The Court held that defendant should have been able to relate to the jury that defendant contended Harris told him. The Court added, "It may be that the suggested conversation was feigned and the proposed evidence false; nevertheless, it was evidence to go to and be weighed by the jury."

In the present case, the jury may not have believed defendant's testimony. He was, however, entitled to have the jury consider it.

For the reasons stated, defendant is awarded a new trial.

New trial.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. FEDDIE MANUEL CARPENTER

No. 7727SC588

(Filed 21 December 1977)

1. **Automobiles § 126.3— breathalyzer test—operator's permit**

It was not necessary for the State to introduce the breathalyzer operator's permit into evidence in order to render the results of the breathalyzer admissible, and the State sufficiently showed that the operator possessed a valid permit and that he performed the test according to prescribed standards where the operator testified about his training, that he was a licensed operator, and that he performed the test according to prescribed regulations.

2. **Automobiles § 126.4— breathalyzer test—written advice of rights**

A breathalyzer operator sufficiently advised defendant of his rights in writing pursuant to G.S. 20-16.2(a) when he placed a written form containing the required information before defendant with the opportunity on defendant's part to read the form, although the operator did not know whether defendant actually read the form.

APPEAL by defendant from *Ervin, Judge.* Judgments entered 30 March 1977 in Superior Court, LINCOLN County. Heard in the Court of Appeals 16 November 1977.

Defendant was charged in a warrant with (1) operating a motor vehicle on a public highway while under the influence of intoxicating liquor, and (2) operating a motor vehicle on a public highway at a speed of 75 miles per hour in a 55 mile per hour speed zone.

Defendant was tried in District Court and found guilty of each charge. He appealed to superior Court for trial *de novo.* In Superior Court he was tried by jury upon the original warrant.

The State's evidence tends to show the following: On 21 September 1976 a Highway Patrol Trooper arrested defendant for the speeding and driving under the influence offenses. The breathalyzer test showed a reading of 0.17. The evidence of speed tended to show that defendant was driving in excess of 75 miles per hour.

Defendant offered no evidence.

The jury found defendant guilty of operating a motor vehicle on a public highway when the amount of alcohol in his blood was

0.10 percent or more by weight, and guilty of driving in excess of 55 miles per hour in a 55 miles per hour speed zone.

Attorney General Edmisten, by Assistant Attorney General William B. Ray, for the State.

Robert C. Powell for the defendant.

BROCK, Chief Judge.

Defendant assigns as error that the trial court admitted into evidence the results of the breathalyzer test. Defendant's argument is based upon two premises.

[1] First he argues that the State failed to show that the breathalyzer operator was competent to administer the test because the State failed to introduce into evidence a valid permit. In *State v. Powell*, 10 N.C. App. 726, 179 S.E. 2d 785 (1971), *affirmed* 279 N.C. 608, 184 S.E. 2d 243 (1971), we clearly stated: "In our opinion, from a reading of the statute and the cases above cited, although permissible, it is not required that either the 'permit' or a certified copy of the 'methods approved by the State Board of Health' be introduced into evidence by the State before testimony of the results of the breathalyzer test can be given." We still adhere to that proposition.

In the present case the breathalyzer operator testified about his training, he testified that he was a licensed operator, and he testified that he performed the test according to prescribed regulations. Defendant did not object or challenge the competency of the breathalyzer operator's testing of defendant. In the absence of evidence to the contrary, this was a sufficient showing that the operator possessed a valid permit and that he performed the test according to prescribed standards.

[2] Secondly, defendant argues that the breathalyzer operator did not inform the defendant, in writing, of his rights. G.S. 20-16.2(a) provides that the operator "shall inform the person arrested both verbally and in writing and shall furnish the person a signed document setting out" certain specific information. There is no evidence to the contrary, and defendant does not dispute that the operator verbally advised defendant of the certain specifics required by statute. Defendant does not dispute that the operator placed before the defendant a form containing the same

information of which he had orally advised him. It is defendant's argument that because the operator did not know whether defendant read the form containing the statutory information there was a failure of evidence to show that defendant was informed in writing as required by statute. This is not a convincing argument.

Having placed the information in writing before the defendant, the operator was not required to make defendant read it. If this were so, any belligerent or uncooperative defendant could defeat the evidence of the breathalyzer test results by merely refusing to read the information that was placed before him. The operator complied fully with the statute when he orally advised defendant and placed the required information in writing before defendant with the opportunity on defendant's part to read the same.

Defendant's assignment of error to the trial judge's instruction to the jury is overruled. *See, State v. Hill*, 31 N.C. App. 733, 230 S.E. 2d 579 (1976).

In defendant's trial we find

No error.

Judges MARTIN and CLARK concur.

STATE OF NORTH CAROLINA v. MARLON KEITH WILLIAMS

No. 7727SC539

(Filed 21 December 1977)

Criminal Law § 86.2— impeachment of defendant—prior convictions—regularity presumed

There is a presumption of regularity of earlier convictions of defendant, and the State has no burden to prove the regularity of the convictions before it can use them to impeach defendant.

ON writ of certiorari to review proceedings before *Thornburg, Judge*. Judgment entered 11 March 1977 in Superior Court, GASTON County. Heard in the Court of Appeals 25 October 1977.

Defendant was convicted, upon proper indictment, of armed robbery, and judgment was entered sentencing him to from 12 to 15 years imprisonment.

The State's evidence tended to show that defendant and another male, not identified, went in the I-85 Shell Service Station in Lowell at about 10:15 p.m. on 11 January 1977. They said they were out of gas and needed a can of gas to take to their car. The station attendant told them he could not let them have a can without a deposit because it might not be returned. One of them pulled $3 from his pocket, saying that was all he had. The attendant asked if either of them had a watch. Defendant was wearing a watch, and the attendant told him that the watch could be left for a deposit and picked up when the can was returned. He refused, and, upon being told that they could not take the can, one of them pulled a small caliber gun, stuck it in attendant's side, cocked it, and put his left hand on the attendant's shoulder. Defendant lifted his sweat shirt, disclosing a larger caliber gun in his belt. Defendant got the money from the cash register, and the two then made the attendant open the safe from which they took the change bags. They then took the attendant into the office and ransacked it. After having gone through all the drawers in the station, they took the attendant to the stockroom, shut the door, and pulled some crates in front of the door. The attendant waited a short while, got out, and called the police.

There was no question raised about the identification of defendant by the attendant.

Attorney General Edmisten, by Associate Attorney Christopher P. Brewer, for the State.

Public Defender Jim R. Funderburk for defendant appellant.

MORRIS, Judge.

Defendant's present counsel, recognizing that for several violations of the North Carolina Rules of Appellate Procedure, this appeal is subject to dismissal, has filed a petition for a writ of certiorari asking that we review the trial of defendant, because the obvious neglect of former counsel properly to perfect the appeal was due to no fault of this indigent defendant. We have allowed the petition and will treat defendant's assignment of error on its merits.

By the one assignment of error brought forward, defendant contends that the court erred in overruling his objection to the District Attorney's asking defendant to relate to the jury the crimes of which he had been convicted "until he [the defendant] states whether or not he had counsel". The defendant answered that he had been convicted of misdemeanor larceny and assault. There was no motion to strike.

This question has been answered by this Court in *State v. Buckner*, 34 N.C. App. 447, 238 S.E. 2d 635 (1977). The opinion was not available to defendant at the time he filed his brief. In *Buckner*, we held that there is a presumption of regularity, and the State has no burden to prove the regularity of the convictions before it can use the convictions to impeach the defendant. This assignment of error is overruled.

No error.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. EDGAR BUCHANAN

No. 7726SC663

(Filed 21 December 1977)

Robbery § 4— armed robbery—sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for armed robbery where it tended to show that defendant accused the victim of having taken his billfold containing $250; defendant displayed a gun and ordered the victim to place the victim's billfold on the steps; there was a struggle and defendant shot the victim as the victim retreated; and defendant took $110 from the victim's billfold.

APPEAL by defendant from *Barbee, Judge*. Judgment entered 17 March 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 7 December 1977.

Defendant was indicted for armed robbery, using a pistol to steal $110.00 in cash from the presence of Hubert Chambers. The evidence at trial tended to show that defendant last saw his wallet containing about $250.00 at an apartment where both he and Chambers were visiting. When he saw Chambers again later

that day, he accosted him demanding the return of the money. There was a struggle and the gun went off, wounding Chambers in the leg. During the altercation, on defendant's orders, Chambers had placed his wallet on the steps with his money on top of it. Defendant took $110.00 from the wallet.

Defendant was found guilty as charged. He was sentenced to five years in prison and recommended for work and study release programs.

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

Public Defender Michael S. Scofield, by Mark A. Michael, for defendant appellant.

VAUGHN, Judge.

Defendant brings forward only one assignment of error, alleging that the evidence was insufficient to take the case to the jury and that the court erred by not dismissing the case at the close of all the evidence. He asserts that there was no substantial evidence tending to show that defendant knew he was not entitled to the money taken.

The evidence must be considered in the light most favorable to the State, giving the State the benefit of any reasonable inferences to be drawn from it. Contradictions and discrepancies, even in the evidence offered by the State itself, are matters for the jury; they do not require dismissal. *State v. Murphy*, 280 N.C. 1, 184 S.E. 2d 845 (1971); *State v. Mabry*, 269 N.C. 293, 152 S.E. 2d 112 (1967).

Here the evidence clearly raised questions for the jury. The State made out a prima facie case of armed robbery when it offered evidence tending to show that defendant openly displayed a gun, ordered Chambers to lay down his wallet and money, and then took the money. *See State v. Keyes*, 8 N.C. App. 677, 175 S.E. 2d 357 (1970), *cert. den.*, 277 N.C. 116. Moreover, Chambers testified that Buchanan ordered him "[t]ake your money out of it [Chambers' billfold]." He further testified that he was shot after he started to run from the defendant. Chambers' neighbor testified that defendant shot Chambers as he retreated and while he pleaded with defendant not to shoot. The neighbor heard

defendant say, "Ah, hell, I'm going to blast you now." All of this evidence, with the reasonable inferences drawn from it, is sufficient to allow a jury to find that a quarrel beginning with defendant's accusation that Chambers had stolen his money ended with defendant, angered by Chambers' resistance, firing a shot at him and taking his money.

No error.

Judges BRITT and PARKER concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 7 DECEMBER 1977

DOWTIN v. COMR. OF MOTOR VEHICLES No. 776SC57	Halifax (76CVS214)	Reversed and Remanded
EVERS v. HOSPITAL No. 7719Sc94	Randolph (75CVS652)	Reversed
RAWLS v. RAWLS No. 772DC45	Martin (75CVD16)	Affirmed
STATE v. ALEXANDER 7726SC459	Mecklenburg (76CR36207)	No Error in Trial, Vacated and Remanded
STATE v. BARUS No. 7725SC536	Burke (76CRS8795)	No Error
STATE v. BURLESON No. 7724SC495	Avery (76CR1571)	Remanded
STATE v. CAMERON No. 779SC483	Person (76CR2374) (76CR2403)	No Error
STATE v. HICKS No. 7729SC504	McDowell (76CR2178) (76CR2180)	No Error
STATE v. HUNT No. 7716SC351	Robeson (76CR13704) (76CR13706)	Vacated and Remanded
STATE v. HUNTLEY No. 7726SC594	Mecklenburg (76CR50841)	No Error
STATE v. McNAIR No. 7716SC564	Scotland (77CR1419)	No Error
STATE v. MAYS No. 7712SC529	Cumberland (76CRS26413)	No Error
STATE v. MOODY No. 7729SC418	Henderson (76CRS3806)	No Error
STATE v. MOORE No. 774SC570	Onslow (76CR19322) (76CR18994)	No Error
STATE v. MURPHY No. 7729SC401	McDowell (75CR3102) (75CR3231)	No Error
STATE v. ROGERS No. 7725SC558	Caldwell (76CR2270)	No Error

STATE v. ROBINSON No. 7716SC444	Robeson (76CR16711) (76CR16712)	Affirmed
STATE v. SMALL No. 7725SC541	Caldwell (76CR6894)	No Error in Trial, Remanded
STATE v. STEVENSON No. 7718SC547	Guilford (76CRS20560)	No Error
STATE v. WATKINS No. 7710SC540	Wake (77CRS15610) (77CRS15611 A & B) (77CRS15612)	No Error
STATE v. WINSTEAD No. 779SC485	Vance (76CRS5546)	No Error
WILKINS v. VONCANNON No. 7719DC47	Randolph (76CVD224)	Modified and Remanded

FILED 21 DECEMBER 1977

BANK v. CAUSEY No. 7718DC77	Guilford (68CVD4199)	Affirmed
STATE v. BROWN No. 775SC677	New Hanover (77CR1836) (77CR1839)	No Error
STATE v. CAMPBELL No. 7719SC597	Rowan (76CRS12464) (76CRS12466) (76CRS12469) (76CRS12470)	Dismissed
STATE v. HEADEN No. 7712SC631	Cumberland (75CRS31643)	No Error
STATE v. HOLLAND No. 7712SC562	Cumberland (76CRS32997)	No Error
STATE v. JONES No. 778SC592	Wayne (77CR0851)	No Error
STATE v. LEWIS No. 7726SC656	Mecklenburg (76CR14486)	No Error
STATE v. LOCKE No. 775SC676	New Hanover (77CRS5633)	No Error
STATE v. LOCKLEAR No. 7716SC603	Robeson (76CR16604) (76CR16605)	No Error
STATE v. McDUFFIE No. 7712SC623	Cumberland (76CRS32833)	No Error

STATE v. McMANUS No. 7720SC672	Anson (77CRS502)	Dismissed
STATE v. NELSON No. 775SC673	New Hanover (77CR2127)	No Error
STATE v. PURVIS No. 7710SC563	Wake (77CRS8587)	No Error
STATE v. SPURLING No. 7726SC589	Mecklenburg (76CR48373) (76CR48473)	No Error
STATE v. SUMLER No. 7721SC577	Forsyth (76CR49210)	No Error
STATE v. TERRELL No. 7714SC667	Durham (76CRS25517) (76CRS25518)	No Error
STATE v. WHITE No. 7726SC668	Mecklenburg (76CR39997)	No Error

APPENDIX

AMENDMENTS TO RULES
OF THE JUDICIAL STANDARDS COMMISSION

AMENDMENTS TO RULES OF THE JUDICIAL STANDARDS COMMISSION

Adopted 27 January 1978

RULE 13

Rights of Respondent. In formal hearings involving his censure, removal, or retirement, a judge shall have the right and opportunity to defend against the charges by introduction of evidence, representation by counsel, and examination and cross-examination of witnesses. He shall also have the right to the issuance of subpoenas for attendance of witnesses to testify or to produce books, papers, and other evidentiary matter.

A copy of the transcript of proceedings prepared for transmission to the Supreme Court shall be furnished to the judge and, if he has objections to it, he may within 10 days present his objections to the Commission, and the Chairman or Vice-Chairman or his designee shall consider his objections and settle the record prior to transmitting it to the Supreme Court.

The judge has the right to have all or any portion of the testimony in the hearings transcribed at his own expense.

Once the judge has informed the Commission that he has counsel, a copy of any notices, pleadings, or other written communications (other than the transcript) sent to the judge shall be furnished to counsel by any reliable means.

RULE 19

Transmission of Recommendations to Supreme Court. After reaching a recommendation to censure or remove a judge, when 10 days have expired after the transcript of the proceeding has been transmitted to the Judge and no objection has been filed, or when the record is settled after objection has been made, the Commission shall promptly file with the Clerk of the Supreme Court the transcript of proceedings, and its findings of fact, conclusions of law, and recommendation, certified by the Chairman or Secretary. The Commission shall concurrently transmit to the Judge a copy of the transcript (if the Judge objected to the original transcript, and settlement proceedings resulting in changes in the transcript were had), its findings, conclusions, and recommendation.

This is to certify that the foregoing amendments to Rules 13 and 19 are the amendments duly adopted by the Judicial Standards Commission this the 27th day of January, 1978.

Edward B. Clark
Chairman, Judicial Standards Commission

ANALYTICAL INDEX

WORD AND PHRASE INDEX

TOPICS COVERED IN THIS 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 3d (Abandonment of Property—Public Officers) and N. C. Index 2d (Quasi Contracts—Witnesses).

ACCOUNTS

§ 1. Open and Running Accounts

Feme defendant had a meritorious defense to an action against her and her husband on an open account where the account was in the name of her husband only. *Trucks, Inc. v. Greene*, 279.

ADMINISTRATIVE LAW

§ 5. Availability of Review by Statutory Appeal

A petitioner who contended in superior court that such court had jurisdiction under one statute to review his dismissal without a hearing as an employee of a State agency may not contend in the appellate court that the superior court had jurisdiction under another statute. *Grissom v. Dept. of Revenue*, 381.

The scope of judicial review of an order of the Commissioner of Insurance disapproving a plan of exchange of stock of an insurance company for the stock of a holding company is that provided in the Administrative Procedures Act and not that provided by G.S. 58-9.3. *Insurance Co. v. Ingram*, 619.

APPEAL AND ERROR

§ 4. Theory of Trial in Lower Court

A petitioner who contended in superior court that such court had jurisdiction under one statute to review his dismissal without a hearing as an employee of a State agency may not contend in the appellate court that the superior court had jurisdiction under another statute. *Grissom v. Dept. of Revenue*, 381.

§ 6.2. Finality as Bearing Upon Appealability

No appeal may be taken from the denial of a motion for summary judgment. *Oil Co. v. Smith*, 324.

§ 6.9. Appealability of Preliminary Matters

Pretrial order declaring certain evidence inadmissible at the trial is an interlocutory order which is not appealable. *Knight v. Power Co.*, 218.

§ 14. Appeal and Appeal Entries

Plaintiffs' notice of appeal filed on 8 December was in apt time where the judge's decision was announced in court on 24 November but judgment was not actually entered until 3 December. *Arnold v. Varnum*, 22.

§ 16.1. Limitations on Powers of Trial Court

Trial court had no authority to enter an order with respect to award of attorney fees where a final order had previously been entered in an alimony action and defendant's appeal therefrom was pending. *Upchurch v. Upchurch*, 658.

§ 31. Exceptions and Assignment of Error to Charge

Defendant appellee's contention that the trial court should have given the jury a certain instruction was not before the appellate court where defendant failed to request such instruction and take exception and cross-assign as error the failure of the court to instruct on this contention. *Parker v. Williams*, 563.

APPEARANCE

§ 1.1. What Constitutes a General Appearance

Defendant did not waive its defense of insufficiency of service of process by obtaining extensions of time in which to plead or by taking plaintiff's deposition after answer was filed. *Wiles v. Construction Co.*, 157.

Where defendant promptly asserted lack of jurisdiction of the trial court, defendant did not thereafter waive that defense and make a general appearance when, before a hearing on the motion to dismiss, defendant filed an answer and counterclaimed for damages and made other preparations for trial. *Smith v. Express Co.*, 694.

ARREST AND BAIL

§ 3.1. Requirement of Probable Cause for Arrest

Testimony that information received from an informant had always been reliable and had led to arrests and one conviction, although it had at other times not resulted in arrests, was sufficient to support a finding that the informant was reliable. *S. v. Wooten*, 85.

§ 3.4. Legality of Arrest for Possession of Narcotics

Officers had probable cause to believe defendant was committing a felony in their presence by possessing heroin where a confidential informant told officers he saw defendant at a certain location in the possession of heroin, and officers observed defendant as described at the named location. *S. v. Wooten*, 85.

§ 3.9. Legality of Arrest for Breach of the Peace

An officer had probable cause to arrest defendant for disorderly conduct when defendant used profanity to an officer who had given him a parking ticket and threatened to run over the officer. *S. v. Cunningham*, 72.

§ 5.1. Permissible Physical Force in Making Arrest

Trial court did not err in refusing to instruct the jury on self-defense in a prosecution for assault on a law officer. *S. v. Mensch*, 572.

ARSON

§ 2. Indictment

An indictment charging defendant with the felony of burning "a storage building" charged an offense under G.S. 14-67.1. *S. v. McWhorter*, 462.

§ 3. Competency of Evidence

An expert in arson investigation was properly allowed to give his opinion that a fire was of incendiary origin. *S. v. Smith*, 671.

§ 4.1. Cases Where Evidence Was Sufficient

State's evidence was sufficient for the jury on a charge of burning a building in violation of G.S. 14-67.1. *S. v. McWhorter*, 462.

Evidence was sufficient in a prosecution for burning a building housing a business. *S. v. Smith*, 671.

ASSAULT AND BATTERY

§ 11.1. Indictment Charging Assault With a Deadly Weapon

An indictment for discharging a firearm into an occupied dwelling was not fatally defective in failing to allege that defendant knew or should have known the dwelling was occupied. *S. v. Walker*, 271.

§ 14.7. Sufficiency of Evidence of Secret Assault

Evidence as to the character and nature of an assault was sufficient to show an intent to kill and to take the case to the jury on a charge of secret assault. *S. v. McWhorter*, 462.

§ 15. Instructions Generally

Trial court did not err in submitting felonious assault and lesser included offenses in the order in which the offenses appear in G.S. 14-32. *S. v. Harris*, 491.

§ 15.1. Instructions on Assault With a Deadly Weapon

In a felonious assault case in which the indictment alleged the assault was accomplished by use of a pistol, defendant was not prejudiced by an instruction permitting the jury to consider whether a cue ball with which defendant struck the victim was a deadly weapon. *S. v. Hewitt*, 152.

§ 15.2. Instructions on Assault With a Deadly Weapon With Intent to Kill or Inflicting Serious Bodily Injury

Trial court did not err in failing to define the term "assault" in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury. *S. v. Hewitt*, 152.

The trial judge sufficiently instructed the jury on the meaning of "assault" when he instructed that in order to convict defendant the jury must find "that the defendant assaulted the victim by intentionally shooting him with a pistol." *S. v. Harris*, 491.

§ 15.3. Instructions on "Intent to Kill"

Defendant was not prejudiced where, in response to a request from the jury after it had begun deliberations, the trial judge gave a definition of "intent to kill" but did not repeat his instructions on reasonable doubt and burden of proof. *S. v. Hill*, 347.

Trial court's instructions recapitulating the evidence and stating that a shotgun was a deadly weapon and failing to define intent to kill were proper. *S. v. McCoy*, 567.

§ 15.4. Instructions on Assault on a Law Officer

In a prosecution for assault upon law enforcement officers, evidence was sufficient to support the trial court's instructions that the officers were acting in the performance of their duties. *S. v. Wheeler*, 243.

In a prosecution for assault on a law officer where there is evidence tending to show use of excessive force by the officer, the court should instruct the jury that the assault on the officer was justified or excused if limited to use of reasonable force by defendant in defending himself. *S. v. Mensch*, 572.

§ 15.6. Defense of Self; Form of Instruction

Trial court's instruction properly placed the burden of disproving self-defense upon the State. *S. v. McCoy*, 567.

ASSAULT AND BATTERY — Continued

§ 15.7. Defense of Self; Instruction Not Required

Trial court did not err in refusing to instruct the jury on self-defense in a prosecution for assault on a law officer. *S. v. Mensch*, 572.

§ 17. Verdict

Defendant's contention that since he was found not guilty of feloniously assaulting a security guard the verdict of guilty of armed robbery of the guard was inconsistent with that verdict and should not be allowed to stand is without merit. *S. v. Wheeler*, 243.

ASSIGNMENTS

§ 1. Transactions Constituting Assignments

In an action to recover a debt allegedly due for the sale of cattle to defendant, evidence was sufficient to support findings by the trial court that there was an absolute assignment to plaintiff of defendant's account for consideration. *Credit Co. v. Hall*, 478.

ATTORNEYS AT LAW

§ 5.1. Liability for Malpractice

Trial court erred in entering summary judgment in favor of defendant attorney in an action against the attorney for breach of an alleged agreement to withhold delivery to plaintiff's estranged wife of a check from the sale of land until the wife executed a separation agreement and stipulation of dismissal of an alimony action, but the court properly entered summary judgment for defendant on the issue of punitive damages. *Carroll v. Rountree*, 169.

AUTOMOBILES

§ 2.1. Grounds for Discretionary Suspension of License

Superior court had no discretionary power to revoke the suspension of petitioner's license which had been ordered by the Division of Motor Vehicles because of petitioner's conviction of driving in excess of 75 mph in a 45 mph speed zone. *Smith v. Walsh*, 287.

§ 77.1. Contributory Negligence in Passing Vehicle Traveling in Same Direction

Trial court properly determined that plaintiff was contributorily negligent as a matter of law in passing defendant's vehicle which was traveling in the same direction. *Carr v. Scott*, 154.

§ 90.4. Instructions Supported by the Evidence

In an action by a pedestrian against a driver, evidence was sufficient to support trial court's instruction that plaintiff "stepped out" into the road. *Ashley v. Ashley*, 45.

§ 91.3. Issues as to Wilful and Wanton Conduct

In an action to recover for injuries sustained in a motorcycle collision, trial court did not err in its failure to submit an issue of gross negligence. *Jarvis v. Sanders*, 283.

AUTOMOBILES — Continued

§ 94.4. Passenger's Interference With Driver

Trial court erred in submitting an issue of a jeep passenger's contributory negligence in distracting the driver of an automobile with which the jeep collided. *Parker v. Williams*, 563.

§ 94.8. Failure to Remonstrate With Driver

Trial court erred in submitting an issue of a jeep passenger's contributory negligence in failing to protest the manner of operation of the jeep. *Parker v. Williams*, 563.

§ 113.1. Homicide; Evidence Held Sufficient

Evidence was sufficient for the jury in a prosecution for manslaughter arising from an automobile accident. *S. v. Hice*, 468.

§ 126.3. Breathalyzer Test; Qualification of Expert

G.S. 20-16.2 which provides for the administering of breathalyzer tests allows a delay not in excess of 30 minutes for defendant to exercise his rights, and a delay of less than 30 minutes is permissible. *S. v. Buckner*, 447.

It was not necessary for the State to introduce the breathalyzer operator's permit into evidence in order to render the results of the breathalyzer admissible. *S. v. Carpenter*, 742.

§ 126.4. Breathalyzer Test; Warnings to Defendant

A breathalyzer operator sufficiently advised defendant of his rights in writing when he placed a written form containing the required information before defendant and gave defendant an opportunity to read the form. *S. v. Carpenter*, 742.

§ 134. Unlawful Taking

Evidence was insufficient for the jury in a prosecution for possession of a vehicle which defendant knew or had reason to believe had been stolen. *S. v. Leonard*, 131.

§ 138. Operating Oversize Vehicle Without Permit

Evidence that plaintiff moved a large crane on a State highway 30 minutes after sunset was insufficient to establish violation of a special permit allowing movement of the crane "in daylight." *Transportation Co. v. Div. of Motor Vehicles*, 616.

BANKS AND BANKING

§ 11.2. Liability for Payment of Forged Instruments

Plaintiff executor's complaint was sufficient to state a claim for relief against defendant stock broker for conversion of drafts where it alleged defendant issued drafts payable through a bank to plaintiff's testate and paid the drafts upon the forged indorsements of the testate. *Bank v. McCarley & Co.*, 689.

BASTARDS

§ 5. Competency and Relevancy of Evidence

In an action for refusal to support an illegitimate child, trial court did not err in the admission of evidence concerning a check from defendant's mother to the prosecutrix. *S. v. Garner*, 498.

BURGLARY AND UNLAWFUL BREAKINGS

§ 1.1. Felonious Intent

G.S. 14-56 makes it a felony to break or enter a motor vehicle containing any goods or other things of value with intent to commit larceny therein, whether the larceny be felonious or misdemeanor larceny. *S. v. Kirkpatrick*, 452.

§ 3.1. Sufficiency of Description of Premises

In a breaking and entering prosecution there was no fatal variance between the indictment and proof with respect to description of the premises. *S. v. Baker*, 434.

§ 4. Competency of Evidence

Trial court in a breaking and entering case did not err in allowing a witness to testify concerning items missing from her house. *S. v. Baker*, 434.

§ 5.5. Sufficiency of Evidence of Breaking and Entering

Evidence was sufficient for the jury in a prosecution for breaking and entering a high school. *S. v. Hollis*, 604.

§ 5.7. Sufficiency of Evidence of Breaking and Entering and Larceny

State's evidence was sufficient for the jury on issues of guilt of two defendants of felonious breaking or entering an automobile and larceny therefrom. *S. v. Kirkpatrick*, 452.

CARRIERS

§ 2.10. Cancellation of Operating Authority

The Utilities Commission properly denied an application for approval of a transfer of control of a common carrier and properly revoked the carrier's operating authority on grounds the franchise was obtained by proposed transferor for transfer to another and that control had been transferred without prior approval. *Utilities Comm. v. Tank Lines*, 543.

CHATTEL MORTGAGES

§ 19. Deficiency and Personal Liability

Feme defendant had no meritorious defense to an action against her and her husband to recover a deficiency remaining after the sale of a truck-tractor under a purchase money security agreement where she signed the agreement as a co-customer. *Trucks, Inc. v. Greene*, 279.

CONSPIRACY

§ 5.1. Admissibility of Statements of Coconspirators

In a prosecution for conspiracy to burn and burning a building used in trade and manufacturing, trial court properly allowed into evidence extra-judicial statements of the alleged conspirators against each other. *S. v. Smith*, 671.

§ 6. Sufficiency of Evidence

Evidence was sufficient for the jury in a prosecution for conspiracy to burn a building used in trade and manufacturing. *S. v. Smith*, 671; to commit armed robbery of a store proprietor. *S. v. Allen*, 260.

CONSPIRACY — Continued

§ 7. Instructions

Trial court's instructions on the identity of conspirators were proper. *S. v. Wilkins*, 392.

CONSTITUTIONAL LAW

§ 4. Standing to Raise Constitutional Questions

Defendant had no standing to challenge the constitutionality of the statute prohibiting the taking of indecent liberties with a minor on the ground that the statute created two arbitrary classifications. *S. v. Vehaun*, 700.

§ 12.1. Regulation of Specific Trades and Professions

Former G.S. Chapter 89 which defined the term "practice of professional engineering" was not unconstitutionally vague. *S. v. Covington*, 457.

§ 28. Due Process and Equal Protection

The statute prescribing the punishment for assault with intent to commit rape upon a female does not deny equal protection of the laws to a male defendant by prohibiting conduct directed toward females without prohibiting the same conduct directed toward males. *S. v. Giles*, 112.

§ 40. Right to Counsel

Defendant was not denied his constitutional right to counsel where he was advised in both district court and superior court that counsel would be appointed for him if he were found to be indigent, defendant thereafter filed affidavits of indigency and requested appointment of counsel in both courts but on both occasions was found not to be an indigent, and defendant thereafter appeared *pro se* at two aborted trials and the trial at which he was convicted. *S. v. Sanders*, 59.

§ 50. Speedy Trial Generally

Order by a superior court judge that defendant's case be tried during the August session of court in Rutherford County or be dismissed by the State was a discretionary interlocutory order, and there was a sufficient showing of changed circumstances to warrant a modification of the order. *S. v. Turner*, 78.

Defendant's contention that the State did not proceed within six months after demand was made upon the solicitor for a speedy trial as provided by G.S. 15A-711(c) is without merit. *Ibid.*

§ 51. Speedy Trial; Delay Between Arrest and Trial

In a prosecution for manslaughter resulting from an automobile accident, defendant's right to a speedy trial was not denied where 12 months elapsed between the offense and trial. *S. v. Hice*, 468.

§ 52. Requirement That Delay Be Negligent or Wilful and Prejudicial

Trial court properly determined that there was no undue delay between certification on 4 January 1977 of an order from the appellate division ordering a new trial and trial on 7 March 1977. *S. v. Sutton*, 371.

CORPORATIONS

§ 28. Actions

A Delaware corporation whose charter had been revoked for nonpayment of its franchise taxes had authority to sue in its own name. *Amicare Nursing Inns v. CHC Corp.*, 310.

§ 30. Claims Against Insolvent Corporation

Trial court properly granted summary judgment for defendant in an action by a trustee in bankruptcy to recover funds allegedly wrongfully diverted from the bankrupt corporation. *Enterprises v. Russell*, 275.

COUNTIES

§ 3.1. Duties and Authority of County Commissioners

A board of county commissioners can assume the role of "governing body" of a township for the purpose of establishing a township hospital and levying a tax to support that hospital. *Arnold v. Varnum*, 22.

§ 9. Governmental Immunity

The placement of children in foster homes by a county department of social services is a governmental function which is protected by the doctrine of governmental immunity. *Vaughn v. County of Durham*, 416.

COURTS

§ 9. Jurisdiction to Review Rulings of Another Superior Court Judge

The general rule that one superior court judge cannot overrule another superior court judge is inapplicable to an interlocutory order which is issued in the discretion of the trial judge when there is a showing of changed circumstances. *S. v. Turner*, 78.

§ 15. Criminal Jurisdiction of Juveniles

District court judge did not err in transferring an armed robbery charge against a 15-year-old male to superior court for trial as an adult. *In re Bunn*, 614.

CRIME AGAINST NATURE

§ 1. Elements of the Offense

The statute prohibiting the taking of indecent liberties with a minor is not void for vagueness. *S. v. Vehaun*, 700.

Defendant had no standing to challenge the constitutionality of the statute prohibiting the taking of indecent liberties with a minor on the ground that the statute created two arbitrary classifications. *Ibid.*

§ 3. Evidence and Trial

The uncorroborated testimony of a victim is sufficient to convict a defendant of taking indecent liberties with a minor. *S. v. Vehaun*, 700.

CRIMINAL LAW

§ 5.1. Determination of Issue of Insanity

Trial court in a first degree murder prosecution did not err in placing the burden of proof on defendant as to the issue of insanity. *S. v. Hammond*, 390.

CRIMINAL LAW — Continued

§ 7. Entrapment

Mullaney v. Wilbur, 421 U.S. 684, does not require the State to carry the burden of proving defendant was not entrapped in order to prove the requisite criminal intent. *S. v. Wilkins*, 392.

§ 7.1. Entrapment; Illustrative Cases

Evidence in a prosecution for possession and sale of marijuana was insufficient to show entrapment as a matter of law. *S. v. Wilkins*, 392.

§ 9.1. Presence of Aider and Abettor at Scene

Evidence was insufficient for the jury on the issue of defendant's guilt of felonious assault as an aider and abettor where he was not actually or constructively present at the scene of the assault. *S. v. Allen*, 260.

§ 10. Accessories Before the Fact

State's evidence was sufficient for the jury on the issue of defendant's guilt of accessory before the fact of armed robbery. *S. v. Allen*, 260.

§ 10.3. Instructions on Accessory Before the Fact

Defendant was not prejudiced by failure of the trial court to instruct the jury that absence from the scene of the principal crime was an element of the offense of accessory before the fact to an attempted armed robbery. *S. v. Allen*, 260.

§ 18. Jurisdiction on Appeals to Superior Court

A defendant who appeared without counsel in district court waived his right of appeal to superior court when he complied with the judgment of the district court. *S. v. Vestal*, 610.

§ 18.4. Trial De Novo in Superior Court

A criminal defendant has a right to appeal from the district court to the superior court for a trial de novo even though he pled guilty in the district court. *S. v. Fox*, 576.

§ 21. Preliminary Proceedings

There was no undue delay where one hour elapsed from the time defendant was taken into custody until he was taken before a magistrate. *S. v. Wheeler*, 243.

§ 23.4. Revocation or Withdrawal of Guilty Plea

Where a defendant originally charged with felonies entered pleas of guilty of misdemeanors in district court pursuant to a plea bargaining agreement and appealed to superior court for trial de novo, the State was not bound by the plea bargaining agreement and could properly try defendant on the original felony charges in superior court. *S. v. Fox*, 576.

§ 26.2. Attachment of Jeopardy

Where a judgment as of nonsuit is entered in a criminal prosecution on the ground that the evidence offered by the State is insufficient to warrant submission to the jury, defendant has been subjected to jeopardy. *S. v. Bland*, 384.

In a prosecution for manslaughter arising from an automobile accident where defendant was earlier charged with death by vehicle and driving under the influence, trial court did not err in refusing to dismiss the manslaughter charge on

CRIMINAL LAW — Continued

the ground of double jeopardy since the earlier charges were dismissed by the prosecution, without objection by defendant, before a jury was impaneled or evidence was introduced. *S. v. Hice*, 468.

§ 26.5. Former Jeopardy; Same Acts Violating Different Statutes

In a prosecution for two felonious assaults and for murder committed during the perpetration of the assaults, the doctrine of merger did not require dismissal of the felonious assault charges when the murder charge was dismissed at the end of the State's evidence. *S. v. Moore*, 141.

Defendant was not subjected to double jeopardy where he was originally placed on trial for misdemeanor larceny but the case was dismissed and he was subsequently charged with felonious larceny from his employer. *S. v. Bullin*, 589.

§ 34.1. Evidence of Other Offenses to Show Defendant's Disposition to Commit Offense

In a prosecution for assault with intent to commit rape, the court properly admitted testimony by the prosecutrix that at the time of the assault she was a police officer being "used as a decoy in order to apprehend the subject or subjects responsible for reported assaults and rapes in the area." *S. v. Giles*, 112.

§ 43.1. "Mug Shots"

Defendant was not prejudiced by the admission of "mug shots" in a prosecution for kidnapping and crime against nature. *S. v. Fulcher*, 233.

§ 46. Flight of Defendant as Implied Admission

Trial court did not err in refusing to allow evidence of defendant's refusal to flee. *S. v. Thomas*, 594.

§ 66.9. Identification From Photographs; Suggestiveness of Procedure

In-court identification of defendant by the victim of an attempted robbery was not tainted by pretrial identification of photographs. *S. v. Clemmons*, 101; *S. v. Haskins*, 376.

§ 66.10. Confrontation at Police Station

An armed robbery victim's inadvertent observation of defendant at a law enforcement center shortly after he was arrested was not an illegal lineup and did not taint a photographic or in-court identification. *S. v. Wheeler*, 243.

§ 66.11. Confrontation at Crime Scene

Evidence was sufficient to support trial court's conclusion that defendant's confrontation with two witnesses at the crime scene immediately after he was apprehended was not improper and did not impermissibly taint in-court identification of defendant. *S. v. Baker*, 434.

§ 66.13. Other Pretrial Confrontations

A robbery victim's in-court identification of defendant was not tainted by a photographic identification several hours after the crimes occurred, identification of one defendant while in a police car at the scene of the crimes, or identification of another defendant at a hospital shortly after the crimes were committed. *S. v. Wheeler*, 243.

CRIMINAL LAW — Continued

§ 66.16. In-Court Identification of Independent Origin

Trial court did not err in allowing in-court identification of defendant even if a photographic identification procedure was improper since there was sufficient evidence that the in-court identification was of independent origin. *S. v. Hill*, 347.

§ 73.1. Admission of Hearsay Statement as Prejudicial Error

An SBI agent's testimony that he told an undercover agent who allegedly purchased marijuana from defendant that he had information from different reliable sources that defendant was dealing in narcotics and it was possible for an undercover agent to make a buy from defendant was inadmissible as hearsay. *S. v. Hargrove*, 48.

§ 73.4. Statement as Part of Res Gestae

Defendant's testimony that he was not aware of what he was doing when he shot the victim was not admissible as part of the res gestae. *S. v. Harris*, 491.

§ 74.3. Competency of Confession Implicating Defendant

Any error in the admission of a codefendant's statements which implicated defendant by his silence was cured when the codefendant changed his plea to guilty and testified at the trial. *S. v. Williams*, 386.

§ 75.2. Effect of Promise of Officers on Confession

Defendant's confession was not induced by a suggestion of hope from the investigating officer. *S. v. Thomas*, 534.

§ 75.10. Waiver of Constitutional Rights

Trial court properly determined that defendant waived his right to remain silent. *S. v. Church*, 58.

The fact that a statement contains evidence implicating defendant in an offense of which he is unaware in no way invalidates a prior, voluntary waiver of the privilege against self-incrimination. *S. v. Thomas*, 534.

§ 76.5. Voir Dire Hearing; Necessity for Findings

Where there was conflicting evidence on voir dire as to whether defendant requested counsel during interrogation, the trial court erred in failing to make specific findings of fact. *S. v. Waddell*, 188.

Defendant was not prejudiced by the court's failure to dictate its findings of fact on voir dire relating to the admission of a codefendant's statements implicating defendant until approximately one month after the trial. *S. v. Williams*, 386.

§ 76.7. Voir Dire Hearing; Evidence Sufficient to Support Findings

Defendant's contention that trial court erred in admitting hearsay statements during the voir dire hearing and in basing its order on such incompetent evidence was without merit since defendant's own testimony on voir dire was competent and sufficient evidence to sustain the court's findings. *S. v. Thomas*, 534.

§ 86.2. Use of Prior Convictions to Impeach Defendant

Defendant's contention that the State must show the regularity of defendant's prior convictions before they could be used by the State to impeach defendant is without merit. *S. v. Buckner*, 447; *S. v. Williams*, 744.

CRIMINAL LAW — Continued

§ 86.3. Prior Convictions; Effect of Defendant's Answer

When defendant admitted that he had pled guilty to a 1973 charge but stated that he was not in fact guilty, the district attorney was properly permitted to ask defendant several additional questions about the 1973 case. *S. v. Allen*, 260.

§ 86.5. Particular Questions and Evidence as to Specific Acts

Defendant was properly cross-examined with respect to two murders with which he had been charged but not tried. *S. v. Allen*, 260.

§ 87.4. Redirect Examination

After the impeachment of a witness, evidence is admissible to restore and strengthen the credibility of the witness. *S. v. Wilkins*, 392.

§ 88.4. Cross-Examination of Defendant

It was within the trial judge's discretion to allow cross-examination regarding violations of the terms of probation and defendant's failure to disclose criminal activity. *S. v. Wilkins*, 392.

§ 89.2. Corroboration

In a prosecution for receiving a stolen motorcycle, trial court did not err in allowing witnesses to testify as to statements made to them by the thief regarding the theft of the motorcycle and the receiving thereof. *S. v. Goodman*, 224.

In a prosecution of defendant for felonious larceny from his employer, the trial court did not err in allowing into evidence an inventory sheet on which defendant's employer had calculated the amount of money which was missing, since the evidence was admissible to corroborate the employer's testimony concerning the missing money. *S. v. Bullin*, 589.

§ 89.3. Prior Consistent Statements

A witness may be corroborated by testimony of a prior consistent statement although the witness does not testify that he made such statement to the corroborating witness. *S. v. Walker*, 271.

§ 91.4. Continuance on Ground of Absence of Counsel

Trial court did not err in denying defendant's motion for continuance made on the ground that defendant's retained counsel was engaged in a trial in another county. *S. v. Williams*, 408.

§ 91.7. Continuance on Ground of Absence of Witness

In a prosecution for possession and sale of heroin, trial court did not abuse its discretion in failing to order a continuance so that defendant could subpoena the informant as a witness. *S. v. Sutton*, 371.

Trial court did not err in denying defendant's motion for continuance to locate witnesses. *S. v. Eatman*, 665.

§ 91.8. Time and Procedure for Motion for Continuance

Appellate court will not consider the question of whether the trial court erred in failing to grant defendant a continuance so that a photograph could be used in the preparation of defendant's defense where defendant made no motion in the trial court for a continuance. *S. v. Cunningham*, 442.

CRIMINAL LAW — Continued

§ 92.3. Consolidation of Multiple Charges Against Same Defendant

Trial court properly consolidated for trial charges of kidnapping and rape of one victim and assault with intent to commit rape on another victim. *S. v. Greene*, 149.

§ 92.5. Severance

The trial court did not err in denying defendant's motion to sever one offense from trial with offenses which took place on a different date. *S. v. Sutton*, 371.

Trial court did not err in denial of defendant's motion to sever his trial from that of two codefendants on charges of breaking or entering an automobile and larceny therefrom. *S. v. Kirkpatrick*, 452.

§ 96. Withdrawal of Evidence

Trial court did not err in denying defendant's motion for mistrial made because of certain evidence where the court allowed defendant's motion to strike the evidence and instructed the jury not to consider it. *S. v. Wilson*, 474.

§ 97.1. No Abuse of Discretion in Permitting Additional Evidence

Trial court did not err in permitting the jury to view exhibits after it had commenced its deliberations. *S. v. Wilson*, 474.

§ 99.8. Examination of Witness by Court

Defendants were not prejudiced by the trial judge's request that the prosecutor ask certain clarifying questions. *S. v. Haskins*, 376.

§ 101.4. Conduct Affecting Jury

Defendant is entitled to a hearing on a motion for a new trial based on a comment by the jury officer in the presence of jurors that he was proud that the district attorney in his jury argument stood up for the law enforcement officers involved in the case. *S. v. Johnson*, 328.

§ 102. Who is Entitled to Conclude Arguments

Trial court properly denied defendant the last jury argument where defendant, during cross-examination of a witness, introduced a photograph of defendant following his arrest for the purpose of illustrating the witness's testimony. *S. v. Baker*, 434.

§ 102.8. District Attorney's Comment on Defendant's Failure to Testify

Defendant is entitled to a new trial because of district attorney's jury argument commenting on the failure of defendant's wife to testify. *S. v. Ward*, 598.

§ 102.12. Counsel's Comment on Sentence or Punishment

Where a murder charge was dismissed and only two felonious assault charges remained, the court properly refused to allow defense counsel's argument relating to the possibility of life imprisonment facing defendant when the trial began. *S. v. Moore*, 141.

§ 113.7. Charge on "Acting in Concert"

Where the trial court properly explained the legal principle of acting in concert and then explained that the principle was equally applicable to each defendant but did not define the principle again, such instruction was not peremptory. *S. v. Wheeler*, 243.

CRIMINAL LAW — Continued

§ 113.9. Correction or Cure of Mistatement or Other Error

Court's instruction cured its erroneous reference in the charge to an exhibit which had been used during a voir dire hearing but had not been introduced into evidence. *S. v. Haskins*, 376.

§ 114.2. No Expression of Opinion in Statement of Evidence or Contentions

Trial court did not comment on the evidence when he instructed the jury that there was some evidence tending to show that defendant and her accomplice made statements to an officer which were "consistent" with their trial testimony. *S. v. Eatman*, 665.

§ 116. Charge on Failure of Defendant to Testify

Where defendant offered evidence by several witnesses but did not testify himself, he was entitled, upon proper request, to have the court tell the jury that his failure to take the witness stand did not create any presumption against him. *S. v. Leffingwell*, 205.

Defendant's contention that any instruction on his failure to testify is improper in the absence of a request by defendant is without merit. *S. v. Hill*, 347.

§ 117.3. Credibility of State's Witnesses

Trial court's instructions concerning the scrutiny to be given the testimony of an undercover agent were proper. *S. v. Wilkins*, 392.

§ 121. Instructions on Defense of Entrapment

Mullaney v. Wilbur, 421 U.S. 684 does not require the State to carry the burden of proving defendant was not entrapped in order to prove the requisite criminal intent. *S. v. Wilkins*, 392.

§ 126. Unanimity of Verdict

Trial court's instruction on unanimity of verdict could not have led the jury to believe that a minority of the jury must yield to a majority. *S. v. Eatman*, 665.

§ 128. Discretionary Power of Trial Court to Set Aside Verdict

Trial court did not abuse its discretion in denying defendant's motion to set aside the verdict where the jury requested additional evidence, the court refused the request, and the court refused defendant's request that the jury be given additional instructions on the burden of proof. *S. v. Thomas*, 534.

§ 134.2. Procedure for Imposition of Sentence

Defendant was not prejudiced where the sentencing judge was a judge other than the trial judge. *S. v. Sampson*, 305.

§ 138.7. Matters considered in Determining Severity of Sentence

Defendant is entitled to be resentenced for possession and sale of marijuana where the record shows that the trial court's finding that defendant would not benefit from sentencing as a committed youthful offender and the court's imposition of maximum consecutive sentences were based solely on an officer's hearsay testimony that a confidential informant told him defendant "was doing between $500 and $1000 worth of grass a week." *S. v. Locklear*, 37.

In a prosecution for attempted armed robbery, trial court did not err by allowing a victim to make a statement relating to the punishment of defendant. *S. v. Clemmons*, 101.

CRIMINAL LAW — Continued

§ 143.1. Time For and Notice of Commencement of Revocation Proceedings

Defendant was given sufficient notice of the State's intent to pray revocation of the suspension of his sentence for abandonment and nonsupport of his wife and children by the arrest warrant. *S. v. Hodges*, 183.

§ 143.3. Revocation of Suspended Sentence; Place and Time of Hearing; Continuance

Defendant was not prejudiced by failure of the court to appoint counsel to represent him at a hearing to revoke his suspended sentence held in district court where defendant had appointed counsel for a trial de novo in superior court. *S. v. Hodges*, 183.

Superior court did not err in the denial of a motion for continuance of a hearing to revoke suspension of sentence to allow defendant to obtain medical records for the purpose of showing he was disabled. *Ibid.*

§ 143.5. Revocation of Suspended Sentence; Sufficiency of Evidence

Trial court did not base the revocation of defendant's probation only upon the unverified report of defendant's probation officer and did consider defendant's evidence of his inability to make child support payments required by his probationary judgment. *S. v. King*, 717.

§ 143.10. Suspended Sentence; Violation of Conditions as to Payments

Evidence supported the court's determination that defendant was in violation of a condition of suspension of his sentence by failing to make child support payments. *S. v. Hodges*, 183.

§ 150.1. Waiver of Right to Appeal

A defendant who appeared without counsel in district court waived his right of appeal to superior court when he complied with the judgment of the district court. *S. v. Vestal*, 610.

DAMAGES

§ 17.7. Punitive Damages

Trial court properly entered summary judgment for defendant attorney on the issue of punitive damages in an action to recover for breach of an alleged agreement to withhold delivery to plaintiff's estranged wife of a check from the sale of land until the wife executed certain documents. *Carroll v. Rountree*, 167.

DEDICATION

§ 2.1. Dedication to Private Use

There was no valid dedication of rights in a golf course tract to the owners of lots in a subdivision. *Cogburn v. Holness*, 253.

DEEDS

§ 20. Restrictive Covenants in Subdivisions

Language in a booklet distributed by a subdivision developer which related to the developer's intent to transfer a golf course tract to owners of lots in the subdivision was insufficient to create a restriction on the use of such tract. *Cogburn v. Holness*, 253.

DISORDERLY CONDUCT

§ 4. Sufficiency of Warrant

A warrant was sufficient to allege the offense of disorderly conduct although it contained unconstitutionally vague language that defendant was engaged in disorderly conduct "by using profane and abusive language in such a manner as to alarm or disturb persons present or provoke a breach of the peace." *S. v. Cunningham*, 72.

§ 5. Sufficiency of Evidence

The state's evidence in a disorderly conduct case was sufficient to permit the jury to find that defendant used abusive language which was intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace when defendant approached an officer concerning a parking ticket placed on his vehicle by the officer. *S. v. Cunningham*, 72.

DIVORCE AND ALIMONY

§ 13. Separation for Statutory Period

The general guardian of an insane person may not maintain on behalf of such person an action for divorce based on a year's separation. *Freeman v. Freeman*, 301.

§ 13.4. Effect of Separation Agreement

In an action for divorce where defendant counterclaimed for child support and alimony as provided in a separation agreement between the parties, and defendant timely moved for summary judgment, the trial court erred in excluding plaintiff's affidavit alleging reconciliation, but such error was not prejudicial. *Cooke v. Cooke*, 124.

§ 16.3. Effect of Other Proceedings in Action for Alimony

In an action for divorce where defendant counterclaimed for alimony, trial court properly dismissed the counterclaim since the judgment in a prior action brought by defendant under the Uniform Reciprocal Enforcement of Support Act was conclusive in its finding that defendant was not entitled to alimony based on incidents prior to the date of the judgment. *Blake v. Blake*, 160.

§ 16.9. Manner of Payment of Alimony

Social Security payments to a divorced wife which were based on her former husband's contributions but were paid to her without her former husband's consent or direction were not sums paid by or on behalf of the former husband, and the husband was not entitled to have such payments credited toward his alimony payments. *Bugher v. Bugher*, 601.

§ 16.10. Duration of Payment of Alimony

Provision of a separation agreement requiring defendant to make a monthly home mortgage payment was for the purpose of providing alimony and child support and survived the sale of the home and retirement of the mortgage. *Krickhan v. Krickhan*, 363.

Defendant's obligation to make alimony payments to plaintiff pursuant to a court order terminated upon plaintiff's remarriage. *Lindsey v. Lindsey*, 201.

DIVORCE AND ALIMONY — Continued

§ 18.8. Competency and Relevancy of Evidence in Action for Alimony Pendente Lite

In an action for alimony pendente lite, lists prepared by plaintiff of her estimated living expenses were admissible in evidence to illustrate plaintiff's testimony. *Chambless v. Chambless*, 720.

§ 18.11. Finding as to Dependency

Trial court is not required in an alimony action to make findings of fact on the question of the dependent spouse's earning capacity. *Upchurch v. Upchurch*, 658.

Evidence in an action for alimony pendente lite was sufficient to support the trial court's finding that defendant was the supporting spouse and plaintiff was the dependent spouse. *Chambless v. Chambless*, 720.

§ 18.12. Findings as to Right to Relief

Evidence in an action for alimony pendente lite supported the court's conclusion that defendant's conduct constituted indignities to the person of plaintiff. *Chambless v. Chambless*, 720.

§ 18.14. Possession of Property

Trial court in an action for alimony did not abuse its discretion in concluding plaintiff was entitled to possession of the parties' home. *Upchurch v. Upchurch*, 658.

§ 18.16. Attorney's Fees and Costs

Trial court had no authority to enter an order with respect to award of attorney fees where a final order had previously been entered in an alimony action and defendant's appeal therefrom was pending. *Upchurch v. Upchurch*, 658.

Trial court erred in awarding attorney fees in an alimony action without making findings of fact showing that the fees were allowable and the amount reasonable. *Ibid.*

§ 19.2. Procedure for Modification of Decree

In an action to recover accrued alimony, trial court erred in refusing to hear evidence of defendant's changed circumstances. *Thompson v. Thompson*, 51.

§ 21.3. Enforcement; Evidence and Findings

Trial court properly found defendant in contempt for failure to make alimony and child support payments. *Elmwood v. Elmwood*, 652.

§ 21.6. Effect of Separation Agreements

Defendant may not be compelled by contempt proceedings to pay alimony as provided in a separation agreement which was merely incorporated in a judgment of absolute divorce. *Levitch v. Levitch*, 56.

§ 24. Child Support Generally

Evidence was sufficient to support findings by the trial court that defendant should pay past and future child support for his two children in plaintiff's custody. *Brumfield v. Brumfield*, 322.

§ 24.1. Determining Amount of Child Support

Trial court's finding that defendant father is indebted to plaintiff mother in the sum of $8000 for back child support was erroneous where there was no evidence or finding as to the amount actually expended by the mother which represented the father's share of support. *Hicks v. Hicks*, 128.

DIVORCE AND ALIMONY — Continued

§ 24.10. Termination of Child Support Obligation

Trial court erred in failing to reduce defendant father's obligation for past due child support for the time the children lived with him and for the time after which one child reached 18 years of age. *Lindsey v. Lindsey*, 201.

§ 26.1. Cases Involving Full Faith and Credit Clause

When the court gives full faith and credit to a foreign custody decree, the court is required to make findings as to the best interests of the child only if the foreign action is pending but not if a custody order has already been entered in another state. *Searl v. Searl*, 583.

Trial court properly gave full faith and credit to a Texas decree which placed custody of the parties' three children in defendant. *Ibid.*

EASEMENTS

§ 6.1. Easements by Prescription

Plaintiffs' evidence was insufficient to establish a road easement by prescription across the lands of defendants. *Coggins v. Fox*, 138.

§ 8.3. Utility Easements

Court properly granted summary judgment for defendant power company in an action to recover damages for the allegedly wrongful cutting of trees on a power company right-of-way. *Hanner v. Power Co.*, 737.

EMINENT DOMAIN

§ 6.3. Evidence of Damage to Remaining Land

In an action to condemn a portion of defendant's land for construction of a controlled access highway, trial court erred in excluding evidence of traffic noise and evidence that there would be no direct access from defendant's remaining land to the highway. *Board of Transportation v. Brown*, 266.

EVIDENCE

§ 19. Evidence of Similar Facts and Transactions

In an action for damages arising from alleged trespass and conversion where plaintiffs alleged they rented a house from defendant and gave notice they were moving and defendant sent his clean-up man into the house, trial court properly allowed plaintiffs to question defendant and his clean-up man with respect to incidents involving defendant and tenants other than plaintiffs. *Love v. Pressley*, 503.

§ 49.2. Basis of Hypothetical Questions; Facts Not Shown by the Evidence

Trial court properly excluded expert medical testimony where hypothetical questions asked the witness assumed the existence and use by the witness of hospital records, letters, a physician's report and x-rays which were not introduced into evidence. *Thompson v. Lockert*, 1.

§ 50. Testimony by Medical Experts

In a malpractice action against an orthopedic surgeon, the proper standard of care was not dictated by the standard of care customary among orthopedic surgeons who are Diplomates of the American Board of Orthopedic Surgeons regardless of the community of practice, since the "same or similar community" rule applies to health providers in this State. *Thompson v. Lockert*, 1.

EXECUTION

§ 3. Issuance of Execution

Only the clerk of superior court in the county where a judgment is rendered may issue execution even though the judgment is docketed in other counties. *Trucks, Inc. v. Greene*, 279.

FALSE IMPRISONMENT

§ 1. Nature and Essentials of Right of Action

The common law crime of false imprisonment has not been superseded by the new kidnapping statute. *S. v. Fulcher*, 233.

A police officer who arrests the wrong person under a valid arrest warrant because of a mistake in the identity of the person arrested will be liable for false imprisonment only when the officer failed to use reasonable diligence to determine that the party arrested was actually the person named in the warrant. *Robinson v. City of Winston-Salem*, 401.

§ 2. Action for False Imprisonment

In this action against two police officers for false imprisonment, there was a genuine issue of material fact as to whether the officers exercised due care in determining whether plaintiff was the person named in the warrant. *Robinson v. City of Winston-Salem*, 401.

§ 2.1. Sufficiency of Evidence

Summary judgment was properly granted for defendant, who had questioned plaintiff's sobriety while on the job, on a charge of false imprisonment purportedly based on plaintiff's "restraint" when he submitted to a breathalyzer test. *Dellinger v. Belk*, 488.

FALSE PRETENSE

§ 2.2. Indictment and Warrant Insufficient

An indictment which purportedly charged defendant with a violation of G.S. 14-100 was insufficient to charge a crime where it did not allege that defendant obtained or attempted to obtain anything. *S. v. Hadlock*, 226.

§ 3.1. Sufficiency of Evidence

There was no fatal variance between an indictment alleging that defendant obtained money from his employer by false pretense and evidence that defendant's employer was overbilled by a B. F. Goodrich store for tire tubes not actually received and the employer's overpayment was applied to goods obtained by defendant from the store. *S. v. Wilson*, 474.

FIRES

§ 3. Evidence

In an action to recover for damages to plaintiff's automobile from a fire, trial court erred in granting a directed verdict for defendant who sold plaintiff the automobile. *Tadlock v. Motors, Inc.*, 557.

FORGERY

§ 2. Prosecution and Punishment

Trial court erred in excluding evidence which was relevant to the issue of defendant's knowledge that the endorsement of a check was forged. *S. v. Keys*, 739.

FRAUDS, STATUTE OF

§ 2.1. Memorandum Sufficient to Take Contract Out of Statute of Frauds

A check drawn by plaintiff payable to defendant which bore the notation on its face "For option on rest of Tuttle tract at $45,000" was a sufficient memorandum of the parties' contract to meet the requirements of the statute of frauds. *Hurdle v. White*, 644.

FRAUDULENT CONVEYANCES

§ 3.4. Action to Set Aside Conveyance; Sufficiency of Evidence

Trial court properly granted summary judgment to plaintiff in an action to have conveyances by defendant set aside as conveyances to defraud creditors. *Bank v. Furniture Co.*, 134.

GARNISHMENT

§ 1. Property Subject to Garnishment

Military retirement pay is the equivalent of active duty pay for the purposes of garnishment, and active duty pay constitutes wages not subject to garnishment for alimony. *Phillips v. Phillips*, 612.

Military retirement pay is not subject to garnishment for the payment of alimony, and defendant's military retirement pay was entitled to the statutory 60-day exemption from garnishment for child support. *Elmwood v. Elmwood*, 652.

GUARANTY

§ 2. Actions to Enforce

Defendants were liable as guarantors of a corporation's 1971 note under a 1966 guaranty agreement since (1) the statute of limitations had not run because the 1966 agreement was a continuing guaranty and (2) the 1971 note which replaced open account dealings was not a novation which released the defendants from liability under the 1966 guaranty agreement. *Oil Co. v. Oil Co.*, 295.

HIGHWAYS AND CARTWAYS

§ 12.2. Cartway; Nature and Extent of Right Acquired and Interference Therewith

In an action to enjoin defendants from interfering with plaintiffs' use of roads for access to their property, trial court properly determined that defendants had no right to or interest in the roads. *Neasham v. Day*, 53.

HOMESTEAD AND PERSONAL PROPERTY EXEMPTIONS

§ 2. Property in Which Homestead May be Allotted and Allotment Thereof

Constitutional and statutory enactments relating to the homestead exemption do not permit exemption of an entire usable dwelling house, regardless of its value, but an allotment of only $1000. *Printery, Inc. v. Schinhan*, 637.

HOMICIDE

§ 15.4. Expert and Opinion Evidence Generally

Trial court properly excluded testimony by a psychiatrist which invaded the province of the jury. *S. v. Williams*, 408.

§ 15.5. Opinion as to Cause of Death

Hypothetical questions posed to two medical witnesses were not improperly phrased because they allowed the witnesses to assume the wounds observed in an autopsy as the cause of death were the same wounds inflicted by defendant. *S. v. Cunningham*, 442.

§ 20.1. Photographs

Trial court did not err in allowing into evidence three photographs of deceased who had been shot. *S. v. Ward*, 598.

§ 21.4. Sufficiency of Evidence of Identity of Defendant

State's evidence was insufficient to support a finding that defendant was the perpetrator of a second degree murder. *S. v. Lee*, 106.

§ 21.5. Sufficiency of Evidence of First Degree Murder

Evidence was sufficient for the jury in a first degree murder prosecution where it tended to show death by stabbing. *S. v. Hugenberg*, 91.

§ 23.2. Instructions on Proximate Cause of Death

Evidence that two hours elapsed between the time defendant stabbed deceased and the discovery of deceased's body at another location did not require the court to instruct on intervening agency. *S. v. Cunningham*, 442.

§ 24.2. Instructions on Overcoming Presumption of Malice

A defendant in a homicide case is granted a new trial because of the court's instructions which placed the burden upon defendant to show circumstances that would reduce the crime from murder to manslaughter. *S. v. Barbour*, 230; *S. v. Barker*, 315; *S. v. Burke*, 317; *S. v. Hunter*, 318.

§ 26. Instructions on Second Degree Murder

Guidelines with respect to unlawfulness are unnecessary in jury instructions. *S. v. Williams*, 408.

§ 27.2. Instructions on Involuntary Manslaughter

Trial court in a homicide prosecution did not err in instructing the jury that defendant's act in using a deadly weapon in assaulting or shooting the victim was unlawful. *S. v. Walker*, 485.

§ 28. Instructions on Self-Defense

In a homicide prosecution where defendant's entire defense was that he shot deceased in self-defense, trial court erred in incorrectly summarizing the evidence with respect to deceased's behavior and possession of a knife just prior to the shooting. *S. v. Ward*, 598.

§ 28.8. Instructions on Defense of Accidental Death

Evidence that defendant intended to fire his gun to the right of the victim's head for the purpose of scaring him did not present the defense of death by accident. *S. v. Walker*, 485.

HOMICIDE — Continued

§ 30. Submission of Question of Guilt of Second Degree Murder

In all cases in which the State relies upon premeditation and deliberation to support a first degree murder conviction, the court must submit the issue of second degree murder. *S. v. Hammond*, 390.

HOSPITALS

§ 2.1. Control and Regulation

A board of county commissioners can assume the role of "governing body" of a township for the purpose of establishing a township hospital and levying a tax to support that hospital. *Arnold v. Varnum*, 22.

HUSBAND AND WIFE

§ 12. Separation Agreement; Resumption of Marital Relationship

Defendant's evidence of sexual relations with plaintiff subsequent to the execution of a separation agreement was insufficient to show a reconciliation that would invalidate the agreement absent a showing that both parties intended to reconcile. *Murphy v. Murphy*, 677.

§ 12.1. Separation Agreement; Revocation and Rescission; Want of Consideration and Other Grounds

A confidential relationship between husband and wife no longer exists and there is no presumption of unfairness to the wife in the execution of a separation agreement when the wife is represented by an attorney. *Murphy v. Murphy*, 677.

Evidence was insufficient to justify setting aside the separation agreement on the ground of unfairness to the wife or duress and undue influence by the husband where the wife was represented by counsel. *Ibid.*

§ 17. Estate by Entireties; Termination and Survivorship

Where deeds recited that defendant and her deceased former husband were tenants by the entirety of described lands, but they became tenants in common because of a divorce obtained by the husband, relatives of the husband were not estopped from making claims on the land. *Jernigan v. Stokley*, 358.

INDICTMENT AND WARRANT

§ 6.2. Sufficiency of Evidence to Support Issuance of Warrant

Evidence was sufficient to support trial court's conclusion that after talking with defendant an officer had probable cause to obtain a warrant for defendant's arrest. *S. v. Thomas*, 534.

INFANTS

§ 11. Jurisdiction Under Juvenile Court Statutes

District court judge did not err in transferring an armed robbery charge against a 15-year-old male to superior court for trial as an adult. *In re Bunn*, 614.

§ 16. Juvenile Delinquent; Hearings; Right to Jury

A juvenile delinquency hearing did not violate due process because it was held before a lay judge without a right to a trial de novo before a legally trained judge. *In re Byers*, 710.

INFANTS — Continued

§ 18. Juvenile Delinquency Hearing; Admissibility and Sufficiency of Evidence

Codefendant's testimony was sufficient to support findings that defendant was a delinquent child by reason of his having assaulted and taken money from another. *In re Byers*, 710.

INJUNCTIONS

§ 3. Mandatory Injunctions

A superior court judge had authority to issue a mandatory injunction requiring the Commissioner of Insurance to approve petitioners' plan of exchange of stock by which a domestic insurance company would be brought under a holding company type of corporate structure. *Insurance Co. v. Ingram*, 619.

INSANE PERSONS

§ 1.2. Findings Required by Involuntary Commitment Statutes; Sufficiency of Evidence to Support Findings

Order committing respondent to a mental health hospital is reversed where the court failed to record sufficient facts to support its findings that respondent was mentally ill and imminently dangerous to himself or others. *In re Koyi*, 320.

Court's finding that respondent was imminently dangerous to himself or others was supported by the evidence. *In re Ballard*, 228.

§ 8. Contracts of Incompetent

The general guardian of an insane person may not maintain on behalf of such person an action for divorce based on a year's separation. *Freeman v. Freeman*, 301.

INSURANCE

§ 1. Control and Regulation Generally; Authority of Commissioner of Insurance

Trial court had authority to order an insurance company undergoing rehabilitation because of threatened insolvency to pay reasonable attorney's fees and expenses to its counsel of record for services rendered in the rehabilitation proceedings. *Ingram v. Assurance Co.*, 518.

The Commissioner of Insurance acted arbitrarily and capriciously when he disapproved a proposed plan of exchange of stock by which a domestic insurance company would be brought under a holding company type of corporate structure, and superior court had authority to issue a mandatory injunction requiring the Commissioner to approve the plan of exchange. *Insurance Co. v. Ingram*, 619.

§ 29.1. Change of Life Insurance Beneficiary

Insured complied with a provision of a group life insurance policy requiring "written notice" to effectuate a change of beneficiary when he marked through defendant's name and added plaintiff's name as designated beneficiary on an insurance review form distributed by his employer. *English v. English*, 193.

§ 79. Automobile Liability Insurance Generally

An automobile liability insurer is liable for property damage arising out of the insured's intentional ramming of another vehicle with the insured vehicle. *Insurance Co. v. Knight*, 96.

LABORERS' AND MATERIALMEN'S LIENS

§ 1. Lien of Contractor

Work performed by a surveying subcontractor in clearing a portion of a building site and placing corner stakes for a building to be constructed on the site was subject to a lien under G.S. 44A-8. *Conner Co. v. Spanish Inns*, 341.

LANDLORD AND TENANT

§ 6.2. Use and Enjoyment of Premises

In an action for damages resulting from alleged trespass and conversion, plaintiffs' evidence that they were lawfully occupying the premises rented to them by defendant and that defendant or his employee removed plaintiff's personal property from the premises was sufficient for the jury. *Love v. Pressley*, 503.

LARCENY

§ 2. Property Subject to Larceny

Defendant was properly charged with felonious larceny rather than with larceny of chattels real for the theft of bronze urns from cemeteries. *S. v. Schultz*, 120.

§ 7. Sufficiency of Evidence

In a prosecution of defendant for felonious larceny from his employer, evidence was sufficient to show that defendant was an employee of the service station in question. *S. v. Bullin*, 589.

LIBEL AND SLANDER

§ 10. Particular Communications as Qualifiedly Privileged

For the purpose of an action for slander and false imprisonment, plaintiff, a municipal taxicab inspector, was a public official and he could not recover damages unless he showed that defendant made his statements knowing them to be false or in reckless disregard of their falseness. *Dellinger v. Belk*, 488.

§ 16. Sufficiency of Evidence and Nonsuit

Summary judgment was properly entered for defendant in an action for slander where defendant had questioned the sobriety of plaintiff taxicab inspector while on the job. *Dellinger v. Belk*, 488.

MASTER AND SERVANT

§ 67.3. Injuries Compensable Under Workmen's Compensation; Pre-existing Condition as Factor

Testimony by a doctor in response to a properly worded hypothetical question was sufficient to support a finding by the Industrial Commission that a sudden deprivation of oxygen accelerated or aggravated decedent's pre-existing heart condition which resulted in his death. *Kennedy v. Martin Marietta Chemicals*, 177.

MORTGAGES AND DEEDS OF TRUST

§ 26. Notice and Advertisement of Sale

Where a deed of trust specified only notice of foreclosure by publication, former G.S. 45-21.17(b) came into play and required that notice also be given by posting at the courthouse door. *Realty and Mortgage Co. v. Bank*, 481.

Defendants could properly show that notice of a foreclosure sale was actually posted at the courthouse door some six days before the date shown on the face of the notice. *Ibid.*

MUNICIPAL CORPORATIONS

§ 1.1. Creation of Municipal Corporations

Acts of the General Assembly incorporating Town of Mesic and annexing additional territory into the town were not invalid. *Jones v. Jeanette*, 526.

§ 4. Powers of Municipalities

A Water and Sewer Authority may enter and survey land prior to the institution of an eminent domain proceeding. *Water and Sewer Authority v. Estate of Armstrong*, 162.

A town ordinance providing higher rates for sewer service to customers using sewer service only than to customers using both water and sewer services was arbitrary and discriminatory. *Town of Taylorsville v. Modern Cleaners*, 146.

NARCOTICS

§ 3.3. Opinion Testimony

Trial court properly admitted an expert chemist's opinions as to the identity of tablets and vegetable matter though the chemist tested only random samples. *S. v. Absher*, 197.

§ 4. Sufficiency of Evidence

Evidence was sufficient to show that defendant had constructive possession of drugs which were hidden under the hood of a car which defendant possessed and of which he claimed ownership. *S. v. Leonard*, 131.

Evidence of defendants' close juxtaposition to the place where marijuana was being manufactured was sufficient to overcome their motion for nonsuit on the charge of manufacturing marijuana. *S. v. Shufford*, 115.

The State's evidence was sufficient for the jury on the issue of defendant's guilt of two charges of accessory before the fact to possession of heroin based on the discovery of defendant's fingerprints on packets of heroin found on two occasions in the possession of another person. *S. v. Truesdale*, 579.

There was no variance between the indictment and proof with respect to defendant's sale of marijuana to an undercover agent. *S. v. Black*, 606.

In a prosecution for possession of marijuana with intent to sell and deliver, evidence was sufficient to show that a mobile home in which officers found over 14 grams of marijuana was the residence of defendant. *S. v. Blackburn*, 683.

Evidence was sufficient to show a connection between marijuana growing in a field and defendant's residence. *Ibid.*

NARCOTICS — Continued

§ 4.5. Instructions

Trial court erred in denying defendant's request for an instruction to the jury as to how they should examine the testimony of an undercover agent to whom defendant allegedly sold marijuana. *S. v. Black*, 606.

§ 5. Verdict and Punishment

Jury verdict finding defendants not guilty of possession of marijuana with intent to manufacture but guilty of the manufacture of marijuana will not be disturbed on appeal. *S. v. Shufford*, 115.

NEGLIGENCE

§ 30.2. Proximate Cause

In an action to recover damages for destruction of an automobile by fire, trial court properly directed verdicts in favor of defendants since plaintiff failed to show the proximate cause of the fire. *Smith v. Motors, Inc.*, 727.

§ 54. Contributory Negligence of Invitee

In an action to recover damages for personal injury suffered by plaintiff when he fell into an elevator shaft in a building under construction, evidence was sufficient to show that plaintiff was contributorily negligent as a matter of law. *Benton v. Construction Co.*, 421.

§ 59.3. Sufficiency of Evidence and Nonsuit in Actions by Licensees

Evidence in a wrongful death action was insufficient to show that defendant was wilfully and wantonly negligent in the operation and maintenance of a swimming pool in which intestate drowned. *Andrews v. Taylor*, 706.

PARENT AND CHILD

§ 2.1. Liability of Parent for Injury to Child

A father was immune from suit by his unemancipated child to recover damages for injuries received when he was run over by a truck driven by his father. *Triplett v. Triplett*, 212.

PARTITION

§ 12. Partition by Exchange of Deeds

Cross-deeds executed in 1942 were effective to partition land and to give respondent his share in severalty although the deeds contained an erroneous boundary course, and a 1959 cross-deed was ineffective to give respondent's wife an interest in the land as a tenant by the entirety. *Miller v. Miller*, 209.

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 15. Malpractice Action; Competency and Relevancy of Evidence

In a malpractice action against an orthopedic surgeon, the proper standard of care was not dictated by the standard of care customary among orthopedic surgeons who are Diplomates of the American Board of Orthopedic Surgeons regardless of the community of practice, since the "same or similar community" rule applies to health providers in this State. *Thompson v. Lockert*, 1.

RAPE — Continued

§ 17. Assault with Intent to Commit Rape

The statute prescribing the punishment for assault with intent to commit rape upon a female does not deny equal protection of the laws to a male defendant by prohibiting conduct directed toward females without prohibiting the same conduct directed toward males. *S. v. Giles*, 112.

RECEIVING STOLEN GOODS

§ 5. Sufficiency of Evidence

Where the indictment alleged the felonious receiving of stolen goods knowing them to have been stolen in violation of G.S. 14-71, but the State's evidence tended to show that defendant received property which was taken by a store employee in violation of the felony statute G.S. 14-74, there was a fatal variance between the charge and the proof. *S. v. Babb*, 336.

Where a defendant, charged with a violation of G.S. 14-71, purchases property in a public business from one in custody or possession and with the actual or apparent authority to sell it, the State must prove that the property was taken by the seller in violation of a felony statute and that at the time of the transaction the defendant had knowledge, or reasonable grounds to believe, that the seller had so taken the property *and* had no authority to transact the sale. *Ibid.*

ROBBERY

§ 4. Sufficiency of Evidence

Evidence was sufficient for the jury to find defendant committed a robbery with a firearm. *S. v. Eatman*, 665.

State's evidence was sufficient for the jury in a prosecution for armed robbery of a person defendant accused of taking his billfold. *S. v. Buchanan*, 746.

§ 5.4. Instructions on Lesser Included Offenses

In a prosecution for attempted robbery where the evidence that defendant's accomplice used a rifle was uncontradicted, trial court did not err in failing to instruct the jury as to the lesser included offense of attempted common law robbery. *S. v. Clemmons*, 101.

Trial court did not err in failing to instruct on the lesser included offenses of robbery with a firearm. *S. v. Wheeler*, 243.

State's evidence was sufficient for the jury on the issue of defendant's guilt of common law robbery and did not require submission of an issue of larceny from the person. *S. v. Dixon*, 383.

§ 6. Verdict and Judgment

Defendant's contention that since he was found not guilty of feloniously assaulting a security guard the verdict of guilty of armed robbery of the guard was inconsistent with that verdict and should not be allowed to stand is without merit. *S. v. Wheeler*, 243.

RULES OF CIVIL PROCEDURE

§ 4. Process

Plaintiff made a prima facie showing that service of process by registered mail was made on a proper person where the return receipt showed that the summons,

SEARCHES AND SEIZURES

§ 1. Generally; Search Without Warrant

"Exigent circumstances" are not necessary to justify a search without a warrant which is incident to a valid arrest based on probable cause. *S. v. Wooten*, 85.

A search of a suspect's person before formal arrest is incident to the arrest when probable cause to arrest existed prior to the search. *Ibid.*

An officer was not authorized by G.S. 20-183(a) to search a vehicle he had stopped where the driver had not violated a motor vehicle statute. *S. v. Blackwelder*, 352.

The plain view doctrine did not authorize an officer's seizure of a tic tac box containing LSD tablets from under the front seat of an automobile driven by defendant. *Ibid.*

An officer did not have probable cause to search an automobile driven by defendant for narcotics because of "furtive movements" by defendant and other occupants. *Ibid.*

Contraband seized when officers went to defendant's apartment to serve orders of arrest was properly admitted into evidence. *S. v. Sutton*, 371.

A pistol was lawfully seized from defendant's hip pocket where officers had reasonable grounds to believe that defendant was carrying a concealed weapon when they questioned defendant about a secret assault. *S. v. McWhorter*, 462.

§ 2. Consent to Search

Evidence found during a warrantless search of a car in which defendant was a passenger was properly admitted in defendant's trial where defendant consented to the search, although the officer failed to obtain permission for the search from either the owner or the operator of the car. *S. v. Walker*, 271.

§ 4. Search Under the Warrant

Any violation of defendant's Fourth Amendment rights which may have occurred when an officer removed marijuana from a suitcase in plain view on defendant's premises prior to obtaining a search warrant did not so taint the entire proceedings as to require exclusion of the marijuana seized pursuant to the warrant. *S. v. Barbee*, 66.

The fact that officers who possessed a valid search warrant had some information that a record book of defendant's drug transactions existed did not render discovery of the book advertent so as to make seizure pursuant to the plain view rule improper. *S. v. Absher*, 197.

TORTS

§ 7. Release From Liability

In an action to recover for injuries sustained by the illiterate plaintiff in an automobile accident where defendant claimed that plaintiff released him from liability by endorsing checks from defendant's insurer, trial court erred in granting summary judgment for defendant. *Ellis v. Mullen*, 367.

TRESPASS

§ 6. Competency and Relevancy of Evidence

In an action for damages arising from alleged trespass and conversion where plaintiffs alleged they rented a house from defendant and gave notice they were

UNFAIR COMPETITION

Where the jury found that defendant or his agent trespassed upon premises rented to plaintiffs and converted personal property of the feme plaintiff, the trial court properly concluded that defendant's conduct constituted unfair or deceptive practices in commerce, and plaintiffs were entitled to treble damages. *Love v. Pressley*, 503.

UNIFORM COMMERCIAL CODE

§ 15. Warranties

In an action to recover for fire damages to plaintiff's automobile, trial court properly allowed defendant dealer's motion for directed verdict since plaintiff failed to show that his injury was covered by the dealer's limited warranty. *Tadlock v. Motors, Inc.*, 557.

§ 25. Commercial Paper; Definitions

Absence of a date on a traveler's check does not render it incomplete and unenforceable, but absence of the name of the payee does make it legally incomplete. *Gray v. American Express Co.*, 714.

Where traveler's checks were not dated and did not bear the name of the payee, plaintiff had the authority to complete the instruments and had nine years to do so and did not, and the instruments remained unenforceable as a matter of law. *Ibid.*

§ 26. Transfer of Commercial Paper

Court erred in finding as a matter of law that plaintiff is the owner and holder of notes made payable to the order of another where the notes had not been indorsed by the payee. *Smathers v. Smathers*, 724.

§ 30. Liability of Parties; Acceptance and Endorsement

Plaintiff executor's complaint was sufficient to state a claim for relief against defendant stock broker for conversion of drafts where it alleged defendant issued drafts payable through a bank to plaintiff's testate and paid the drafts upon the forged indorsements of the testate. *Bank v. McCarley & Co.*, 689.

§ 64. Purchase of Securities

Plaintiff executor's complaint stated a claim for relief against defendant stock broker for conversion of securities owned by testatrix by selling such securities when the husband of testatrix, without her authority, delivered the securities to defendant with assignment instruments bearing the forged signature of testatrix. *Bank v. McCarley & Co.*, 689.

VENDOR AND PURCHASER

§ 1. Requisites, Validity and Construction of Options

A check drawn by plaintiff payable to defendant which bore the notation on its face "For option on rest of Tuttle tract at $45,000" was a sufficient memorandum of the parties' contract to meet the requirements of the statute of frauds. *Hurdle v. White*, 644.

§ 2. Duration of Contract

In an action for the specific performance of a contract to convey land, defendant's contention that plaintiff could not prevail because time was of the essence of their agreement is without merit. *Taylor v. Bailey*, 290.

VENDOR AND PURCHASER — Continued

§ 3. Description

Description in a contract to convey land was sufficient to meet the requirements of the statute of frauds where the contract referred to a deed of trust which specifically described the land. *Taylor v. Bailey*, 290.

In an action for the specific performance of a contract to convey land, description of the land in question as the "rest of Tuttle tract" was sufficient. *Hurdle v. White*, 644.

WEAPONS AND FIREARMS

Evidence was insufficient for the jury in a prosecution for discharging a firearm into an inhabited dwelling. *S. v. Hewitt*, 109.

An indictment for discharging a firearm into an occupied dwelling was not fatally defective in failing to allege that defendant knew or should have known the dwelling was occupied. *S. v. Walker*, 271.

Evidence was sufficient for the jury in a prosecution for possession of a firearm by a convicted felon though there was no evidence as to whether the gun was operable. *S. v. Baldwin*, 307.

Where the evidence showed defendant fired into an occupied trailer while the indictment charged he fired into an occupied building, there was no fatal variance. *S. v. Bland*, 384.

Trial court's instructions recapitulating the evidence and stating that a shotgun was a deadly weapon and failing to define intent to kill were proper. *S. v. McCoy*, 567.

WILLS

§ 61. Dissent of Spouse and Effect Thereof

In establishing the right of a surviving spouse to dissent from her deceased spouse's will, the determination of "intestate share" is based on the value of decedent's net estate rather than the value of decedent's gross estate as of the date of his death. *Phillips v. Phillips*, 428.

WORD AND PHRASE INDEX

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